

U.S. Department of Justice
Office of Legal Policy



Report to the Attorney General

The Question of Statehood for the District of Columbia

April 3, 1987



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REPORT TO THE ATTORNEY GENERAL
ON
THE QUESTION OF
STATEHOOD FOR THE DISTRICT OF COLUMBIA

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U.S. Department of Justice
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Office of the Attorney General
Washington, D. C. 20530

In 1790, almost two centuries ago, the District of Columbia was created as the permanent seat of the government of the United States. Since the federal government took up residence in the new capital, ten years later, the people of the District of Columbia have not had a voting Representative in Congress, although they are currently represented by a single non-voting delegate. This arrangement has engendered debate among Americans from the very first, and a number of efforts have been made to alter the constitutional status of the District.

In 1978, a constitutional amendment was proposed that would have given the District of Columbia representation in the Senate and House of Representatives as if it were a state. The states, however, declined to ratify the amendment and it lapsed in 1985. Efforts have, therefore, shifted to focus on attempts to admit the District of Columbia to the Union as a state. Proposals of this nature have caused a lively debate over the legal, economic, and moral questions raised by the District's status in our constitutional scheme.

The present study, "Report to the Attorney General on the Question of Statehood for the District of Columbia" is a contribution to that debate. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues.

This study will generate considerable thought on a topic of great national importance. It will be of interest to anyone concerned about a provocative and informative examination of the pertinent legal issues.

Edwin Meese III

EDWIN MEESE III
Attorney General

Executive Summary

Efforts to admit the District of Columbia to the Union as a state should be vigorously opposed. Granting the national capital statehood through statutory means raises numerous troubling constitutional questions. After careful consideration of these issues, we have concluded that an amendment to the Constitution would be required before the District of Columbia may be admitted to the Union as a state. Statehood for the Nation's capital is inconsistent with the language of the Constitution, as well as the intent of its Framers, and would work a basic change in the federal system as it has existed for the past two hundred years. Under our Constitution, power was divided between the states and the federal government in the hope, as Madison wrote, that "[t]he different governments will control each other," thus securing self-government, individual liberty, and the rights of minorities. In order to serve its function in the federal structure a state must be independent of the federal government. However, the District of Columbia is not independent; it is a political and economic dependency of the national government.

At the same time, it is essential that the federal government maintain its independence of the states. If the District of Columbia were now admitted to statehood, it would not be one state among many. Because it is the national capital, the District would be *primus inter pares*, first among equals. The "State of Columbia . . . could come perilously close to being the state whose sole business is to govern, to control all the other states. It would be the imperial state; it would be 'Rome on the Potomac.'" It was this very dilemma that prompted the Founders to establish the federal capital in a district located outside of the borders of any one of the states, under the exclusive jurisdiction of Congress. Their reasons for creating the District are still valid and militate against granting it statehood.

Many have recognized the fundamental flaws in plans to grant the District of Columbia statehood. For instance, while testifying in support of the proposed 1978 District amendment, which would have treated the District of Columbia "as if it were a State" for purposes of national elections, Senator Edward Kennedy dismissed what he called "the statehood fallacy," and stated that, "[t]he District is neither a city nor a State. In fact, statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical

status of the Nation's Capital." A pamphlet entitled "Democracy Denied" circulated in support of the 1978 amendment, and fully endorsed by District Delegate Walter E. Fauntroy, plainly acknowledged that granting statehood to the District of Columbia "would defeat the purpose of having a federal city, i.e., the creation of a district over which the Congress would have exclusive control." That pamphlet also recognized that statehood "presents a troublesome problem with the 23rd Amendment if the federal district were to be wiped out by legislation." Indeed, Delegate Fauntroy has opposed statehood for the District in the past, correctly pointing out that "this would be in direct defiance of the prescriptions of the Founding Fathers." As former Senator Mathias of Maryland stated, "[i]t is not a State . . . it should not be a State."

These points are well taken. The factors that mitigated against statehood for the District of Columbia in 1978 have not changed. The rejection of the District voting rights constitutional amendment by the states does not make statehood any more desirable, or any less constitutionally suspect, today than it was a decade ago. Granting statehood to the District of Columbia would defeat the purpose of having a federal city, would be in direct defiance of the intent of the Founders, and would require an amendment to the Constitution.

I. Need for an Amendment to the Constitution Before the District of Columbia May Be Admitted to the Union as a State

Even if statehood for the District of Columbia represented sound policy, we do not believe that it can be accomplished merely by a statute admitting the District to the Union. The Constitution contemplates a federal district as the seat of the general government, and would have to be amended. The Department of Justice has long taken this position. In 1978, Assistant Attorney General John M. Harmon concluded on behalf of the Carter Administration that, "it was the intent of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the Framers' intentions."

The retention of federal authority over a truncated federal service area would not answer this constitutional objection. The language of the Constitution grants Congress exclusive authority over the district that became the seat of government, not merely over the seat of the government. The district that became the seat of government is the District of Columbia. It does not appear that Congress may, consistent with the language of the Constitution, abandon its exclusive authority over any part of the District.

Further, the Twenty-third Amendment requires that “[t]he District constituting the seat of Government of the United States” appoint electors to participate in the Electoral College. The amendment was proposed, drafted and ratified with reference to the District of Columbia. When the states adopted this amendment, they confirmed the understanding that the District is a unique juridical entity with permanent status under the Constitution. Another amendment would be necessary to remake this entity.

Finally, we believe that Congress’ ability to admit the District of Columbia into the Union as a new state would depend upon the consent of the legislature of the original ceding state. Article IV, section 3 of the Constitution provides that: “no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the legislatures of the States concerned as well as of the Congress.” Accordingly, the consent of Maryland would be necessary before the District of Columbia could be admitted to the Union. Should Maryland refuse to consent, the area that is now the District of Columbia could not be made a state without amendment of Article IV, section 3.

Thus, before the District of Columbia may be admitted to the Union as a state, the Constitution would have to be amended. Such an amendment, however, would be unwise.

II. The Sound Historical Reasons for a Federal District Still Operate Today

In the Founders’ view, a federal enclave where Congress could exercise complete authority, insulating itself from insult and securing its deliberations from interruption, was an “indispensable necessity.” They settled upon the device of a federal district as the means by which the federal government might remain independent of the influence of any

single state, to avoid, in the words of Virginia's George Mason, "a provincial tincture to ye Natl. deliberations."

The passing years have, if anything, increased the need for ultimate congressional control of the federal city. The District is an integral part of the operations of the nation's government, which depends upon a much more complex array of services, utilities, transportation facilities, and communication networks than it did at the Founding. If the District were to become a state, its financial problems, labor troubles, and other concerns would still affect the federal government's operations. Congress, however, would be deprived of a direct, controlling voice in the resolution of such problems. In a very real sense, the federal government would be dependent upon the State of Columbia for its day to day existence.

The retention of congressional authority over a much reduced federal enclave would not solve this problem. The Founder's contemplated more than a cluster of buildings, however grand, and their surrounding parks and gardens as the national capital. The creation of a new "federal town" was intended, in large part so that Congress could independently control the basic services necessary to the operation of the federal government. As former Senator Birch Bayh pointed out in 1978, "when our Founding Fathers established this as a capital city . . . they did not just establish a place that should be the Federal city and say this is where the Federal buildings are. But they envisioned this as a viable city, a capital city with people who work, have businesses, and have transportation lines, and homes. The essential establishment of the Nation's Capital was not an establishment of the Nation's Federal buildings but the Nation's city."

Further, there remain virtually insurmountable practical problems with District statehood. The operations of the federal government sprawl over the District. As a result, the new "state" would be honeycombed with federal installations, its territory fragmented by competing jurisdictions. As Assistant Attorney General Patricia Wald asked while testifying on behalf of the Carter Administration, regarding the proposed 1978 District amendment, "[w]ould the remaining non-Federal area constitute in any real sense a geographically homogeneous entity that justifies statehood?" It was for these very reasons that former Mayor Washington expressed doubts about statehood for the District. In 1975 he commented that the city of Washington is "so physically, and economically and socially bound together that I would have problems

with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city."

Finally, in a very real sense the District belongs not only to those who reside within its borders, but to the Nation as a whole. In opposing statehood for the District in 1978, Senator Bayh, an otherwise ardent proponent of direct District participation in congressional elections, eloquently summed up the objection: "I guess as a Senator from Indiana I hate to see us taking the Nation's Capital from [5,000,000] Hoosiers. It is part ours. I do not see why the District should be a State because it is, indeed, the Nation's Capital."

III. The District of Columbia is Not Independent of the Federal Government

A. Dependence on the Federal Establishment

The states of the American Union are more than merely geographic entities: Each is what has been termed "a proper Madisonian society" -- a society composed of a "diversity of interests and financial independence." It is this diversity which guards the liberty of the individual and the rights of minorities. As Madison wrote, "the security for civil rights . . . consists in the multiplicity of interests The degree of security . . . will depend on the number of interests . . . and this may be presumed to depend on the extent of country and number of people comprehended under the same government."

The District of Columbia lacks this essential political requisite for statehood. It has only one significant "industry," government. As a result, the District has one monolithic interest group, those who work for, provide services to, or otherwise deal with, the federal government. The national government was, historically, the city's only reason for being. Close to two-thirds of the District's workforce is employed either directly or indirectly in the business of the federal government. Indeed, in 1982 the District government maintained that, in the Washington Metropolitan area, for every federal worker laid off as a result of government reductions in force, one person would be thrown out of work in the private sector.

The implications of this monolithic interest are far reaching. For instance, the Supreme Court, in *Garcia v. San Antonio Metropolitan*

Transit Authority, 469 U.S. 528 (1985), has recently decided that the delicate balance between federal and state power is to be guarded primarily by the intrinsic role the states play in the structure of the national government and the political process. The congressional delegation from the District of Columbia, however, would have little interest in preserving the balance between federal and state authority entrusted to it by *Garcia*. The continued centralization of power in the hands of the national government would, in fact, be to the direct benefit of "Columbia" and its residents. Hence, the system of competing sovereignties designed to preserve our fundamental liberties would be compromised.

B. Economic Dependence

In addition to political independence and diversity, a state must have "sufficient population and resources to support a state government and to provide its share of the cost of the Federal Government." The District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government. The District is a federal dependency. Annually, in addition to all other federal aid programs, it receives a direct payment from the federal treasury of a half billion dollars; some \$522 million was budgeted for the District in Fiscal 1987, \$445 million to be paid directly to the District's local government. All in all, District residents outstrip the residents of the states in per capita federal aid by a wide margin. For instance, in 1983 the District received \$2,177 per capita in federal aid, some five and one-half times the national average of \$384.

Not surprisingly, Washington Mayor Marion Barry has plainly stated that the District would still "require the support of the Federal Government" if statehood were granted. The continuation of federal support is ordinarily justified because of the percentage of federal land in the District of Columbia that cannot be taxed by the local government. However, the federal government owns a greater percentage of the land area of 10 states, each of which bears the full burdens of statehood without the sort of massive federal support annually received by the District of Columbia. If the District aspires to statehood, it must be prepared to stand as an equal with the other states in its fiscal affairs.

Conclusion

The District of Columbia should not be granted statehood. In our considered opinion, an amendment to the Constitution would be needed

before the District could be admitted as a state, and in any case, the reasons that led the Founder's to establish the national capital in a district outside the borders of any state are still valid. The District's special status is an integral part of our system of federalism, which itself was a compromise between pure democracy and the need to secure individual liberties and minority rights. The residents of the District enjoy all of the rights of other citizens, save the right to vote in congressional elections. They exchanged this right, as Mr. Justice Story wrote, for the benefits of living in the "metropolis of a great and noble republic." Instead, "their rights [are] under the immediate protection of the representatives of the whole Union." This was the price of the national capital, and District residents have enjoyed the fruits of this bargain for almost two centuries.

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Introduction

On August 22, 1985, the seven years allowed for ratification of the proposed 1978 District of Columbia Representation Amendment expired. The plan, which would have granted residents of the District of Columbia the right to elect members of Congress as if the District "were a state," was resoundingly rejected by the states.¹ Proponents of direct participation in congressional elections for District residents have, therefore, turned their attention to achieving full statehood for the District of Columbia. In his inaugural address on January 3, 1987, Mayor Marion Barry made statehood for the city of Washington, "our first order of business on the Hill."²

This is not the first time in the District's almost two hundred years that demands have been made for full participation in congressional elections, but never before has statehood been the favored means of achieving this end by District leaders. Several have actually opposed statehood in the past.

Statehood for the District of Columbia presents numerous troubling constitutional and policy questions. After careful consideration of these issues, the Office of Legal Policy has concluded that statehood for the national capital is unsound as a matter of policy and, in our considered opinion, would require amendment of the Constitution.

The cornerstone of our federal system is the independence of the states from the federal government and the federal government from the states. As will be discussed in detail below, our system of federalism was more than a historical accident. It was the result of a conscious decision by the Founders, who adopted it as the best means of securing self-government, individual liberty, and the rights of minorities. The components of the federal structure must be independent of each other if they are to serve these functions. However, because it is the federal capital, the District of Columbia cannot be independent as are the states.

