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# Equal Representation in Congress: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 110th Cong., May 15, 2007 (Statement of Viet D. Dinh, Geo. U. L. Center)

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**Testimony of Viet Dinh**

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**Hearing: D.C. Voting Rights**

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**U.S. Senate Committee on Homeland Security and Governmental Affairs**

As delegates gathered in Philadelphia in the summer of 1787 for the Constitutional Convention, among the questions they faced was whether the young United States should have an autonomous, independent seat of government. Just four years prior, in 1783, a mutiny of disbanded soldiers had gathered and threatened Congressional delegates when they met in Philadelphia. Congress called upon the government of Pennsylvania for protection; when refused, it was forced to adjourn and reconvene in New Jersey.1 The incident underscored the view that "the federal government be independent of the states, and that no one state be given more than an equal share of influence over it..." According to James Madison, without a permanent national capital, 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.

The Constitution thus authorized the creation of an autonomous, permanent District to serve as the seat of the federal government. This clause was effectuated in 1790, when Congress accepted land that Maryland and Virginia ceded to the United States to create the national capital.4 Ten years later, on the first Monday of December 1800, jurisdiction over the District of Columbia (the "District") was vested in the federal government.5 Since then, District residents have not had a right to vote for Members of Congress. The District of Columbia House Voting Rights Act of 2007, S.1257, (the "Act"), would grant District residents Congressional representation by providing that the District be considered a Congressional district in the House of Representatives, beginning with the 111th Congress.6 To accommodate the new representative from the District, membership in the House would be permanently increased by two members.7 One newly created seat would go to the representative from the District, and the other would be assigned to the State next eligible for a Congressional district, Utah.

Congress has ample constitutional authority to enact the District of Columbia House Voting Rights Act of 2007. The District Clause, U.S. Const. Art. I, 8, cl. 17, empowers Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District" and thus grants

Congress plenary and exclusive authority to legislate all matters concerning the District. This broad legislative authority extends to the granting of Congressional voting rights for District residents as illustrated by the text, history and structure of the Constitution as well as judicial decisions and pronouncements in analogous or related contexts. Article I, section 2, prescribing that the House be composed of members chosen "by the People of the several States," does not speak to Congressional authority under the District Clause to afford the District certain rights and status appurtenant to states. Indeed, the courts have consistently validated legislation treating the District as a state, even for constitutional purposes. Most notably, the Supreme Court affirmed Congressional power to grant District residents access to federal courts through diversity jurisdiction, notwithstanding that the Constitution grants such jurisdiction only "to all Cases . . . between Citizens of different States."9 Likewise, cases like Adams v. Clinton, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), aff'd, 531 U.S. 940 (2000), holding that District residents do not have a judicially enforceable constitutional right to Congressional representation, do not deny (but rather, in some instances, affirm) Congressional authority under the District Clause to grant such voting rights.

I. Congress Has the Authority under the District Clause to Provide the District of Columbia with Representation in the House of Representatives.

The District Clause provides Congress with ample authority to give citizens of the District representation in the House of Representatives. That Clause provides Congress with extraordinary and plenary power to legislate with respect to the District. This authority was recognized at the time of the Founding, when (before formal creation of the national capital in 1800) Congress exercised its authority to permit citizens of the District to vote in Maryland and Virginia elections.

A. The Constitution Grants Congress the Broadest Possible Legislative Authority Over the District of Columbia.

The District of Columbia as the national seat of the federal government is explicitly created by Article I, 8, clause 17 (the "District Clause"). This provision authorizes Congress [t]o 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...

This clause, which has been described as "majestic in its scope,"10 gives Congress plenary and exclusive power to legislate for the District.11 Courts have held that the District Clause is "sweeping and inclusive in character"12 and gives Congress "extraordinary and plenary power" over the District.13 It allows Congress to legislate within the District for "every proper purpose of government."14 Congress therefore possesses "full and unlimited jurisdiction to provide for

the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end," subject, of course, to the negative prohibitions of the Constitution.

To appreciate the full breadth of Congress' plenary power under the District Clause, one need only recognize that the Clause works an exception to the constitutional structure of "our Federalism,"16 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 activities 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-a-vis the states. The District Clause contains no such counterbalancing restraints because its authorization of "exclusive Legislation in all Cases whatsoever" explicitly recognizes that there is no competing state sovereign authority. Thus, when Congress acts pursuant to the District Clause, it acts as a legislature of national character, exercising "complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other." In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.

B. Evidence at the Founding Confirms that Congress' Extraordinary and Plenary Authority under the District Clause Extends to Granting Congressional Representation to the District.

