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The Constitution and Voting Representation for the District of Columbia

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The Senate is currently considering S. 1257, the "District of Columbia House Voting Rights Act of 2007," which would grant the District of Columbia a full representative in Congress and provide an additional representative to Utah. The House of Representatives passed a version of this legislation in April.

The case for granting full congressional representation to District residents rests on the unassailable premise of government by consent. However, Congress lacks the constitutional authority to simply grant the District a representative by fiat, as S. 1257 would do. The Constitution also limits representation to states alone. In seeking to resolve this genuine dilemma, Congress must examine solutions that do not violate the Constitution.

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

> To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States….

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

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

One proposed solution to this problem is for Congress to declare the District a state or to "retrocede" residential portions of the city to Maryland. But this approach also runs into Constitutional obstacles.

If the District is subject to Congress's "exclusive legislation," then no state government can manage its affairs. Furthermore, if the District is to be created "by cession of particular states," it is, by implication, not part of any state. The District's home rule, whereby it elects its mayor and other local officials, came about only by a specific act of Congress ceding such authority but leaving the Congress with the power to veto any local legislation.2

There is broad consensus about the Constitutionality of statehood and retrocession. Constitutional experts, including legal scholar Lee Casey in

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The Heritage Guide to the Constitution, have argued that it would require a Constitutional amendment for the District to become a state.[3] And when retrocession plans were introduced in the early 1960s, Attorney General Robert F. Kennedy found them to be both impractical and unconstitutional.[4]

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

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

> The indispensable necessity of compleat authority at the seat of Government carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.[5]

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

Congress did not act immediately to secure its control over the territory that is now the District of Columbia. Until Congress first met in the city in 1800, District residents voted for representatives as if they were residents of Virginia or Maryland.[6] Supporters of S. 1257 have pointed to this as a precedent for allowing the city representation under the Constitution.[7] This argument, however, does not withstand scrutiny.

Since the Constitution limits Congress's authority to "such District … as may become the seat of government," lawmakers could not exercise their inherent authority until they actually convened in the District. Taking up this authority was among lawmakers' top priorities after Congress first met in the District in November 1800. President John Adams called on the Congress to "consider whether the local powers over the District of Columbia vested by the Constitution in the Congress of the United States shall be immediately exercised."[8] In February of the following year, Congress duly passed the Organic Act and formally took the District under its jurisdiction, as provided in the Constitution.[9]

Pass a Law or Amend the Constitution? At present, the District sends a "delegate" to the House

1. *Banner v. United States,* 303 F. Supp. 2d 1, 19 (D.D.C. 2004), cited in Lee A. Casey, "The Constitution and the District of Columbia," Heritage Foundation *WebMemo* No. 1404, March 22, 2007, at *www.heritage.org/Research/LegalIssues/wm1404.cfm.*
2. Thomas R. Ascik, "District of Columbia Representation," Heritage Foundation *Issue Bulletin* No. 24, September 7, 1978, at *www.heritage.org/research/governmentreform/IB24.cfm.*
3. Lee A. Casey, "The Constitution and the District of Columbia," Heritage Foundation *WebMemo* No. 1404, March 22, 2007, at *www.heritage.org/Research/LegalIssues/wm1404.cfm.*
4. *Ibid*.
5. James Madison, *The Federalist* No. 43, at *www.yale.edu/lawweb/avalon/federal/fed43.htm.*
6. Mark David Richards, "The Debates over the Retrocession of the District of Columbia, 1801–2004," *Washington History,* Spring/Summer 2004, at *www.dcvote.org/pdfs/mdrretro062004.pdf.*
7. "Response to Senate Republican Policy Committee Paper on H.R. 1433: D.C. Voting Rights," DC Vote, at *www.dcvote.org/pdfs/congress/ResponseToSRPConHR1433.pdf.*
8. John Adams, "Fourth Annual Message," November 22, 1800, at *www.yale.edu/lawweb/avalon/presiden/sou/adamsme4.htm.*
9. Ascik.

who may vote in committee and draft legislation but cannot vote on the House floor.[10] Under S. 1257, "the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." The additional representative for Utah comes across as a purely political effort to secure the support of Republican lawmakers.

S. 1257 conflicts with the long-accepted notion that only through a constitutional amendment can the nation's capital be treated as a state.

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

Lawmakers argued at the time of its passage that the 23rd Amendment "would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government." By implication, then, only another amendment could grant full representation to District residents, who "cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States."[11]

Later Congresses also looked to the Constitution when they sought to change the city's status in federal elections. In 1978, Congress proposed an amendment declaring that "[f]or purposes of representation in the Congress, election of the President and Vice President, and Article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State." The amendment failed to secure the support of 38 states required for adoption.[12]

Proposals for Reform. Lawmakers have several alternatives they can consider that are not so problematic and unconstitutional as S. 1257. While there may be drawbacks to these solutions, lawmakers would be wise to closely examine them before rushing to adopt the seriously flawed proposal now before them.

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

Grant Statehood. Congress could grant statehood to the District upon its application, automatically providing it a representative and two senators. Such a plan might require a constitutional amendment since Congress is granted "exclusive legislation" over the nation's capital. Such a plan would also run counter to the still reasonable intent of the Founders to have a national capital outside the influence of state politics.

Retrocede to Maryland. Congress could return, or "retrocede," residential portions of the District to Maryland, allowing residents to vote as citizens of that state. Though such a move would be fraught with practical considerations, it would not be unprecedented, as Congress returned those portions of the city south of the Potomac River to Virginia in 1846. The constitutionality of retrocession is hardly settled, though. The Supreme Court avoided ruling directly on the Virginia retrocession, and Attorney General Robert F. Kennedy

10. "D.C. Voting Rights and Representation," at *http://about.dc.gov/statehood.asp.*

11. H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1, 2 (1960), at *http://caselaw.lp.findlaw.com/data/constitution/amendment23.*

12. "Proposed Amendments Not Ratified by the States," *The Constitution of the United States, as Amended*, United States Government Printing Office, 2003, at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_documents&docid=f:hd095.pdf.*

argued in the early 1960s that such a plan would be unconstitutional.[13]

Allow Voting in Maryland. Congress could consider allowing District residents to vote as if they were residents of Maryland or some other state. While such a plan would give city residents a say in Congressional elections and would not affect the District's status under the Constitution, it would suffer from a number of practical considerations. It may also face Constitutional challenges.

End Federal Taxation. Given its exclusive power over the District, Congress could abolish federal income taxes on District residents, providing a powerful solution to the city's "taxation without representation" complaint. This is a reasonable compromise and fully within Congress's powers. Other non-voting territories, like Puerto Rico, do not pay federal income taxes for similar reasons.

Change of Residence. It should be noted that District residents—unlike the American colonists, who had little choice in the face of British denial of representation—have always had the option to move to other U.S. jurisdictions, like Maryland or Virginia, where they could enjoy full representation in Congress. While this might not be preferable or immediately affordable to all District residents, it remains a simple and unobjectionable option.

Conclusion. Lawmakers need to reconsider their proposal to grant the District of Columbia representation in Congress by legislation. The plan runs afoul of a commonsense understanding of the Constitution, the intentions of the Founders, and more than two centuries of interpretation by legislators and the courts. If they seek to allow congressional representation for District residents, they should instead examine proposals that do justice to principles of republican governance and the Constitution.

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13. Casey.