¹Only sixteen states ratified the proposal: Connecticut, Delaware, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Oregon, Rhode Island, West Virginia and Wisconsin. See *Congressional Quarterly 1985 Almanac* 404-405. Under Article V, an amendment must be ratified by at least three-fourths (38) of the states.

²The Washington Post, Jan. 3, 1987, at A16, col. 4.

The economy of Washington is dependent upon the federal government. A majority of the District's workforce is employed either directly by the federal government, or in private sector jobs providing services to the federal government. Each year the District receives a direct payment from the federal treasury of close to a half billion dollars. At the same time, because it is the seat of the national government, the "State of Columbia" would be in a position to exercise far more influence over the federal government than any of its sister states. It was this very dilemma which prompted the Framers to establish the federal capital in a district located outside of the borders of any one of the states, under the plenary jurisdiction of Congress. Sound policy reasons led the Founders to exclude the residents of the seat of the national government from participation in national elections, policy reasons that are as compelling today as in 1787. Accordingly, any attempt to admit the District of Columbia to the Union as a state should be vigorously opposed.

I. Founding the National Capital

From the meeting of the First Continental Congress on September 5, 1774, to the time the new government took up residence on the Potomac in November of 1800, the Congress met in at least eight different locations, often dictated by the exigencies of war. Sessions were held in Philadelphia, Baltimore, Annapolis, Trenton and New York, among other sites.³ As early as November, 1779, this nomadic existence prompted several members to propose that a few square miles be purchased in the vicinity of Princeton, N.J., where a permanent meeting place for the Congress could be erected.⁴ Three and-a-half years later, in the first few weeks after the end of the War for Independence (on April 30, 1783), the subject was raised in Congress.⁵ By June 4, offers of sites were received from New York and Maryland. Other states readily followed suit.⁶ That summer, James Madison was appointed by his colleagues in the Congress to chair a committee to investigate the matter.

³H. P. Caemmerer, *Washington: The National Capital*, S. Doc. 332, 71st Cong., 2d Sess. 3 (1932) [hereinafter Caemmerer].

⁴*Id.* at 4.

⁵*Id.* at 17.

⁶New York offered two square miles within the township of Kingston. Maryland offered to allow the establishment of the national government in Annapolis. Virginia offered the entire city of Williamsburg, with its colonial capitol, governor's palace, public buildings, 300 acres of additional land, a cash payment of up to 100,000 pounds, and a contiguous district not to exceed five miles square. New Jersey offered to cede a suitable site anywhere in the state. *Id.* at 4.

Madison's committee reported on September 18, 1783, recommending that the Congress have exclusive jurisdiction over the site to be chosen as the permanent seat of government, and that the enclave be no less than three, nor more than six, miles square. For the next four years the question of the site of this district occupied the attention of Congress and little was resolved. Locations on both the Delaware and Potomac Rivers were proposed, accepted and then rejected.⁷ A site on the Susquehanna was favored by many.⁸

When the Constitutional Convention met in May of 1787 little had been settled. There was, however, a general consensus that Congress, and not one of the states, should have jurisdiction over the permanent seat of the new government.⁹ Accordingly, a proposal for a district over which Congress would exercise exclusive jurisdiction was included in Charles Pinckney's early draft of the Constitution, submitted on May 29, 1787. On August 18, Madison sent a recommendation to the Committee of Detail granting Congress exclusive legislative authority over the district, "not to exceed — miles square," to become the seat of the federal government. This provision survives, virtually unaltered, in Article I, section 8, clause 17 of the Constitution, the "District Clause".¹⁰

When the Constitution took effect in the Spring of 1789, the site of the new capital remained unsettled. The location of this sought-after prize was a bone of much contention, in and out of Congress. Both New York and Philadelphia felt entitled to the plum. New York was the greatest port on the continent, and had been the home of Congress since 1785. Washington was inaugurated in New York, and the old city hall,

⁷*Id.* at 5-6.

⁸12 *The Papers of James Madison* 397-98 (C. Hobson & R. Rutland eds. 1981) [hereinafter *Madison Papers*].

⁹C. M. Green, *Washington: A History of the Capital 1800-1950* 8-9 (1962) [hereinafter *Green*].

¹⁰D. Hutchinson, *The Foundations of the Constitution* 125 (1975). See also Caemmerer, *supra* note 3, at 6. Article I, section 8, clause 17 provides that Congress shall have the power:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may by Cession of particular States and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

where Congress had been meeting, was replaced with a new more spacious building in the hope that Congress would make its home there.¹¹ Philadelphia, on the other hand, had been the customary seat of the Continental Congress, was the Nation's most populous city, and had the added advantage of a more central location. According to Alexander White, a member of the House of Representatives from Virginia, the citizens of Philadelphia, "[s]hew[ed] almost a childish anxiety for the removal of the Congress to this place."¹² The members of the 1st Congress, at the insistence of Messrs. Lee and Madison of Virginia, took up the subject in September 1789, although no resolution was reached until the following July.

There is no doubt that the Congress understood the vast benefits awaiting the site chosen as the permanent seat of the national government. As Madison pointed out:

The seat of Government is of great importance, if you consider the diffusion of wealth that proceeds from this source. I presume that the expenditures which will take place, where the Government will be established by those who are immediately concerned in its administration, and by others who may resort to it, will not be less than half a million dollars a year

Those who are most adjacent to the seat of Legislation will always possess advantages over others. An earlier knowledge of the laws, a greater influence in enacting them, better opportunities for anticipating them, and a thousand other circumstances will give a superiority to those who are thus situated.¹³

¹¹Caemmerer, *supra* note 3, at 7.

¹²12 *Madison Papers*, *supra* note 8, at 329.

¹³1 *Annals of Cong.* 864 (1789). Dr. Franklin, perhaps the canniest of the Founders, suggested that Pennsylvania cede the ten miles square moments after the new Constitution was first presented to the Pennsylvania legislature. On September 19, 1787, "[a]s soon as the Speaker had concluded [reading the Constitution], Dr. Franklin rose and delivered a letter . . . [containing] a recommendation to the legislature, 'that a law shall be immediately passed vesting in the new Congress a tract of land of ten miles square by which that body might be induced to fix the seat of the federal government in this state -- an event that must be highly advantageous to the Commonwealth of Pennsylvania.'" 2 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States - Pennsylvania* 61 (M. Jensen ed. 1976).

Outside of Philadelphia and New York, there was little enthusiasm for selecting one of the Nation's great cities as the site for the new capital. It was widely assumed that the "federal town" would be built from scratch, or upon the foundations of a smaller town already extant.¹⁴ Many members are said to have agreed with Washington "that America should establish the precedent of a nation locating and founding a city for its permanent capital by legislative enactment."¹⁵ The Founders saw the folly in fixing the national capital in an established urban center, particularly one which was also the seat of a state government, like Philadelphia. This concern was voiced by George Mason of Virginia during the Constitutional Convention. He observed that:

[I]t would be proper, as he thought, that some provision should be made in the Constitution agst. choosing for the seat of the Genl. Govt. the City or place at which the seat of any State Govt. might be fixt. There were 2 objections agst. having them at the same place, which without mentioning others, required some precaution on the subject. The 1st. was that it tended to produce disputes concerning jurisdiction. The 2d. & principal one was that the intermixture of the two Legislatures tended to give a provincial tincture to ye Natl. deliberations.¹⁶

Alexander White articulated the concern that the capital not be located at the site of an existing commercial center:

A few weeks later, Dr. Benjamin Gale of Connecticut wrote "[t]hat [Pennsylvania] has raised expectations of being made the seat of government which [will] naturally throw into it the riches and wealth of all the States in the Union." 3 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States - Del., N.J., Ga. & Conn.* 397 (M. Jensen ed. 1976) [hereinafter *Ratification Documents - Del., N.J., Ga., & Conn.*]. That same October, Elbridge Gerry of Massachusetts wrote that "the wealth of the Continent will be collected in Pennsylvania, where the seat of the federal Government is proposed to be." 13 *The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution Public & Private, Vol. 1 -- 21 Feb. - 7 Nov. 1787* 407 (J. Kaminski & G. Saladino eds. 1983).

¹⁴At the Constitutional Convention Elbridge Gerry, "conceived it to be the genl. sense of America, that neither the Seat of a State Govt. nor any large commercial City should be the seat of the Genl. Govt." J. Madison, *Notes of Debates in the Federal Convention of 1787* 379 (A. Koch ed. 1966) [hereinafter *Notes on the Federal Convention*].

¹⁵Caemmerer, *supra* note 3, at 10.

¹⁶*Notes on the Federal Convention, supra* note 14, at 378. Charles Pinckney, agreed that the seat of a state government should be avoided, but felt that "a large town or its vicinity would be proper." *Id.* at 379.

[M]odern policy has obliged the people of European countries, (I refer particularly to Great Britain,) to fix the seat of Government near the centre of trade. It is the commercial importance of the city of London which makes it the seat of Government; and what is the consequence? London and Westminster, though they united send only six members to Parliament, have a greater influence on the measures of Government than the whole empire besides. This is a situation in which we never wish to see this country placed.¹⁷

After much wrangling, and no little horse trading, the site favored by the southern members, below Georgetown, Maryland, near the fall line of the Potomac River, was chosen. In return for northern acceptance of a southern location for the capital, the southern delegates agreed to support the assumption of state Revolutionary War debts by the national government.¹⁸

By an Act of July 16, 1790,¹⁹ the Potomac site was selected and a "district of territory, not exceeding ten miles square . . . accepted for the permanent seat of the government of the United States." President Washington was given authority to appoint a commission to survey the district, to acquire such land on the eastern side of the river deemed necessary for the use of the United States, and, according to "such plans as the President shall approve," to erect "suitable buildings for the accommodation of Congress, and of the President, and for the public offices of the Government of the United States."²⁰ All of this was to be accomplished prior to the first Monday in December, 1800, when "the seat of the government of the United States shall, by virtue of this act, be transferred to the district."²¹ Until then, Philadelphia would serve as the seat of the new government.

¹⁷2 Annals of Cong. 1661 (1790).

¹⁸The debts incurred by the northern states during the Revolution were significantly higher than those incurred by their southern sisters.

¹⁹Act of July 16, 1790, 1 Stat. 130.

²⁰*Id.*

²¹*Id.*

II. Early Efforts to Provide National Representation

Congress convened in the District of Columbia for the first time on November 21, 1800. Two weeks earlier, on November 11, the residents of the District cast their last ballots in national congressional elections.²² While both Maryland and Virginia had ceded the territory comprising the new district in 1788 and 1789 respectively, the seat of government was not established there until December of 1800. District residents did not lose their state citizenship until that time. The Act of July 16, 1790, by which the cessions were accepted, provided that "the operation of the laws of the [ceding] state[s] within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."²³ By an Act of February 27, 1801, Congress provided that the laws of Maryland then in force would continue to be applied in the Maryland cession (to be called Washington County), and the laws of Virginia then in force would apply to the Virginia cession (to be called Alexandria County). A new circuit court was created to hear cases arising in the District.²⁴

The disenfranchisement of the inhabitants of the District did not go unnoticed. In December, 1800, Representative Smilie of Pennsylvania noted that "[n]ot a man in the District would be represented in the government, whereas every man who contributed to the support of a government ought to be represented in it."²⁵ In a pamphlet published in 1801, Augustus B. Woodward, a Virginia lawyer recently moved to the District, wrote that, "[t]his body of people is as much entitled to the enjoyment of the rights of citizenship as any other part of the people of the United States. There can exist no necessity for their disfranchisement They are entitled to a participation in the *general councils* on the principles of equity and reciprocity."²⁶ In May, 1802, the residents of the

²²See Green, *supra* note 9, at 23.

²³Act of July 16, 1790, *supra* note 19.

²⁴Act of February 27, 1801, 2 Stat. 103; Act of March 3, 1801, 2 Stat. 115.

²⁵T. W. Noyes, *Our National Capital and its Un-Americanized Americans* 60 (1951) [hereinafter Noyes].

²⁶*Id.* From 1801 to 1803 Woodward published a series of eight pamphlets entitled "Considerations on the Government of the Territory of Columbia" under the pseudonym "Epaminondas." He was appointed one of the first federal judges in the newly formed Michigan Territory in 1805, and prepared a plan for the city of Detroit (which had burned in that year), based upon L'Enfant's Washington. See *Dictionary of American Biography* 506-07 (D. Malone ed. 1936).

new city of Washington petitioned Congress for a charter, which allowed them to elect a city council, putting the city on a par with the District's other cities, Georgetown and Alexandria.²⁷ The City's mayor, however, was to be appointed by the President.²⁸ Within seven months, the citizens of Washington began agitating for a territorial form of government. The possibility of retroceding the District's territory back to Maryland and Virginia was, for the first time, raised. The proposal, however, was dropped when several members of Congress, tired of living in an uncomfortable backwater, suggested that the capital be moved back to Philadelphia.²⁹ As the City's leading biographer points out:

Whether, in the interest of reclaiming full political rights, a Washingtonian had ever stood ready to risk loss of the capital is doubtful. Men had invested in property in the city because here was to be the seat of government. Stripped of that privilege, Washington would wither.³⁰

The District's predicament, however, was not forgotten. Citizens complained that Congress was unconcerned with their problems. Said one in the second decade of the Nineteenth Century, "[i]f a national bank is created, the head is fixed elsewhere. If a military school is to be founded, some other situation is sought. If a national university [to be located in the District] is proposed, the earnest recommendation of every successive president in its favour . . . is disregarded Every member [of Congress] takes care of the needs of his constituents, but we are the constituents of no one."³¹

Throughout its early period, the District, under the supreme authority of Congress, was governed by five separate jurisdictions: the city of Washington; the city of Georgetown (incorporated in 1789), governed by its own city council, alderman and mayor; the city of Alexandria (incorporated in 1790), with its municipal government; and

²⁷ See Green, *supra* note 9, at 29.