There are no indications, textual or otherwise, to suggest that the Framers intended that Congressional authority under the District Clause, extraordinary and plenary in all other respects, would not extend also to grant District residents representation in Congress. The delegates to the Constitutional Convention discussed and adopted the Constitution without any recorded debates on voting, representation, or other rights of the inhabitants of the yet-to-be-selected seat of government. The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.20 Denying 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. Indeed, so long as the exact location of the seat of government was undecided, representation for the District's residents seemed unimportant. It was assumed that the states donating the land for the District would make appropriate provisions in their acts of cession for the rights of the residents of the ceded land.23 As a delegate to the North Carolina ratification debate noted, Wherever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?

James Madison also felt that "there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether." The terms of the cession and acceptance illustrate that, in effect, Congress exercised its authority under the District Clause to grant District residents voting rights coterminous with those of the ceding states when it accepted the land in 1790. Maryland ceded land to the United States in 1788. Virginia did so in 1789. The cessions of land by Maryland and Virginia were accepted by Act of Congress in 1790. This Act also established the first Monday in December 1800 as the official date of federal assumption of control over the District. Because of the lag between the time of cession by Maryland and Virginia and the actual creation of the District by the federal government, assertion of exclusive federal jurisdiction over the area was postponed for a decade. During that time, District residents voted in Congressional elections in their respective ceding state.

In 1800, when the United States formally assumed full control of the District, Congress by omission withdrew the grant of voting rights to District residents. The legislatures of both Maryland and Virginia provided that their respective laws would continue in force in the territories they had ceded until Congress both accepted the cessions and provided for the government of the District. Congress, in turn, explicitly acknowledged by act that the "operation of the laws" of Maryland and Virginia would continue until the acceptance of the District by the federal government and the time when Congress would "otherwise by law provide." The laws of Maryland and Virginia thus remained in force for the next decade and District residents continued to be represented by and vote for Maryland and Virginia congressmen during this period.

The critical point here is that during the relevant period of 1790-1800, District residents were able to vote in Congressional elections in Maryland and Virginia not because they were citizens of those states the cession had ended their political link with those states. Rather, their voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation. It was therefore not the cessions themselves, but the federal assumption of authority in 1800, that deprived District residents of representation in Congress. The actions of this first Congress, authorizing District residents to vote in Congressional elections of the ceding states, thus demonstrate the Framers' belief that Congress may authorize by statute representation for the District.

II. Article I, Section 2, Clause 1 Does Not Speak to Congressional Authority to Grant Representation to the District.

The District is not a state for purposes of Congress' Article I, section 2, clause 1, which provides

that members of the House are chosen "by the people of the several States." This fact, however, says nothing about Congress' authority under the District Clause to give residents of the District the same rights as citizens of a state. As early as 1805 the Supreme Court recognized that Congress had authority to treat the District like a state, and Congress has repeatedly exercised this authority. This long-standing precedent demonstrates the breadth of Congress' power under the District Clause.

A. Congress May Exercise Its Authority Under the District Clause to Grant District Residents Certain Rights and Status Appurtenant to Citizenship of a State, Including Congressional Representation. Article I, 2, clause 1 of the Constitution provides for the election of members of the House of Representatives. It states:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. [emphasis added].

Although the District is not a state in the same manner as the fifty constituent geographical bodies that comprise the United States, the failure of this clause to mention citizens of the District does not preclude Congress from legislating to provide representation in the House.

Case law dating from the early days of the Republic demonstrates that Congressional legislation is the appropriate mechanism for granting national representation to District residents. In Hepburn v. Ellzey, residents of the District attempted to file suit in the Circuit Court of Virginia based on diversity jurisdiction. However, under Article III, section 2, of the Constitution, diversity jurisdiction only exists "between citizens of different States." Plaintiffs argued that the District was a state for purposes of Article III's Diversity Clause. Chief Justice Marshall, writing for the Court, held that "members of the American confederacy" are the only "states" contemplated in the Constitution. Provisions such as Article I, section 2, use the word "state" as designating a member of the Union, the Court observed, and the same meaning must therefore apply to provisions relating to the judiciary. Thus, the Court held that the District was not a state for purposes of diversity jurisdiction under Article III.

However, even though the Court held that the term "state" as used in Article III did not include the District, Chief Justice Marshall acknowledged that "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [District citizens]."43 But, he explained, "this is a subject for legislative, not for judicial consideration."44 Chief Justice Marshall thereby laid out the blueprint by which Congress, rather than the courts, could treat the District as a state under the Constitution.