²⁸ Act of May 15, 1802, 3 Stat. 583. After 1820 the mayor was popularly elected. See *Representation in Congress for the District of Columbia: Hearings on S.J. Res. 76 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 38-39 (1973) [hereinafter *1973 Senate Hearings*].

²⁹ See Green, *supra* note 9, at 29-30.

³⁰ *Id.* at 30.

³¹ *Id.* at 66.

the unincorporated areas of Washington and Alexandria counties, each governed by their respective county governments.³² Between the establishment of the capital and the end of the Civil War, there were few changes in the governance of the District. In 1846 Alexandria County was returned to Virginia at the request of its inhabitants,³³ and in 1861 the "Metropolitan Police District of the District of Columbia" was created, the first step toward a unitary government for the District.

The next significant change in the nature of District government came in 1871. On June 1, 1871, a territorial government was established.³⁴ The city charters of Washington and Georgetown were repealed, and the other governing bodies were abolished. A single government was created for the entire District, allowing for a governor appointed by the President (with the advice and consent of the Senate) and an assembly, the upper house of which was appointed by the President (again with the advice and consent of the Senate), and the lower house of which was elected by popular vote. As with other territories, a non-voting delegate from the District was seated in the House of Representatives.³⁵

Three and a half years later, hopelessly in debt, the bankrupt territorial government was abolished by Congress without debate.³⁶ By this act, of June 20, 1874, the President was empowered to appoint three commissioners to administer the District, and its non-voting seat in the House of Representatives was abolished.³⁷ Four years later, a permanent commission form of government was adopted. Two of the three commissioners provided for were to be appointed by the President (with the advice and consent of the Senate) from the civil service, each to serve

³² See *Voting Representation in Congress for the District of Columbia: Hearings on H.J. Res. 46; H.J. Res. 253; H.J. Res. 374; H.J. Res. 470 Before Subcommittee No. 1 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 232, 234-35 (1971) (statement of Carl L. Shipley, District of Columbia Republican National Committeeman) [hereinafter *1971 House Hearings*].

³³ As will be discussed later, the constitutionality of the 1846 retrocession is open to some question. See *infra* pp. 16-23.

³⁴ Act of February 21, 1871, 16 Stat. 419.

³⁵ *1971 House Hearings*, *supra* note 32, at 210-211 (statement of F. Elwood Davis, Chairman, Citizens' Joint Committee on National Representation for the District of Columbia).

³⁶ Green, *supra* note 9, at 360.

³⁷ Act of June 20, 1874, 18 Stat. 116.

three years. The third commissioner was to be selected by the President from the Army Corps of Engineers.³⁸ This remained the District's form of government until 1967.

Under the District of Columbia Reorganization Plan No. 3 of 1967, the executive and administrative authority which had been vested in the commissioners was transferred to a mayor, and a nine-member city council was given certain legislative and regulatory powers. The mayor, deputy-mayor and council members were to be presidential appointees.³⁹ District residents were once again allowed to elect a non-voting delegate to the House of Representatives beginning in 1971.⁴⁰

The District of Columbia was granted full "Home Rule" in 1973. Under The District of Columbia Self-Government and Governmental Reorganization Act,⁴¹ the capital is now governed by a mayor and a thirteen member city council both elected by popular vote. Extensive legislative power over the District's affairs is invested in this government, although Congress retains significant oversight authority.⁴²

Between 1878 and 1973 clearly the most significant change in the voting rights of District residents was the Twenty-third Amendment, which provides that:

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

³⁸ Act of June 11, 1878, 20 Stat. 102. *See 1971 House Hearings, supra* note 32, at 235 (statement of Carl L. Shipley, District of Columbia Republican National Committeeman).

³⁹ *Id.* at 235-36.

⁴⁰ Act of April 19, 1971, 84 Stat. 848.

⁴¹ Pub. L. No. 93-198, 87 Stat. 774 (1973).

⁴² The Congress retains substantial veto power. Many regulatory functions are still subject to congressional authority. For example, final approval of the District's budget is reserved to Congress. In addition, the President is responsible for the appointment of local judges and may sustain a veto of an act of the City Council passed over the mayor's veto. *See e.g., id.* at §§ 404, 434, 446, 601, 603.

State, but in no event more than the least populous state
....⁴³

This amendment was ratified on March 29, 1961, after only 9 months.⁴⁴ Proposals to give the District direct voting representation in the Congress, however, have not fared so well. Since the territorial government was abolished in 1878, no fewer than 150 plans have been introduced in the Congress to provide direct voting representation for the District. Hearings have been held more than twenty different times.⁴⁵ The District's first champion, Augustus B. Woodward, proposed an amendment which would have granted the District one senator and representation in the House commensurate with its population (and corresponding presidential electors) in a series of articles published shortly after the federal government took up residence.⁴⁶ Woodward was not, however, a member of Congress and the proposed amendment was never introduced.⁴⁷

In 1888, a proposal much like Woodward's, which would have granted the District one senator, representatives in the House according to its population, and participation in the electoral college, was introduced. No further action, however, was taken.⁴⁸ In 1922, the Senate District of Columbia Committee favorably reported a resolution which would have allowed, but not required, the Congress to "admit to the status of citizens of a State the residents of ... the seat of the Government of the United States ... for the purposes of representation in Congress." *Senate District of Columbia Comm., Report on S.J. Res. 75.*⁴⁹ Again, no further action was taken.

In fact, it is only in the past two decades that direct representation for the District of Columbia has sustained significant congressional interest. In both 1967 and 1972 proposals to give the District representa-

⁴³U.S. Const. amend. XXI, § 1.

⁴⁴J. Best, *National Representation for the District of Columbia* 1 (1984) [hereinafter Best].

⁴⁵Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 *Fordham U.L.J.* 479, 495-96 & n.69 (1978-79) [hereinafter Hatch].

⁴⁶*Id.* at 495 n.68. See also Noyes, *supra* note 25, at 204.

⁴⁷See Noyes, *supra* note 25, at 204.

⁴⁸See Hatch, *supra* note 45, at 496-97.

⁴⁹*Id.* at 497 n.74.

tion were reported out of House committees. Early 1976 saw the defeat of a House resolution giving the District full representation in both houses.⁵⁰ Two years later, the proposed D.C. Representation Amendment was narrowly approved by a two-thirds majority in both houses of Congress. This amendment would have granted "nominal statehood" to the District, treating it "as though it were a state" for purposes of representation in both House and Senate. The District would also have been given the rights of a state to participate in the amendment process, and the right to participate in the Electoral College on an equal footing with the states. The Twenty-third amendment, thus rendered unnecessary, was to be repealed. Seven years were allowed for ratification of the proposed amendment, by August 22, 1985. In that time, it was ratified by only sixteen states.⁵¹

III. Proposals for Giving Representation in Congress to the District of Columbia

The numerous schemes proposed over the last two hundred years to give the residents of the federal district some sort of direct voting representation in Congress may be distilled into five basic proposals: (1) legislation to allow the District a voting member in the House of Representatives alone; (2) retrocession of the District of Columbia to Maryland, retaining a truncated federal district; (3) allowing District residents to vote as residents of Maryland in national elections; (4) an amendment to the Constitution to give the District full representation in both House and Senate as if it were a state; and (5) full statehood. None of these proposals offers a sound policy solution, and several appear to be fatally flawed when exposed to constitutional scrutiny.

A. Voting Member in the House of Representatives

From time to time it has been suggested that the District be granted, by simple legislation, a voting member in the House of Representatives. This proposal, however, runs into significant constitutional difficulties.

⁵⁰H.J. Res. 280, 94th Cong., 2d Sess. (1976). See Hatch, *supra* note 45, at 498.

⁵¹See *supra* p. 1, n.1. At least ten states rejected the proposal, and four of these felt compelled to pass resolutions affirmatively condemning the measure. See Best, *supra* note 44, at 1. For two exhaustive critical analyses of this proposal, see Best, *supra* note 44, and Hatch, *supra* note 45.

Those sections of the Constitution which define the political structure of the federal government speak uniformly in terms of the states and their citizens. Article I, section 2 provides that, “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States No person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”⁵² Article I, section 3 provides that, “[t]he Senate of the United States shall be composed of two Senators from each State No Person shall be a Senator . . . who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”⁵³ With respect to the election of the President, Article II, section 1 provides that, “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁵⁴ The Seventeenth Amendment directs that “[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.”⁵⁵ In short, “[d]irect representation in the Congress by a voting member has never been a right of United States citizenship. Instead, the right to be so represented has been a right of the citizens of the States.”⁵⁶

The word “state” as used in Article I may not be interpreted to include the District of Columbia, even though as a “distinct political society” it might qualify under a more general definition of that term. Consistent with the intent of the Framers, such arguments were properly dismissed long ago by Chief Justice Marshall in *Hepburn v. Ellzey*.⁵⁷ In that case, plaintiffs, residents of the District, claimed that they were citizens of a state for purposes of diversity jurisdiction in the federal courts. The Court rejected this position. Marshall reasoned that Congress had adopted the definition of “state” as found in the Constitution in the act providing for diversity jurisdiction, and that the capital could not

⁵²U.S. Const. art. I, § 2.

⁵³U.S. Const. art. I, § 3.

⁵⁴U.S. Const. art. II, § 1, cl. 2. The people of the District of Columbia may vote for President only because of the Twenty-third Amendment, which specifically grants them that right.

⁵⁵U.S. Const. amend. XVII.

⁵⁶1973 *Senate Hearings*, *supra* note 28, at 67 (minority views of Rep. Edward Hutchinson).

⁵⁷6 U.S. (2 Cranch) 445 (1805).

be considered such a "state". Citing Article I, sections 2 and 3, and Article II, section 1, he concluded that "the members of the American confederacy only are the states contemplated."⁵⁸ "These clauses show that the word state is used in the constitution as designating a member of the union, and excludes from the term the significance attached to it by writers on the law of nations."⁵⁹ Congress, to be sure, has often treated

⁵⁸ *Id.* at 452.

⁵⁹ *Id.* at 452-53. The Judiciary Act has since been amended to extend the diversity jurisdiction of the federal courts to include District residents. See Act of April 20, 1940, Ch. 117, 54 Stat. 143.

A deeply divided Supreme Court upheld this extension of federal court jurisdiction in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). Five justices agreed that the statute was constitutional, although they divided over the grounds upon which to rest their finding. Two justices concurred in Justice Jackson's plurality opinion, which followed Marshall's lead in concluding that the District cannot be considered a "state" for Article III purposes, but held that Congress' authority under the District Clause was sufficient to support a grant of diversity jurisdiction over District residents to the federal courts. In Article III, Justice Jackson wrote, the Drafters were referring to "those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers They obviously did not contemplate unorganized and dependent spaces as states." *Id.* at 588.

Two justices concurred in this result, creating a bare majority, but rejected Jackson's reasoning. They would have overruled *Hepburn*, noting that Marshall had supported his decision in that case by referring to "provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such." *Id.* at 619. Article III could not, in their view, be fairly compared with Articles I and II with respect to the word "state". They did not, however, question Marshall's interpretation of the word as it was used in the first two articles.

Justices Frankfurter and Reed dissented, arguing that Article III's grant of jurisdiction to the federal courts could not be enlarged beyond its original scope by simple statute. *Id.* at 655. The word "state" in Article III, they concluded, did not "cover the district which was to become 'the Seat of the Government of the United States,' nor the 'territory' belonging to the United States, both of which the Constitution dealt with in differentiation from the States." *Id.* at 653.

Chief Justice Vinson, joined by Justice Douglas, also would have invalidated the statute, based upon Marshall's *Hepburn* reasoning. He concluded that the Framers clearly did not intend to extend diversity jurisdiction to citizens of the District of Columbia, as Marshall, "[o]ne well versed in that subject, writing for the Court within a few years of adoption of the Constitution, so held." *Id.* at 645. Thus, while the statute withstood constitutional challenge, seven of nine justices agreed with Marshall that the word "state" could not be interpreted to include the District of Columbia in this instance. All agreed that "state" as used in the "political" articles of the Constitution did not include the District.

the District of Columbia as a state for purposes of statutory benefit programs. It is customarily included in the major federal grant programs by the well-worn phrase "for purposes of this legislation, the term 'State' shall include the District of Columbia."⁶⁰ The courts, also, have occasionally interpreted the word "state" to include the District of Columbia. However, the District has never been automatically included under the term "state" even in federal statutes. In *District of Columbia v. Carter*,⁶¹ the Supreme Court held that it was not a "State or Territory" under 42 U.S.C. § 1983, which creates a federal cause of action for civil rights violations under color of state law. Under the test articulated by Justice Brennan in that case, "[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."⁶² In any event, allowing the District to participate on an equal footing with the states in federal statutory programs is different in kind from reading the language of the Constitution itself in such a way as to allow alteration of the very composition of the Congress by legislative fiat.

The Constitutional mandate is clear. Only United States citizens who are also citizens of a state are entitled to elect members of Congress. This is hardly a novel proposition. There are many different levels of rights recognized in our system. Aliens, for instance, enjoy certain basic rights,⁶³ including the benefit of the Equal Protection Clause,⁶⁴ but are not citizens of the United States and have no vote. The residents of United States possessions overseas also enjoy the protection of the Constitution, but may not vote in federal elections. Many of them are United States citizens -- the residents of Puerto Rico and Guam, for instance, fit this category. Like the residents of the District of Columbia,

⁶⁰See *Representation in Congress for the District of Columbia: Hearings on S.J. Res. 76 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 6 (1974) (statement of Sen. Kennedy).

⁶¹409 U.S. 418 (1973).

⁶²*Id.* at 420. Section 1983 has since been amended to expressly include the District of Columbia. See Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979).

⁶³See e.g., *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (due process clause of Fifth Amendment applicable to aliens).

⁶⁴See e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (aliens entitled to equal protection under the Fourteenth Amendment).

American citizens who are not also citizens of a state do not participate in congressional elections, and they never have enjoyed such participation.⁶⁵ The residents of the District of Columbia may not participate directly in congressional elections without becoming citizens of a state, or without an amendment to the Constitution.

B. Retrocession of the District to Maryland

The original District of Columbia was an area ten miles square composed of territory ceded to the national government by the states of Virginia and Maryland. Of this 100 square miles, approximately 30 square miles came from Virginia (Alexandria County) and 70 from Maryland (Washington County). In 1846, at the earnest request of the residents of Alexandria County, Congress enacted legislation retroceding it to the Commonwealth.⁶⁶ Therefore, what is thought of as the District of Columbia today includes only territory that was once part of Maryland.

A favored alternative of some is to retrocede the District to Maryland. A reduced federal enclave, they say, could be preserved, generally including the areas immediately surrounding the Capitol, Supreme Court, and Library of Congress, the museums and federal office buildings adjacent to the Capitol Mall, the Jefferson, Lincoln and Vietnam Memorials, the Washington Monument, and the White House

⁶⁵Indeed, "[a]ll during the 19th century and into the 20th, American citizens left their States of residence and migrated into new lands, which were subject to the jurisdiction of the United States but were in no State. As migration into those areas increased they were organized into territories but at no time did those American citizens elect voting Members of Congress. Not until their territory was admitted as a State did they have that representation There was no widespread belief that the people in the territories were discriminated against because they had no direct voting representation in Congress." *1973 Senate Hearings, supra* note 28, at 66-67 (minority views of Rep. Edward Hutchinson).

⁶⁶*See* Act of July 19, 1846, Ch. 35, 9 Stat. 35. Alexandria's pleas for retrocession began early in the Nineteenth Century, as the city's prosperity declined. In 1840 certain Alexandria residents began to seek support for a retrocession and, after several years, succeeded in obtaining the approval of the Virginia General Assembly. In an act passed on February 3, 1846, the Assembly agreed to accept the county of Alexandria back into the Old Dominion upon the approval of Congress. *See* Virginia Act of February 3, 1846, Ch. 64. Five months later Congress passed an act retroceding the area to Virginia, provided that a majority of the electorate of the county accepted the provisions of the act. 763 residents of Alexandria County voted to rejoin Virginia and 222 voted to remain in the District. *See* Green, *supra* note 9, at 173-74.

with its attendant executive office buildings.⁶⁷ Current residents of the District would become citizens of Maryland, and would then vote for Senators and Representatives from that state. This resolution, argue its supporters, would allow District residents a full and equal voice in national affairs, and would preserve the constitutional mandate of the District Clause that the seat of government remain under the exclusive jurisdiction of Congress -- a "constitutionally elegant solution" for which there is already a precedent.⁶⁸

Theoretically, it is argued, retrocession could be accomplished without an amendment to the Constitution,⁶⁹ as was the retrocession in 1846 of part of the original District to Virginia. Since Virginia's consent was secured in 1846, it is assumed that Maryland's agreement would be necessary today. In the event that Maryland lacked enthusiasm for the scheme, an amendment could still conceivably be adopted, because Maryland would not have to be among the three-fourths of the states ratifying the measure.⁷⁰

The advantages of retrocession, however, are more apparent than real. Whether or not Maryland's consent would be legally required, as a practical political matter her agreement to any such plan would be needed. Moreover, such a scheme would not pass constitutional muster in the absence of an amendment to the Constitution. This is because (1) it is not at all clear that Congress has the power to relinquish its authority over the District, even if a "national capital service area" were retained; and, (2) we believe that the passage of the Twenty-third Amendment has given additional constitutional recognition to the District of Columbia.

⁶⁷This has generally been the area reserved as a "national capital service area" in both retrocession and District statehood plans. See *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) [hereinafter *1978 Senate Hearings*]; H.R. 51, 99th Cong., 1st Sess. (1986) (A Bill to Provide for the Admission of the State of New Columbia into the Union).

⁶⁸See Best, *supra* note 44, at 77.

⁶⁹*Representation for the District of Columbia: Hearings on Proposed Constitutional Amendment to Provide for Full Congressional Representation for the District of Columbia Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 37 (1977) (statement of Rep. Thornton) [hereinafter *1977 House Hearings*].

⁷⁰See Best, *supra* note 44, at 79-80.

1. *The District Clause Appears to Provide No Authority for Retrocession*

Retrocession is grounded upon the assumption that Congress may relinquish its authority over part of the federal district, retaining for itself only the major federal monuments and buildings, and the surrounding parkland, consistent with the District Clause. It is not at all clear, however, that the Constitution allows Congress that power. Article I, section 8, clause 17 provides that Congress shall have the power:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may by Cession of Particular States and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.⁷¹

Congress is here given exclusive jurisdiction over the district which was to “become the seat of government of the United States,” not merely over the seat of government, wherever that might happen to be. Clearly, the district chosen could not exceed ten miles square,⁷² but, under the language of the clause, once the cession was made and this “district” became the seat of government, the authority of Congress over its size and location seems to have been exhausted. The district which became

⁷¹U.S. Const. art. I, § 8, cl. 17.

⁷²The phrase “not exceeding ten Miles square” has been cited as giving Congress the authority to alter the size of the District at will, or even to change the site of the seat of government. See *1978 Senate Hearings*, *supra* note 67, at 191 (views of Hilda M. Mason, District of Columbia councilmember-at-large). However, as found in the text, this language was merely a limit upon the size of the original cession. Many feared that, since it would be under the jurisdiction of no state, the District might become a haven for miscreants or the recruiting ground whence federal armies could be raised to subdue the states and put an end to republican liberty. During the debates over the Constitution’s ratification, one Georgian argued that the district should be confined to five miles square, as “a larger extent might be made a nursery out of which legions may be dragged to subject us to unlimited Slavery, like ancient Rome.” *Ratification Documents - Del. N.J., Ga. & Conn.*, *supra* note 13, at 240. Congress chose to exercise its authority under the District Clause to the fullest extent, and accepted the full ten miles square. Once the cession was made, the site accepted by Congress, and the permanent seat of government established, it appears that the boundaries of the District were finally fixed.

the seat of government is the District of Columbia. The Constitution appears to leave Congress no authority to redefine the District's boundaries, absent an amendment granting it that power.⁷³ As Attorney General Robert F. Kennedy stated in 1963, commenting on a bill that would have retroceded the District to Maryland, "[w]hile Congress' power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance, or for retrocession. In this respect the provisions of Art. I, Sec. 3, cl. 17 are comparable to the provisions of Art. IV, Sec. 3 which empower Congress to admit new states but make no provision for the secession or expulsion of a state."⁷⁴ It follows that, an amendment to the Constitution would be needed before any part of the District of Columbia could be returned irrevocably to Maryland.

⁷³ While it has occasionally been assumed that Congress could remove the seat of government if it chose, this does not seem to be the import of the constitutional language. Undoubtedly Congress could, should circumstances require, convene elsewhere on a temporary basis. (Even so, at the two points in our history when such a removal might have been justified on the grounds of military necessity, at the beginning of the Civil War and after the city was burned by the British in 1814, Congress stayed put.) However, this is very different from removing the permanent seat of the national government. The District of Columbia, for better or worse, is the permanent seat of the Government of the United States. Short of an amendment to the Constitution, its character as a federal enclave under the exclusive jurisdiction of Congress may not be altered, or the permanent seat of government removed.

Indeed, the Carter Justice Department took the position that an amendment would be needed to effect retrocession. As Assistant Attorney General Patricia Wald stated while testifying in 1977 before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, "[t]his option [retrocession of the District to Maryland] would also require a constitutional amendment, in our view, in view of the exclusive legislation clause." See *1977 House Hearings, supra* note 69, at 127 (testimony of Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs), Appendix E.

⁷⁴ Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1963, *reprinted in Home Rule, Hearings on H.R. 141 Before Subcommittee No. 6 of the House Committee on the District of Columbia*, 88th Cong., 1st Sess. 341, 345 (1964) [hereinafter *Kennedy Memorandum*]. See Appendix J.

Retrocession was, in fact, debated in Congress shortly after the seat of government was moved to the District. As Rep. Dennis of Maryland noted, "[t]he provision of the Constitution is imperative, and it is impossible by any act of ours to divest ourselves of the ultimate jurisdiction over the Territory." See 12 *Annals of Cong.* 490 (1803).

The retrocession of former Alexandria County (present day Arlington County and much of the city of Alexandria) to Virginia some one-hundred and forty-one years ago does not provide constitutional support for the principle of retrocession. In fact, the constitutionality of retrocession has never been ruled on. Alexandria's return to Virginia was not challenged until almost thirty years after the fact. In 1846, "the war with Mexico was a far more engrossing matter."⁷⁵ It was not until 1875, when a disgruntled Virginia taxpayer challenged a levy on his property, arguing that it was properly located in the District of Columbia, that the 1846 retrocession was brought into question. However, in that case, styled *Phillips v. Payne*,⁷⁶ the Supreme Court dodged the issue, reviewing the dire consequences that would follow a declaration that the retrocession was unconstitutional: "all laws of the State passed since the retrocession, as regards the county of Alexandria, were void; taxes have been illegally assessed and collected; the election of public officers, and the payment of their salaries, were without warrant of law; public accounts have been improperly settled; all sentences, judgments, and decrees of the courts were nullities, and those who carried them into execution are liable civilly, and perhaps criminally, according to the nature of what they have severally done."⁷⁷ The Court noted that Virginia was *de facto* in possession of the territory, and that the United States, and the English Common Law before it, had always recognized the doctrine of *de facto* rights in international and domestic public law. It concluded that plaintiff was "estopped" to "vicariously raise a question, nor force upon the parties to the compact an issue which neither of them desires to make. In this litigation we are constrained to regard the *de facto* condition of things which exists with reference to the county of Alexandria as conclusive of the rights of the parties before us."⁷⁸

⁷⁵Green, *supra* note 9, at 174.

⁷⁶92 U.S. 130 (1875).

⁷⁷*Id.* at 133.

⁷⁸*Id.* at 134. In 1910, Hannis Taylor, author of "The Origin and Growth of the English Constitution," as well as several other works on constitutional law, challenged the validity of the 1846 retrocession. He argued that, once the Maryland and Virginia cessions were accepted by Congress, its power to alter the size of the District was exhausted. He also maintained that the grants from Virginia, Maryland, and the local landowners to Congress were part of one transaction or compact, and that the act of retrocession among two of the parties, the United States and Virginia, had impaired the contract in violation of the Contract Clause. See R.P. Franchino, *The Constitutionality of Home Rule & National Representation for the District of Columbia*, 46 Geo. L.J. 207 (1958), reprinted in 1973 Senate Hearings, *supra* note 28, at 81.

The validity of Alexandria's return to Virginia need not be questioned. Neither Virginia nor the federal government has raised the issue. However, the Alexandria retrocession of 1846 should not be used as precedent for a further retrocession of the District of Columbia to Maryland today. The Court has yet to pass upon the constitutionality of retrocession as a principle, and its reluctance to face the question (first presented nearly 30 years after the fact), based more upon a parade of horrors than any constitutional analysis, indicates just how suspect is the proposition.

2. *The Twenty-third Amendment was Adopted With Reference to the District of Columbia*

The Twenty-third Amendment, adopted in 1961, gave additional constitutional recognition to the District of Columbia. This amendment provides that the "District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct" electors to participate in the Electoral College. The district referred to by this amendment is the District of Columbia as established pursuant to Article I, section 8, clause 17. Indeed, the committee report noted that the amendment "would . . . perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress."⁷⁹ Its avowed purpose was to provide these voting rights to "the citizens of the District of Columbia." This, also, supports the conclusion that the District, once created, became a permanent juridical entity under the Constitution.

In the alternative, the "District constituting the seat of Government" may refer to the District of Columbia as it existed at the amendment's ratification, in 1961. At that time Title 4 of the United States Code provided that, "[a]ll that part of the territory of the United States included within the present limits of the District of Columbia shall be the permanent seat of government of the United States."⁸⁰ In either

Indeed, in 1867 the House of Representatives passed a bill, by a vote of 111-28, repealing the 1846 Act on the stated ground that it was unconstitutional. The bill, however, was never reported out of the Senate Judiciary Committee. See 77 Cong. Globe 26, 32 (1867).