Over the many years since Hepburn, Congress heeded Chief Justice Marshall's advice and

enacted legislation granting District residents access to federal courts on which "affect[] only the mechanics of administering justice in our federation [and do] not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms" and "considerations which bid us strictly to apply the Constitution to congressional enactments which invade diversity grounds. In 1940, Congress enacted a statute bestowing jurisdiction on federal courts in actions "between citizens of different States, or citizens of the District of Columbia . . . and any State or Territory." This statute was challenged in National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co. Relying on Hepburn as well as Congress' power under the District Clause, the Court upheld the statute. Justice Jackson, writing for a plurality of the Court, declined to overrule the conclusion in Hepburn that the District is not a "state" under the Constitution. Relying on Marshall's statement that "the matter is a subject for 'legislative not for judicial consideration,'" however, the plurality held that the conclusion that the District was not a "state" as the term is used in Article III did not deny Congress the power under other provisions of the Constitution to treat the District as a state for purposes of diversity jurisdiction.

Specifically, the plurality noted that the District Clause authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District," and concluded that Chief Justice Marshall was referring to this provision when he stated in Hepburn that the matter was more appropriate for legislative attention. The responsibility of Congress for the welfare of District residents includes the power and duty to provide those residents with courts adequate to adjudicate their claims against, as well as suits brought by, citizens of the several states.52 Therefore, according to the fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states ..." Id. at 585.

The statute, it held, was constitutional. Justice Rutledge, concurring in the judgment, would have overruled Hepburn outright and held that the District constituted a "state" under the Diversity Clause.54 The 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. The decision did not overrule Hepburn, but it effectively rejected the view that "state" has a "single, unvarying constitutional meaning which excludes the District."55 Although both Article I, section 2, and Article III, section 2, refer to "States" and by their terms do not include the District, Tidewater makes clear that this limitation does not vitiate Congressional authority to treat the District like a state for purposes of federal legislation, including legislation governing election of members to the House.

Adams v. Clinton57 is not to the contrary. Rather, the decision reinforces Chief Justice Marshall's pronouncement that Congress, and not the courts, has authority to grant District residents certain rights and status appurtenant to state citizenship under the Constitution. In Adams, District residents argued that they have a constitutional right to elect representatives to

Congress.58 A three-judge district court, construing the constitutional text and history, determined that the District is not a state under Article I, section 2, and therefore the plaintiffs do not have a judicially cognizable right to Congressional representation.59 In so doing, the court noted specifically that it "lack[ed] authority to grant plaintiffs the relief they seek," and thus District residents "must plead their cause in other venues."60 Just as Chief Justice Marshall in Hepburn and Justice Jackson in Tidewater recognized that the District Clause protected the plenary and exclusive authority of Congress to traverse where the judiciary cannot tread, so too the court in Adams v. Clinton suggested that it is up to Congress to grant through legislation the fairness in representation that the court was unable to order by fiat.

Tidewater is simply the most influential of many cases in which courts have upheld the right of Congress to treat the District as a state under the Constitution pursuant to its broad authority under the District Clause. From the birth of the Republic, courts have repeatedly affirmed treatment of the District a "state" for a wide variety of statutory, treaty, and even constitutional purposes. In deciding whether the District constitutes a "state" under a particular statute, courts examine "the character and aim of the specific provision involved." In Milton S. Kronheim & Co. Inc. v. District of Columbia,62 Congress treated the District as a state for 1983,helps illustrate this fundamental point. In the aftermath of the Carter decision, Congress passed an amendment treating the District as a state under section 1983,purposes of alcohol regulation under the Alcoholic Beverage Control Act. The District of Columbia Circuit held that such a designation was valid and it had "no warrant to interfere with Congress' plenary power under the District Clause '[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District.'" In Palmore v. United States,65 the Court recognized and accepted that 28 U.S.C. 1257, which provides for Supreme Court review of the final judgments of the highest court of a state, had been amended by Congress in 1970 to include the District of Columbia Court of Appeals within the term "highest court of a State." The federal district court in the District found that Congress could treat the District as a state, and thus provide it with 11th Amendment immunity, when creating an interstate agency, as it did when it treated the District as a state under the Washington Metropolitan Area Transit Authority.

The District may also be considered a state pursuant to an international treaty. In de Geofroy v. Riggs,72 a treaty between the United States and France provided that:

In all states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner, as the citizens of the United States. The Supreme Court concluded that "states of the Union" meant "all the political communities exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as 'territories' and the 'District of Columbia.'"

Courts have even found the District to constitute a state under other provisions of the Constitution. The Supreme Court has held that the Commerce Clause75 authorizes Congress to regulate commerce across the District's borders, even though that Clause only refers to commerce "among the several States."76 Similarly, the Court has interpreted Article I, section 2, clause 3, which provides that "Representatives and direct Taxes shall be apportioned among the several States ... according to their respective Numbers," as applying to the District.77 The Court also found that the Sixth Amendment right to trial by jury extends to the people of the District,78 even though the text of the Amendment states "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." And the District of Columbia Circuit held that the District is a state under the Twenty-First Amendment, which prohibits "[t]he transportation or importation into any state, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof..." If the District can be treated as a "state" under the Constitution for these and other purposes, it follows that Congress can legislate to treat the District as a state for purposes of Article I representation.

B. Other Legislation Has Allowed Citizens Who Are Not Residents of States to Vote in National Elections.

A frequent argument advanced by opponents of District representation is that Article I explicitly ties voting for members of the House of Representatives to citizenship in a state. This argument is wrong. The Uniformed and Overseas Citizens Absentee Voting Act allows otherwise disenfranchised American citizens residing in foreign countries while retaining their American citizenship to vote by absentee ballot in "the last place in which the person was domiciled before leaving the United States." The overseas voter need not be a citizen of the state where voting occurs. Indeed, the voter need not have an abode in that state, pay taxes in that state, or even intend to return to that state. Thus, the Act permits voting in federal elections by persons who are not citizens of any state. Moreover, these overseas voters are not qualified to vote in national elections under the literal terms of Article I; because they are no longer citizens of a state, they do not have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." If 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.

Justice Kennedy's concurring opinion in U.S. Term Limits, Inc. v. Thornton89 provides further evidence that the right to vote in federal elections is not necessarily tied to state citizenship. In his opinion, Justice Kennedy wrote that the right to vote in federal elections "do[es] not derive from the state power in the first instance but...belong[s] to the voter in his or her capacity as a citizen of the United States. . ." Indeed, when citizens vote in national elections, they exercise "a

federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere." Needless to say, the right to vote is one of the most important of the fundamental principles of democracy: 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. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

The right to vote is regarded as "a fundamental political right, because preservative of all rights." Such a right "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Given these considerations, depriving Congress of the right to grant the District Congressional representation pursuant to the District Clause thwarts the very purposes on which the Constitution is based. Allowing Congress to exercise such a power under the authority granted to it by the District Clause would remove a political disability with no constitutional rationale, give the District, which is akin to a state in virtually all important respects, its proportionate influence in national affairs, and correct the historical accident by which District residents have been denied the right to vote in national elections.

The Twenty-Third Amendment Does Not Affect Congressional Authority to Grant Representation to the District.

Although District residents currently may not vote for representatives or senators, the 23rd Amendment to the Constitution provides them the right to cast a vote in presidential elections. The 23rd Amendment, ratified in 1961, provides: 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;... but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State.

Opponents of District representation argue that the enactment of the Amendment demonstrates that any provision for District representation must be made by constitutional amendment and not by simple legislation.

The existence of the 23rd Amendment, dealing with presidential elections under Article II, has little relevance to Congress' power to provide the District with Congressional representation under the District Clause of Article I. Not only does the Constitution grant Congress broad and plenary powers to legislate for the District by such clause, it provides Congress with sweeping authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution"

its Article I powers.98 The 23rd Amendment, however, concerns the District's ability to appoint presidential electors to the Electoral College, an entity established by Article II of the Constitution.99 Congressional authority under Article II is very circumscribed100 indeed, limited to its authority under Article II, 1, clause 4, to determine the day on which the Electoral College votes. Because legislating with respect to the Electoral College is outside Congress' Article I authority, Congress could not by statute grant District residents a vote for President; granting District residents the right to vote in presidential elections of necessity had to be achieved via constitutional amendment.101 By contrast, providing the amend the Constitution through the 23rd Amendment. These obstacles to legislation in the context of presidential elections are not present here, however, because Article I (not Article II) governs Congressional elections and it provides Congress with plenary authority over the District in the District Clause.

District with representation in Congress implicates Article I concerns and Congress is authorized to enact such legislation by the District Clause. Therefore, no constitutional amendment is needed, and the existence of the 23rd Amendment does not imply otherwise.

Although this opinion is limited to analyzing the legal basis of Congressional authority to enact the District of Columbia House Voting Rights Act of 2007 and does not venture a view on its policy merits, it is at least ironic that residents of the Nation's capital continue to be denied the right to select a representative to the "People's House." My conclusion that Congress has the authority to grant Congressional representation to the District is motivated in part by the principle, firmly imbedded in our constitutional tradition, that "[n]o 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."