⁷⁹ *Granting Representation in the Electoral College to the District of Columbia*, H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1, 3 (1960) [hereinafter *House Report No. 1698*]. See Appendix H.

⁸⁰ Act of July 30, 1947, ch. 389, § 1, 61 Stat. 641, 4 U.S.C. § 71 (1982).

case, Congress' alteration of the size of the District either by retrocession or admission as a state would contradict the premise of the amendment -- the existence of the District of Columbia as the constitutional seat of government. The House Report accompanying the amendment confirms this understanding, casting doubt upon any proposed retrocession plan, or plan to admit the District to the Union as a state. The Report states in pertinent part:

It was suggested that, instead of a constitutional amendment to secure voting rights, the District be made either into a separate State or its land retroceded to the State of Maryland. Apart from the serious constitutional question which would be involved in the first part of this argument, any attempted divestiture by Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the "seat of Government" from the States and set it aside as a permanent Federal district. They considered it imperative that the seat of Government be removed from any possible control by any State and the Constitution in Article I, section 8, clause 17 specifically directs that the seat of Government remain under the exclusive legislative power of the Congress. This same reasoning applies to the argument that the land on which the District is now located be retroceded to the State of Maryland.⁸¹

Thus, the framers of the Twenty-third Amendment specifically considered and rejected as unconstitutional any attempt to retrocede the District of Columbia to Maryland, or to grant it statehood.

For these reasons, we believe that a constitutional amendment would be needed to extinguish the Constitution's permanent grant to Congress of exclusive legislative authority over the District of Columbia, whether through retroceding any portion of the District to Maryland or attempting to admit any part of the District as a state.

⁸¹House Report No. 1698, *supra* note 79, at 2-3.

Finally, retroceding the District to Maryland, or admitting it as a state via statute (assuming the foregoing constitutional obstacles could be overcome), would dramatically alter the effect of the Twenty-third Amendment. All agree that a district of some size must be retained as the seat of the federal government. However, retaining a truncated federal enclave as the capital would lead to the absurd spectacle of a few hundred, perhaps a few dozen, people (including at least, the incumbent President and First Family) selecting three presidential electors, the same number each of six states is currently entitled to choose. As Attorney General Kennedy noted in his 1963 memorandum, “[i]t is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a District of Columbia which had a population of 75 families or which had no population at all.”⁸²

3. *A Greatly Truncated Federal District Would be Unwise and Contrary to the Reasons Leading to the Creation of the District of Columbia*

For the foregoing reasons, a constitutional amendment would be required before retrocession could be accomplished. Such an amendment, however, would be unwise. The historical reasons that led the Founders to create a federal district could not be more clear, and a truncated federal enclave as the seat of government would hardly be adequate to the task they assigned to the District of Columbia. The phrase “such District . . . as may . . . become the Seat of the Government of the United States,” contemplates more than a cluster of buildings, however grand, and their surrounding parks and gardens. Had this been the intent, compounds could have been constructed to house the Congress, over which it would have had exclusive authority, in any one of the Nation’s major cities. Indeed, at the time New York rebuilt its city hall in the hope and expectation that Congress would settle there. Like arrangements could have been made in Philadelphia, Princeton, Annapolis, Boston or Charleston. As Attorney General Kennedy stated in his 1963 submission, commenting on a bill that would have retroceded the District to Maryland, retaining a small federal enclave “comprised primarily of parks and Federal buildings,” “[s]uch a small enclave clearly does not meet the concept of the ‘permanent seat of government’ which

⁸²See *Kennedy Memorandum*, *supra* note 74, at 350.

the framers held. Rather, they contemplated a Federal city, of substantial population and area, which would be the capital and a showplace of the new Nation.”⁸³

The Drafters, in fact, exhibited a clear understanding of the difference between public installations belonging to the United States and the seat of government. Had the Framers intended the seat of government to be merely another federal installation, the grant of exclusive legislative authority over the federal district would have been unnecessary. The grant of authority over “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings,” would have sufficed. As Assistant Attorney General Patricia M. Wald observed while testifying on the proposed 1978 District amendment, “we believe the syntax of the constitutional provision is such that the drafters meant for the District not to be located within the borders of any State. It would seem at odds with that intent to treat the seat of Government just like any other Federal facility in a State.”⁸⁴ In short, the creation of a new “federal town” was intended. As Senator Bayh pointed out in the debates on H.J. Res. 554, which became the proposed 1978 Amendment, “when our Founding Fathers established this as a capital city . . . they did not just establish a place that should be the Federal city and say this is where the Federal buildings are. But they envisioned this as a viable city, a capital city with people who work, have businesses, and have transportation lines, and homes. The essential establishment of the Nation’s Capital was not an establishment of the Nation’s Federal buildings but the Nation’s city.”⁸⁵

Indeed, the minuscule federal service area generally allowed in proposals to retrocede the District’s territory to Maryland, or to grant it statehood, would be completely inadequate to meet the needs of the federal government. As Attorney General Kennedy noted in his 1963 letter, with reference to a bill retroceding the District to Maryland, retaining a reduced federal enclave as the seat of government:

The inadequacy, of the small area proposed to be retained by H.R. 5564, to meet the objectives of the framers and the inherent needs of our Federal system, is apparent. Thus, if

⁸³ *Id.* at 347.

⁸⁴ See 1977 House Hearings, *supra* note 69, at 126.

⁸⁵ 124 Cong. Rec. 26,383 (1978). See Appendix F.

H.R. 5564 were adopted, the Members of Congress, the heads of executive departments, and the employees of the legislative and executive branches, would have no alternative but to reside in the States of Maryland or Virginia [or the State of Columbia if statehood were granted]. They would be dependent on one or the other State for the means of transportation to and from their Federal offices. Even transportation between Federal offices would probably be controlled by Maryland [or Columbia], since separate taxicab and bus service for the new District of Columbia would probably not be physically or economically feasible. All the foreign embassies would be located in Maryland [Columbia], dependent on it for police protection, and subject to its zoning and other requirements The total inconsistency is evident between such a situation and the intention of the framers.⁸⁶

An autonomous federal enclave was settled upon to assure Congress of authority over its immediate surroundings, to forever secure the independence of the federal government, avoiding the overweening influence of any one state, as well as to avoid interstate and sectional rivalries. All of these reasons are as valid today as they were in 1787. If the District were retroceded to Maryland, even though the major monuments remained under federal control, the capital city of the United States would be in a state. The intent of the Framers would be flouted and their wisdom ignored.

C. Allowing the Residents of the District of Columbia to Vote in Maryland

The third proposal suggests that the residents of the District of Columbia be allowed to vote in Maryland. They would vote in Maryland congressional elections, but would not become citizens of Maryland. The borders of the District of Columbia would remain intact. Rep. Ray Thornton of Arkansas advanced this proposal in 1977, as a means by which District residents could participate in congressional elections without the need of an amendment to the Constitution, and which would "not result in a loss of the special character of Washington, D.C., as our Nation's Federal City."⁸⁷

⁸⁶ See *Kennedy Memorandum*, *supra* note 74, at 348.

⁸⁷ 1977 *House Hearings*, *supra* note 69, at 36 (statement of Rep. Thornton).

Rep. Thornton argued that the Constitution does not specifically forbid voting representation in the Congress to District residents, but merely reserves such representation to the citizens of the states. Indeed, he pointed out, District residents voted in the Maryland congressional elections of 1800, before Congress took up residence in the District. Under this proposal, District residents could vote in congressional elections and be counted as Maryland residents for apportionment purposes. This solution would preserve the District as a federal enclave, but would allow its citizens voting representation in Congress, and, Rep. Thornton believed, could be achieved without the need of an amendment.⁸⁸ Following the 1846 precedent, he argued, this "partial retrocession" could be accomplished by mere statute. The residents of other federal enclaves covered by Article I, section 8, clause 17, he pointed out, "may vote in the States where those reservations are located, and the constitutional provision being identical, there is no reason why District residents should not be accorded the same privilege."⁸⁹

If this proposal were feasible, the District would indeed be preserved, and its residents would be able to participate in congressional elections. Maryland might not be enthusiastic, but her objections would be tempered with the gain of the District's population for apportionment purposes, without the corresponding problems of an urban area the size of the city of Washington. At the present time, she could expect one addition to her delegation in the House of Representatives, from eight to nine. The Congress would, more or less, maintain its exclusive authority over the District, and the intent of the Founders would be, more or less, preserved. There are, however, several practical and legal problems with this proposition which cast doubt on the ability of Congress to implement such a proposal by mere legislation.

It is true that residents of federal enclaves are generally entitled to vote in elections held in the states where the installation is located. The Supreme Court affirmed this right in *Evans v. Cornman*.⁹⁰ However, much more than a statute retroceding the "voting rights" of District residents to Maryland would be needed before they could vote in that state. The Court's decision in *Evans* was grounded in the premise that the residents of federal enclaves may be, in practice, residents of the states in

⁸⁸ *Id.* at 37.

⁸⁹ *Id.*

⁹⁰ 398 U.S. 419 (1970).

which the enclaves are located. In *Evans*, the residents of the National Institutes of Health ("NIH"), located in Montgomery County, Maryland, challenged a decision to strike them from the county voting rolls. The NIH had originally been a federal installation not covered by the Article I, section 8, clause 17 grant of exclusive legislative authority. It was not until 1953 that Maryland agreed to cede exclusive jurisdiction over the enclave to the federal government. Accordingly, before that cession, residents of NIH had voted in Maryland elections, both state and national. They were indisputably citizens of Maryland. They continued to enjoy those rights after the cession until the mid-1960s. In 1963 the Maryland Court of Appeals, in *Royer v. Board of Election Supervisors*,⁹¹ ruled that residents of federal enclaves were not "residents of the State" under the Maryland Constitution, and therefore were not entitled to vote as Maryland citizens. NIH residents were dropped from the rolls based upon this decision.

The *Evans* Court, however, took a different view. It noted that the NIH was within the geographical borders of Maryland, and that its residents were treated as residents of Maryland for census and congressional apportionment purposes. Relying on its previous decision in *Howard v. Commissioners of Louisville*,⁹² the Court held that the NIH did not cease to be a part of Maryland when exclusive jurisdiction was ceded to the federal government. Those living on the NIH grounds were, thus, still residents of Maryland. Accordingly, to deprive NIH residents of the voting rights enjoyed by other Maryland residents violated the Equal Protection Clause of the Fourteenth Amendment. Maryland's contention, that NIH residents were not "primarily and substantially included in or affected by electoral decisions" in Maryland because of the federal government's exclusive jurisdiction was rejected. The Court reasoned that NIH residents were not "sufficiently disinterested" to justify their disenfranchisement. It pointed out that Maryland law applied to the NIH grounds (although the criminal offenses defined by that law were prosecuted by federal authorities in federal courts), and that Congress has allowed Maryland, and the other states, to "levy and collect their income, gasoline, sales and use taxes -- the major sources of

⁹¹231 Md. 561, 191 A.2d 446 (1963).

⁹²344 U.S. 624, 626-27 (1953). Here, the Court held that a federal enclave does not cease to be a part of the state where it is located when exclusive jurisdiction is ceded to the federal government.

State revenues -- on federal enclaves. See 4 U.S.C. §§ 104-110.”⁹³ Maryland’s unemployment, workman’s compensation and auto licensing laws all applied to NIH residents, who were also “subject to the process and jurisdiction of [Maryland] state courts.”⁹⁴ The children of NIH residents attended Maryland schools. In effect, the Court concluded that NIH residents were treated as citizens of Maryland in most other respects by that state and could not, therefore, be constitutionally deprived of the vote. They participated in the polity that is Maryland, shouldering the obligations, and could not, therefore, be deprived of the corresponding rights.

This participation is lacking in the case of District residents. Article I, sections 2 and 3, limit membership in the House and Senate to individuals elected by the people of the several states. The residents of NIH were found to be residents of Maryland, and could not be deprived of their right to vote merely because their homes were on a federal enclave; such was found to be a deprivation of equal protection. While it is true that District residents once voted in Maryland elections (until 1800), they cannot now fairly be described as residents of Maryland. The District, since its establishment, has not in any sense been a part of Maryland. The residents of the District of Columbia do not send their taxes to Annapolis, do not send their children to Maryland schools, and are not subject to the laws of Maryland within the District. They are not, as were NIH residents, “as concerned with State spending and taxing decisions as other Maryland residents.”⁹⁵ The *Evans* Court did not decide that residents of federal enclaves are entitled to vote as citizens of the state in which the enclave is located, but that those individuals who could fairly be characterized as residents of the state, part of the state polity -- citizens -- could not be denied the vote consistent with the Equal Protection Clause. In doing so, it allowed for the possibility that residents of enclaves who could not fairly be characterized as citizens of the state, could be denied the vote. The Court noted that, “[w]hile it is true that federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds [citation omitted] whether appellees are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today, not on what it may be sometime in the future.”⁹⁶

⁹³ *Evans*, 398 U.S. at 424.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Thus, under *Evans*, it seems clear that District residents could constitutionally be *denied* voting rights in Maryland, as is now the case. *Evans*, of course, does not speak to the converse question -- when residents of federal enclaves may not constitutionally be *permitted* voting rights in a state. Its reasoning, however, may be instructive. Because District residents neither pay taxes in Maryland nor receive services from the state, their affiliation with Maryland may be constitutionally insufficient to support the exercise of voting rights in that state.

The proposal also raises questions with respect to the Twenty-third Amendment. Under the Constitution, each state selects a number of presidential electors equal to the number of senators and representatives to which it is entitled. If District residents are allowed to vote in Maryland congressional elections, then Maryland's House delegation, and its corresponding strength in the Electoral College, would reflect the combined population of Maryland and the District of Columbia. Voting in presidential elections is here directly tied to voting in congressional elections. Under the Twenty-third Amendment, however, District residents are entitled to select their own presidential electors. They could hardly expect to be counted in determining the number of Maryland's presidential electors, as well as forming the basis for the District's electors under the Twenty-third Amendment. Indeed, the creation of a separate voting arrangement for District residents by the Twenty-third Amendment is a constitutional recognition that they are not part of the body politic of Maryland. Permitting the residents of the District of Columbia to vote as residents of Maryland would conflict with the Twenty-third Amendment and, thus, should be accomplished, if at all, by an amendment to the Constitution. Moreover, as a practical matter, in the absence of a constitutional amendment, District residents would be ineligible to run for congressional office. Under this arrangement, District residents would be able to vote in Maryland, but would not be Maryland residents. Article I, section 2, clause 2 and section 3, clause 3, however, require that Senators and Representatives must "when elected, be an Inhabitant of that State for which [they] shall be chosen."

However, whatever its legal and logistical defects, a constitutional amendment allowing District residents to participate in Maryland elections at least would have the practical virtue of avoiding many of the critical problems that militate against retrocession of the District itself to Maryland, or of granting the District statehood. Congress would keep control over the basic services needed to ensure the smooth operation of the federal government, and the residents of the District would be

included, at least for voting purposes, in what one scholar terms a "proper Madisonian society."

D. Treating the District "As if It Were a State"

Recognizing the serious constitutional questions involved in granting the District of Columbia direct participation in congressional elections under the Constitution as it now stands, the 95th Congress adopted an amendment which would have treated the District "as if it were a state" for purposes of representation in the House of Representatives and the Senate, as well as for participation in presidential elections and the constitutional amendment process. The Twenty-third Amendment would have been repealed. While this proposal was overwhelmingly rejected by the states, it did raise a potential question under Article V of the Constitution regarding the number of states needed for ratification of any such amendment.⁹⁷

Article V details the procedures that must be followed in amending the Constitution, and provides that, in the normal case, a proposal must pass both houses of Congress by a two-thirds majority and be ratified by three-fourths of the states. Article V, however, contains the following proviso: "no State, without its Consent, shall be deprived of its equal

⁹⁷The proposal read:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

Article

Sec. 1. For 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.

Sec. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

Sec. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

Sec. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

H.J. Res. 554, 95th Cong., 1st Sess. (1977).

Suffrage in the Senate.”⁹⁸ Any state that had not voted to ratify the proposed 1978 Amendment would have been able to challenge the validity of the Amendment on the theory that the addition of two Senators from the District of Columbia, a non-state, could be said to deprive each state of its equal suffrage.

This argument has been dismissed as an unimportant inconvenience by the supporters of direct District participation in congressional elections.⁹⁹ The addition of two senators from the District, they say, would no more deprive the states of their equal suffrage than the admission of any new state over the past two centuries has done. Originally, each state had two out of twenty-six votes in the Senate. Today, each state has merely two votes out of one hundred, but none has been deprived of its equal suffrage. The position was summed up by Senator Kennedy in his testimony before the Senate Judiciary Committee in 1973: “The meaning of Article V is clear -- no single state may be given a larger number of Senators than any other State So long as the District of Columbia is represented in the Senate no more advantageously than any State, it cannot be said that representation for the District deprives any State of its equal suffrage in the Senate.”¹⁰⁰

The Senator’s argument, while valid when applied to the admission of a new state, does not take account of the fact that the District of Columbia is not a state. Article I, section 3 provides that “[t]he Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one vote.”¹⁰¹ The creation of an upper house in which the states would be equally represented, as opposed to the lower where seats were to be apportioned on the basis of population, was the result of the Great (Connecticut) Compromise. Each state, regardless of

⁹⁸ Article V also provides that no amendment prior to the year 1808 could have altered Article I, section 9, clause 1, forbidding congressional regulation of the slave trade before that year, and Article I, section 9, clause 4, forbidding direct taxes unless in proportion to the census. These restrictions on the amendment process have, of course, long since expired. Indeed, in 1913 the Sixteenth Amendment was ratified, amending Article I, section 9, clause 4, and allowing Congress to tax incomes without regard to any apportionment among the states or the census.

⁹⁹ See, e.g., *1973 Senate Hearings*, *supra* note 28, at 13-14 (statement of Sen. Kennedy). See also Berns, *Rome on the Potomac*, Harpers, Jan. 1979, at 31-33.

¹⁰⁰ *Id.*

¹⁰¹ U.S. Const. art. I, § 3.

its size, was assured of an equal voice in the senior chamber. As the *Federalist* explains:

The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.¹⁰²

Thus, “the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.”¹⁰³ Federalism was here preserved. This compromise “made possible the Constitution of the United States and the establishment of a powerful American Union. Without [it] the [Constitutional] Convention, its nerves already strained to the breaking point, would have dissolved.”¹⁰⁴

The Founders, however, realized that later generations might tamper with their handiwork, and that the Compromise might be undone. At the Convention, Roger Sherman of Connecticut “expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate.”¹⁰⁵ As a remedy, he suggested the following addition to Article V: “that no State shall without its consent be affected in its internal police, or deprived of its equality in the Senate.”¹⁰⁶ When his motion was voted down, Sherman moved that

¹⁰²The *Federalist* No. 62, 416 (J. Madison) (J. Cooke ed. 1961).

¹⁰³*Id.* at 417.

¹⁰⁴B. Hendrick, *Bulwark of the Republic: A Biography of the Constitution* 84 (1937).

¹⁰⁵*Notes on the Federal Convention, supra* note 14, at 648.

¹⁰⁶*Id.* at 649-650.

Article V be deleted altogether. This motion was also defeated, but Gouverneur Morris immediately proposed that the language, "that no State, without its consent shall be deprived of its equal suffrage in the Senate," be added. This motion, according to Madison, "being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no."¹⁰⁷ Thus, the Senate was to be the guarantor of federalism, and Article V the guarantor of the Senate. Accordingly, the Senate is the only branch of government whose composition is protected by extraordinary constitutional amendment procedures. "The very fact that all of these other institutions and relationships [in the Constitution] can unquestionably be affected by ordinary constitutional amendments should lead us to take the Article V proviso *very* seriously."¹⁰⁸

Although the District would have no more votes in the Senate than any other state, the problem is that the District of Columbia would be accorded representation in that body at all. Under Article I, section 3, only *states* may be represented in the Senate and the District of Columbia is not a state. Although Article V on its face does not appear to forbid amendment of Article I, section 3 by normal process, opponents could argue that an amendment to admit the District to the Senate violates the Article V proviso. The purpose of the last sentence of Article V is to ensure that the Senate remains as the guarantor of federalism, absent extraordinary constitutional amendment. Thus, states not consenting to an amendment allowing the District representation in the Senate could have argued that the amendment "necessarily dilut[ed] the influence of the states considered in the aggregate, in the Senate. The 'equal suffrage' of the accumulated states would be reduced by the proportion that non-states are represented in that body. As this occurs, 'equal suffrage' of the individual state must also be reduced."¹⁰⁹ In short, instead of 100/100ths of the total representation in the Senate, the several states' share would be reduced to 100/102nd. While we are not prepared to express an opinion on the ultimate success of such an argument, we believe that it must be taken seriously.

Several other problems were identified with the proposed amendment, the most basic being that exclusive congressional authority over

¹⁰⁷*Id.* at 650.

¹⁰⁸*Best, supra* note 44, at 48.

¹⁰⁹*Hatch, supra* note 45, at 517.

the District would have led to problematic and unintended results if it were treated as a state. Article V, for instance, requires that as part of the amending process three-fourths of the state legislatures (or conventions in three-fourths of the states called by Congress), must ratify any proposed amendment before it becomes part of the Constitution. Congress, however, is the District's ultimate legislature. The 1978 Amendment did not purport to change the language of the District Clause, which grants to Congress the power to "exercise exclusive Legislation in all Cases whatsoever" over the District.¹¹⁰ Congress would, therefore, have been allowed direct participation in the ratification of proposed amendments. Article V, however, restricts the role of Congress in the amending process to proposing amendments, and to determining whether they shall be transmitted to the state legislatures or to ratification conventions in each of the states.

Congress could, of course, have attempted to delegate this authority to a District council of some sort, but any such body would still have been ultimately answerable to Congress, not to the people of the District. The residents of the District of Columbia, therefore, would not have had an equal voice in the amendment process, a process in which Congress would have been awarded a new and entirely unintended role.¹¹¹ Treating the District as a state for purposes of Article V would simply not solve this problem.

Finally, it was pointed out that the proposed amendment might have been interpreted to grant to District residents rights superior to those enjoyed by the citizens of the states. The proposal provided that the rights conferred by the amendment would be exercised "by the people of the District constituting the seat of government."¹¹² In allowing the direct election of members of the House of Representatives and of the Senate, the identical language is used in the Constitution. Article I, section 2 provides that members of the House shall be "chosen every second Year by the People of the several States." The Seventeenth Amendment provides that the Senate "shall be composed of two Senators

¹¹⁰U.S. Const. art. I, § 8, cl. 17. Indeed, the Twenty-third Amendment reinforces this role for Congress in granting that body the authority to direct the manner in which District presidential electors are appointed. This is a responsibility reserved by Article II to the state legislatures. See U.S. Const. art. II, § 1, cl. 2.; Best, *supra* note 44, at 27.

¹¹¹See Best, *supra* note 44, at 27-28.

¹¹²H.J. Res. 554, 95th Cong., 1st Sess. (1977). See *supra* p. 30 n.97.

from each state elected by the people thereof." The use of the phrase, "by the people," in the 1978 Amendment could, thus, have been construed to give District residents the right to vote directly on the ratification of amendments to the Constitution. The citizens of none of the states enjoy such a direct voice in this process, since Article V requires that proposed amendments be passed upon by the state legislatures, or by special ratifying conventions.¹¹³ Like questions were raised regarding the proposal's effect upon the presidential selection process, and the possibility that it could be construed to give District residents the right to vote directly for President, and not through the Electoral College.¹¹⁴

IV. Statehood for the District of Columbia

Since little enthusiasm has been shown for making the District into a quasi-state in the state houses, efforts have now shifted towards granting the District full statehood. Statehood proponents are quick to assert that this expedient would not require an amendment. The District, they say, could be admitted to the Union by simple statute as other states have been. Article IV, section 3 merely states that "[n]ew states may be admitted by the Congress into this Union."¹¹⁵ By this device, the District of Columbia would be entitled to a delegation in the Congress without the permission heretofore withheld by the several states.

It is true that, in the past, states have been admitted to the Union through the device of simple legislation. Ordinarily, statehood has been achieved through a progression of territorial status, referendum or other means to determine if the population desires statehood, and then the passing of an enabling act or acts allowing the proposed state to draft a constitution to be submitted for congressional approval. Once the proposed state constitution is approved by both Congress and the territorial residents, the territory is declared a state by statute or joint resolution, signed by the President.¹¹⁶

¹¹³See *Hawke v. Smith*, 253 U.S. 221 (1920) (popular vote referendum procedure adopted in state constitution may not be applied to the ratification of amendments to the federal Constitution, which is limited to state legislatures or ratifying conventions).

¹¹⁴See Best, *supra* note 44, at 39.

¹¹⁵U.S. Const. art. IV, § 3, cl. 1.

¹¹⁶See P. Sheridan, *The Library of Congress, Congressional Research Service - Policy Issues in the Admission of Certain States into the Union: A Brief Analysis*, reprinted in 1978 *Senate Hearings*, *supra* note 67, at 386 [hereinafter Sheridan].

This process has, of course, varied considerably over the years. Not all states have been admitted through the device of an enabling act. In several cases, a mere act of admission has been employed. In seven instances the so called "Tennessee Plan" was adopted. Under this program the territory seeking statehood, following the lead of the Volunteer State, drafted a constitution, elected senators and representatives, and sent them to Washington. These delegations have never been seated in the Congress before actual statehood, but it is thought that this procedure has considerably expedited admission.¹¹⁷

However, for reasons that will be set forth below, statehood for the District of Columbia cannot be so easily achieved. A constitutional amendment would be required.

As discussed above (pp. 18-25), Congress does not appear to have the power to relinquish the plenary legislative authority granted it by Article I over the district which has become the seat of government. The provision requiring that the District be no more than ten miles square was merely a limit on the size of the original cession from the states. It does not purport to grant Congress the authority to reduce the size of the area constituting the seat of government at will. Moreover, the Twenty-third Amendment recognized that the District of Columbia is a unique juridical entity in the American commonwealth. Therefore, even if a smaller federal district were retained by Congress, the Constitution would have to be amended before the District of Columbia can be admitted as a state.

¹¹⁷ *Id.* The admission of new states has almost always been a politically sensitive issue. Prior to the Civil War the precarious balance between the Northern and Southern states was maintained by a tacit policy of dual admissions -- one slave and one free state at a time. Later in the century, other reasons were advanced in opposition to the admission of new states. Statehood for Wyoming was opposed because, among other things, the state provided political equality to women. The admission of Utah was delayed because of the practice of polygamy by members of the Mormon Church, and because the territory lacked a genuine two party system. New Mexico's admission was opposed because its character was perceived to be insufficiently American, based upon its Hispanic heritage and the widespread use of the Spanish language. Hawaiian statehood was opposed by some because its residents were largely of Asian extraction, and because of widespread communist influence perceived in the territory's largest union, the International Longshoreman's and Warehouseman's Union. At the time Hawaii was also predominantly Republican and "the Democrats refused to vote for its admission unless Alaska, a Democratic stronghold, was granted statehood also." *Id.* at 386-90.

The Department of Justice has long taken the position that an amendment is necessary to grant statehood to the District of Columbia. In 1978 Assistant Attorney General John M. Harmon spoke to this very issue while testifying on behalf of the Carter Administration. He noted that:

If admitted to the Union as a State, the District of Columbia would be on an equal footing with the other States with respect to matters of local government.

We do not believe that the power of Congress vested by Article I, section 8, clause 17 of the Constitution to exercise plenary legislative jurisdiction over the District could be thus permanently abrogated by a simple majority vote of both Houses of Congress. That could only be accomplished, in our view, by a constitutional amendment.¹¹⁸

He concluded that, "it was the intent of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the Framers' intentions."¹¹⁹

As discussed above in connection with retrocession plans (pp. 21-23), granting statehood to the District by legislation alone also raises serious questions with respect to the Twenty-third Amendment.

The serious constitutional questions raised by District statehood proposals have been recognized by many others over the years. Members of both parties, conservatives and liberals, politicians and academicians, have opposed the measure. In 1978, for instance, Senator Edward Kennedy dismissed what he called "the statehood fallacy," and categorically stated that, "[t]he District is neither a city nor a State. In fact, statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical status of the

¹¹⁸ 1978 Senate Hearings, *supra* note 67, at 17 (statement of Assistant Attorney General John M. Harmon, Office of Legal Counsel). See Appendix D.

¹¹⁹ *Id.* at 18.

Nation's Capital.”¹²⁰ A pamphlet entitled “Democracy Denied”, circulated in support of the 1978 Amendment (and fully endorsed by District Delegate Walter E. Fauntroy), plainly acknowledged that granting statehood to the District of Columbia “would defeat the purpose of having a federal city, i.e., the creation of a district over which the Congress would have exclusive control. (Article I, Section 8, clause 17 of the Constitution.)”¹²¹ That pamphlet also recognized that statehood “presents a troublesome problem with the 23rd Amendment if the federal district were to be wiped out by legislation.”¹²² Indeed, Delegate Fauntroy has opposed statehood for the District in the past, correctly pointing out that “this would be in direct defiance of the prescriptions of the Founding Fathers.”¹²³

As the House Committee Report on the joint resolution that ultimately became the Twenty-third Amendment stated:

Apart from the serious constitutional question which would be involved . . . any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision

¹²⁰ *Id.* at 8-9 (testimony of Sen. Kennedy). See Appendix C. As Senator Mathias of Maryland stated, “[i]t is not a State; it will not be a State; it should not be a State.” *Id.* at 41 (testimony of Sen. Mathias).

¹²¹ *A Simple Case of Democracy Denied: A Statement of Why it is Undemocratic and Contrary to the Intent of the Constitution for the Residents of the District of Columbia to Remain Disenfranchised*, reprinted in 1978 Senate Hearings, *supra* note 67, at 113 [hereinafter *Democracy Denied*]. See Appendix A.

¹²² *Id.* at 114.

¹²³ W. Fauntroy, *Viewpoints: Voting Rights for D.C.*, Board of Trade News, Jan., 1978, reprinted in 1978 Senate Hearings, *supra* note 67, at 189. See Appendix B. See also 1977 House Hearings, *supra* note 69, at 122 (statement of Professor Stephen A. Saltzburg) (“Keeping the Capital a federal enclave preserves something important to our government. The number of federal installations in the District, the location of the Congress and the White House, and the very idea of a ‘center’ for the nation suggest that it would be wrong to entrust complete power over the District to any State, whether it be Maryland by retrocession or a new State called ‘Columbia’ or something like it by amendment. No State should have responsibility for and control over the critical parts of the Federal power structure.”).

for carving out the "seat of government" from the States and set it aside as a permanent Federal district.¹²⁴

Even apart from the numerous constitutional problems with District statehood, there remain virtually insurmountable practical problems. The operations of the federal government sprawl over the District of Columbia. Relatively few of those installations are located along the Capitol Mall, the area casually proposed as a reduced federal enclave. As Assistant Attorney General Harmon pointed out in 1978, in actuality, "[a]ny concentrated 'Federal enclave' would be very difficult to circumscribe and would have to be geographically fragmented. This would give rise to complex arrangements for sewers, police and fire protection, and other services."¹²⁵ Reserving these areas to the federal government would, thus, create monumental practical problems with respect to basic services and, "it is questionable whether such a geographical entity could fairly be characterized as a single District at all."¹²⁶

At the same time, the new "state" would be honeycombed with federal installations, its territory fragmented by competing jurisdictions. As Assistant Attorney General Wald asked while testifying on the proposed 1978 District amendment, "[w]ould the remaining non-Federal area constitute in any real sense a geographically homogeneous entity that justifies statehood?"¹²⁷ While not directly responding, she noted that, "legitimate questions might be raised as to the political wisdom and sincerity of a Congressional enactment which attempted in effect to Balkanize the District so as to create a new State by building it around Federal land and installations."¹²⁸

It was for these very reasons that former Mayor Washington expressed doubts about statehood for the District. In 1975 he commented that the city of Washington is "so physically, and economically and

¹²⁴ See *House Report 1698*, *supra* note 79, at 2.

¹²⁵ *1978 Senate Hearings*, *supra* note 67, at 17 (testimony of Assistant Attorney General John M. Harmon), Appendix D. See also *1977 House Hearings*, *supra* note 69, at 126 (testimony of Assistant Attorney General Patricia M. Wald), Appendix E.

¹²⁶ *1978 Senate Hearings*, *supra* note 67, at 17-18 (testimony of Assistant Attorney General John M. Harmon).

¹²⁷ *1977 House Hearings*, *supra* note 69, at 126 (testimony of Assistant Attorney General Patricia M. Wald).

¹²⁸ *Id.*

socially bound together that I would have problems with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city.”¹²⁹

Thus, we believe that, before the District of Columbia may be admitted to the Union as a state, an amendment to the Constitution would be necessary. Even that step, however, would be undesirable, unwise, and insufficient to create a workable arrangement for District statehood. The defects in District statehood plans recognized and articulated in 1978 have not changed. The fact that the states have rejected the District voting amendment offers no sound reason to now grant statehood to the Nation’s capital. The measure is no more desirable, nor less constitutionally suspect, today than it was a decade ago.

A. Common Arguments in Favor of Statehood

The common arguments in favor of statehood for the District of Columbia can be grouped into three basic categories: (1) District disenfranchisement is inconsistent with majoritarian democracy; (2) the size of the District’s population and their contributions to the Nation justify national representation; and (3) all other nations grant the residents of their capital cities the right to vote. None of these arguments offer a compelling reason to grant statehood to the District of Columbia.

1. *Disenfranchisement*

The most obvious argument in favor of statehood for the District of Columbia is that the present system is “a simple case of democracy denied.” The residents of the District of Columbia are citizens of the United States, they “are taxed and carry the same burdens of citizenship as all other Americans, yet they have no representation whatsoever in the Senate, and one ‘non-voting’ delegate in the House of Representatives.”¹³⁰ This circumstance, it is argued, is inconsistent with majoritarian democracy. The United States, however, is not a pure majoritarian

¹²⁹*Representation of the District of Columbia in Congress: Hearings on H.J. Res. 280 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 29 (1975) (testimony of Mayor Walter E. Washington) [hereinafter *1975 House Hearings*]. See Appendix G.

¹³⁰See *Democracy Denied*, *supra* note 121, at 97.

democracy; it is a federal democratic republic. The Founders consciously rejected majoritarian democracy. Pure democracy, as Madison wrote:

can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.¹³¹

To avoid these results, a federal system was adopted. Power was dispersed among competing sovereignties and the functions of government were divided under our Constitution. While ultimately drawn from the people, power was placed in the hands of various representative bodies and individuals with the expectation that each would restrain the others. In short, the federal system was a compromise between the principles of pure democracy and the absolute need to secure individual liberties and minority rights. The District of Columbia is an integral part of this compromise, designed to safeguard the independence of the rival sovereignties.

Concomitantly, there are many different levels of rights in our society. Residents of U.S. possessions abroad enjoy the protections of their civil rights under the Constitution -- the residents of Puerto Rico and Guam are, in fact, U.S. citizens -- but they have no vote in federal elections. Aliens, again, have basic civil rights, but not all -- for instance, they may not vote. Indeed, the residents of every state, other than the original thirteen, were unable to vote in national elections until their territory was admitted to the Union as a state. The Founders of our republic saw fit to require United States citizenship *and* state citizenship, full responsibility in both of the competing sovereignties, before the complete panoply of rights available under our Constitution may be enjoyed.

¹³¹The Federalist No. 10, 61 (J. Madison) (J. Cooke ed. 1961).

The residents of the District enjoy all of the rights of other citizens, save the right to vote for an individual delegation in Congress. In exchange for the benefits of living in the "metropolis of a great and noble republic" they have given up this right.¹³² Instead, they are represented by the entire Congress, "their rights [are] under the immediate protection of the representatives of the whole Union."¹³³

The disenfranchisement of District residents was not, as some would have it, an oversight.¹³⁴ The Founders knew what they were about, and, in fact, not all agreed that the residents of the seat of government should be disenfranchised. At the New York ratifying convention Thomas Tredwell complained that, "[t]he plan of the *federal city*, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world."¹³⁵ Direct congressional representation for District residents was actually proposed at that convention by no less than Alexander Hamilton. He suggested that the District Clause be amended to provide:

That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes Amount to ____ such District shall cease to be parcel of the State granting the Same, and

¹³² Such trade-offs are well accepted under our system of government. For instance, as the price of federal employment, federal civil servants must surrender many of their basic political rights under the Hatch Act. Act of Aug. 2, 1939, 53 Stat. 1147. With a few exceptions, for example, employees of the executive branch may not take an active role in partisan political campaigns. See 5 U.S.C. § 7324(a) (1982).

¹³³ 3 J. Story, *Commentaries on the Constitution* §§ 1212-22 (1833), reprinted in 3 *The Founder's Constitution* 236 (P. Kurland & R. Lerner eds. 1987) [hereinafter Story].

¹³⁴ See *Statehood for the District of Columbia: Hearings on H.R. 3861 Before the Subcommittee on Fiscal Affairs & Health of the House Committee on the District of Columbia*, 98th Cong., 2d Sess. 28 (1984) (statement of Del. Fauntroy) [hereinafter *1984 House Hearings*].

¹³⁵ 2 *Elliot's Debates in the Several State Conventions on the Adoption of the Constitution* 402, reprinted in 3 *The Founder's Constitution* 225 (P. Kurland & R. Lerner eds. 1987) [hereinafter *Elliot's Debates*].

Provision shall be made by Congress for their having a District Representation in that Body.¹³⁶

Hamilton's motion, however, was rejected.¹³⁷

Madison responded to criticism such as Tredwell's in Federalist No. 43. He wrote that:

The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; *as they will have had their voice in the election of the Government which is to exercise authority over them*; as a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated. (Emphasis added.)¹³⁸

The meaning of Federalist No. 43 has long been debated. Proponents of direct participation in congressional elections for the District of Columbia point to the language "as they will have had their voice in the election of the Government which is to exercise authority over them" in support of their case.¹³⁹ Madison, they say, could not have meant that only the first generation of District residents will have had a vote with respect to their destiny. However, this is the plain meaning of the language Madison uses. Madison speaks in the past tense, "they will have *had* their voice." If he meant that District residents would have a continuing voice in the national government, the proper language would

¹³⁶ 5 *The Papers of Alexander Hamilton* 189-90 (H. Syrett ed. 1962) [hereinafter *Hamilton Papers*].

¹³⁷ *Id.*

¹³⁸ The Federalist No. 43, 289 (J. Madison) (J. Cooke ed. 1961) [hereinafter Federalist No. 43].

¹³⁹ See *Democracy Denied*, *supra* note 121, at 104-05; *1977 House Hearings*, *supra* note 69, at 105 (statement of Sen. Kennedy).

have been "they will have their voice."¹⁴⁰ The principle that the acts of one generation may bind another was well known to the Drafters. It was consistent with the Seventeenth and Eighteenth Century social contract theories with which they were imbued. Madison clearly expressed his thoughts on the subject in a letter to Jefferson, rebutting Jefferson's "the Earth belongs to the living" precept. He wrote that:

If the earth be the gift of nature to the living their title can extend to the earth in its natural State only. The *improvements* made by the dead form a charge against the living who take the benefit of them. This charge can no otherwise be satisfied than by executing the will of the dead accompanying the improvements.¹⁴¹

District residents, as Madison wrote, had their voice in the creation of the government that was to rule them at the time of the ratification of the Constitution, and the cession of the territory, through their elected representatives.¹⁴² The acts of these representatives are binding upon District residents so long as they wish to enjoy the "improvements" bequeathed them by that generation -- the national capital.

It is also argued, based on Federalist No. 43, that the Founders assumed that the ceding states would provide for the rights of the citizens to be transferred from their jurisdiction to that of the national government, but that the states failed in this obligation. Congress would, according to this theory, be justified in now correcting this supposed dereliction. In fact, both Virginia and Maryland took care in their respective acts of cession to secure those rights they perceived to be endangered by the cession. The Virginia act of cession provides that "nothing herein contained, shall be construed to vest in the United

¹⁴⁰ Best, *supra* note 44, at 19-20.

¹⁴¹ 13 *Madison Papers*, *supra* note 8, at 19.

¹⁴² As early as 1813 the Virginia Supreme Court adopted a representational rationale, in *Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813). There, the Court declined to extend voting privileges in Virginia to an individual who resided in then Alexandria County. It recited the various acts by which the area was ceded to the federal government by Virginia and concluded that, "[t]o all these acts the appellant, by his representatives, was a party. He has therefore, no reason to complain that he has been cut off from the dominion of *Virginia*, in consideration of, perhaps, adequate advantages. That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that Congress are vested, by the constitution, with exclusive power of legislation over the territory in question." *Id.* at 591.

2. *Population and Contribution to the Nation*

It is often asserted that the District of Columbia has a population larger than that of several states, and that because residents of the District pay their taxes, obey the laws, and go to war at the behest of the federal government, they have the right to a direct participation in congressional elections. However, population alone is not, and has never been, the only criteria for statehood. There has always, effectively, been a minimum population required before statehood may be considered (a territory must have sufficient resources both to support a state government and bear its fair share of the federal burden), but population alone has never been sufficient. If population were the criteria, then there are fifteen other cities with a better claim to statehood than Washington.¹⁵² New York, Los Angeles and Chicago with their millions certainly have a more compelling case than the District of Columbia. While these urban giants are currently represented in the House, they must share their Senators with out-state areas whose interests, needs and sympathies are often vastly different, and even diametrically opposed, to their own. Conversely, there are many regions of the nation which, to some extent justifiably, feel that they are not fully represented in the Congress because they must share their delegations with much more powerful metropolitan areas. Witness upstate New York and downstate Illinois.

The District's cry of "no taxation without representation" is also unpersuasive. The District is hardly in the position of the American Colonies two-hundred years ago. Its residents pay only those taxes paid by all other citizens of the United States. They are not the victims of a far off imperial power, imposing taxes selectively as a means of economic exploitation.¹⁵³ In return, the District receives five and one-half times the national average in per capita federal aid.¹⁵⁴ Annually, the District of

within the same general environment. Because most of them anticipate stays of substantial duration in the Washington, D.C., area, it is not surprising that the vast majority of senators and congressmen should be genuinely concerned about the welfare of the District." *Id.* at 521-522.

¹⁵² Washington is, in fact, only the sixteenth largest city in the United States -- smaller, for instance, than Indianapolis, San Jose and Baltimore. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986* 18 (106th ed. 1985) [hereinafter *Statistical Abstract*].

¹⁵³ Hatch, *supra* note 45, at 524.

¹⁵⁴ See *infra* p. 61.

Columbia government receives a special congressional grant of over one-half billion dollars, which no state receives. In addition, it participates with the states on an equal basis in the grant-in-aid and entitlement programs adopted by the federal government. This is in addition to the numerous parks, monuments, museums and other civic facilities provided by the federal government and enjoyed by District residents. Far from being oppressed colonials, the residents of the District of Columbia receive a heavy return from the federal coffers in exchange for the taxes they pay. And, there have always been exceptions to the basic principle of "no taxation without representation" tolerated in the United States. For example, most states and many major cities tax commuters who work within their borders but live elsewhere. These individuals, however, are given no voice in the manner in which their taxes are spent, or in how the state or city they support is to be run.

Finally, the fact that District residents fight in the Nation's wars and contribute to the national community in other ways does not entitle them to an individual delegation in Congress. Political representation in our system is not, should not be, and has never been, tied to the extent of an individual's civic contribution. The number of votes a citizen may cast, for instance, is not linked to the amount of taxes he pays. The residents of the District are entitled to all of the basic civil rights to which every citizen of the United States is entitled. They are not entitled to vote in congressional elections because this right is reserved to the citizens of the states. District residents are not deprived of the right to participate in congressional elections because of who they are, but because of where they have chosen to live. They have exchanged their vote for the privilege of living in the Nation's capital. To reclaim it, they need only move across the District line.

3. *The Practice of Foreign States*

A favored argument of many statehood supporters is that the United States is the only nation on earth which denies residents of its capital city representation in the national legislature.¹⁵⁵ "Thus, the

¹⁵⁵Indeed, in 1978 proponents of the 1978 Amendment invited John Knight, a member of Australia's national legislature from that nation's federal enclave, to testify before the Senate Judiciary Committee and help make their case. *See 1978 Senate Hearings, supra* note 67, at 76-88, 127-129 (testimony and statement of Sen. John Knight of the Australian Capital Territory).

citizens of London have voting representation in the British Parliament, and the citizens of Paris have voting representation in the National Assembly of France.”¹⁵⁶

This argument is baseless. Ours is a unique form of government. Our Constitution provides for “a compound republic partaking both of the national and federal character,”¹⁵⁷ the result of a unique history and development. It cannot fairly be compared with other governments which do not benefit from the same history or constitutional structure. Our system has not cost us the respect of others in the world community once its intricate structure and purpose are understood.

4. *Miscellaneous Arguments*

There are many other arguments that have occasionally been advanced in the ongoing controversy over whether the residents of the District of Columbia should be granted statehood and/or some other form of direct voting representation in Congress. Three of these arguments merit brief discussion. First, it has been stated that opposition to District statehood/representation is merely veiled racism,¹⁵⁸ since a majority of the residents of the District are black. This

¹⁵⁶Letter of Delegate Walter E. Fauntroy of the District of Columbia to Members of the Congress (May 22, 1985), reprinted in *District of Columbia -- Statehood: Hearings Before the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia*, 99th Cong., 1st Sess. 39-42 (1985) [hereinafter *1985 House Hearings*]. In pointing out that the city of London is represented in Parliament, Delegate Fauntroy stumbled upon the very concern expressed by Congressman White so long ago. See *supra* p. 6. Further, neither Britain nor France may be fairly compared with the United States, even though they are two of the world's leading democracies. Britain, while encompassing four ancient states (England, Scotland, Wales and Ulster), is not a federal union, but a kingdom united under the British Crown, subject to the unitary sovereignty of the British Parliament. France has been one of the most unitary states in Europe since at least the ministry of Cardinal Richelieu, during reign of Louis XIII, 1610-1643. The independence of its great medieval provinces had all but disappeared a century before with the triumph of the French Crown over the Dukes of Burgundy.

¹⁵⁷The Federalist No. 62, 416 (J. Madison) (J. Cooke ed. 1961).

¹⁵⁸Senator Kennedy, for example, alleged in 1970 that opposition to congressional representation for the District was based upon the conviction that it is “too liberal, too urban, too black and too Democratic.” *Voting Representation for the District of Columbia: Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 8 (1970) (statement of Sen. Kennedy). Three years later, however, Senator Kennedy recognized that opposition to

myth is based more on political posturing than on fact; it is readily exploded by a review of the historical record. Agitation for District representation began in 1801, with Judge Woodward's essays, and has continued in one form or another ever since. Throughout most of this period the majority of the District's residents were white. Indeed, since the only persons generally eligible to vote in 1800 were white male property owners, only they were disenfranchised. Statehood for the District of Columbia is not a racial issue. It is not a civil rights issue. It is a constitutional issue that goes to the very foundation of our federal union. A change in the status of the District of Columbia would signal a substantial change in our form of federalism. The issue should be dealt with on that level, and not on the level of racial politics.

Second, there is some speculation that the majority of Americans are unaware that the residents of the District of Columbia may not vote for direct representation in the Congress, that the American people "are generally in a state of disbelief about this issue."¹⁵⁹ However, no evidence stronger than supposition has been offered to support this assertion.¹⁶⁰ In any case, the cure for ignorance is education, not a radical change in the Nation's constitutional structure. Once the constitutional necessity of a federal district, free of the influence of the states and controlled by the federal government, is explained, there is no reason to believe that the popular sentiment today would be different from that of 1787, as expressed in the Constitution. If popular sentiment has changed, the people can amend the Constitution granting statehood to the District of Columbia if they wish.

Finally, it is often maintained that direct voting representation in the Congress for the District of Columbia is merely the final step in that progression, over the past two centuries, which has systematically extended the franchise in the United States. The Fifteenth Amendment,

direct District congressional representation began long before a majority of the District's residents were black. In complaining of the "paternalistic attitude" that allows members of Congress elected from the states to make "vital decisions affecting" District residents he noted that, "[i]ndeed, 85 years ago when the city's population was overwhelmingly white, that arrogant attitude was as prevalent as it is today, when black people make up a majority of the city's population." See *1973 Senate Hearings*, *supra* note 28, at 4-5 (statement of Sen. Kennedy).

¹⁵⁹ *1978 Senate Hearings*, *supra* note 67, at 12 (statement of Sen. Kennedy).

¹⁶⁰ In response to questioning, Senator Kennedy admitted that "I have no statistics . . . nor do I know of any polls that would reflect on [the attitude of the general public]." *Id.*

(“[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude”), and the Nineteenth Amendment, (“[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex”), can be cited as examples.¹⁶¹ Under this theory, granting statehood and/or full congressional representation to the District is merely “unfinished business,” in the words of Delegate Fauntroy. In each of the cases referred to, however, the individuals involved were denied the vote because of who they were, because they were black, because they were women. These groups were each granted the vote because there was no sound, reasoned basis for their disenfranchisement.

The case of the residents of the District of Columbia is very different. They are not excluded from participation in congressional elections because of the color of their skin, or their sex, but because they have chosen to live outside of the boundaries of any state. Any adult resident of the District may participate in congressional elections by the simple expedient of moving across the District line. District residents, whether they are black or white, male or female, influential Washington attorneys or street vendors, are treated identically. They lack a direct voice in the selection of members of Congress for sound reasons, which are the result of the scheme of government chosen by the people for this Nation. Their situation cannot, in short, fairly be compared with that of those groups who have been deprived of the vote in the past because of who they were, factors beyond their control.

The Twenty-third amendment, granting the District the right to participate in the Electoral College, does not militate in favor of a different result. The President has a national constituency. The residents of the District of Columbia, as citizens of the United States, are part of that constituency. Granting them a voice in the selection of the President is, therefore, entirely appropriate.¹⁶² The Congress, however, is a body which represents both the states and the citizens of the states. Accordingly, only the citizens of the states are entitled to select the members of that body.

¹⁶¹ 1978 Senate Hearings, *supra* note 67, at 71-72 (testimony of Del. Fauntroy).

¹⁶² Such a scheme would, of course, have been unconstitutional in the absence of an amendment since Article II, section 1 directs that the states appoint the electors to the Electoral College. See U.S. Const. art. II, § 1, cl. 2.

B. Arguments Against Statehood

1. *Historical Reasons for Disenfranchising the District of Columbia*

It has become fashionable, unfortunately, to state that the disenfranchisement of District residents was a mere oversight by the Founders,¹⁶³ the result of indifference,¹⁶⁴ or a lack of foresight,¹⁶⁵ and to assume that the reasons which prompted them to establish a federal district as the seat of government have disappeared.¹⁶⁶ The Drafters of our Constitution, it is said, cannot have meant that the people who would inhabit the district comprising the seat of government would be reduced to a state of second class citizenship, deprived of the very rights of self-determination so recently won from Great Britain. The disenfranchisement of District residents, however, was neither a mistake nor an oversight, but an integral part of the original Constitutional plan.¹⁶⁷ As noted above, the subject of District voting rights was considered at the time. As an example, both Alexander Hamilton and Thomas Tredwell raised the question at the New York ratifying convention.¹⁶⁸ Their arguments, however, were rejected.

¹⁶³P. Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 172 (1975).

¹⁶⁴See Hatch, *supra* note 45, at 488. The fact that, in 1801, there were only 14,000 District residents is advanced as a reason why they were not granted direct voting representation in the Congress. As Senator Bayh remarked in 1977, "such a small population could be easily overlooked." 1977 *House Hearings*, *supra* note 69, at 14 (statement of Sen. Bayh). As noted above, Hamilton proposed that District residents be given representation in the House of Representatives when its population reached a sufficient level, but the proposition was rejected. See *supra* p. 42-43.

¹⁶⁵See 1984 *House Hearings*, *supra* note 134, at 28 (statement of Del. Fauntroy). In fact, it was widely anticipated that a great commercial center would develop at the site of the federal city. See Green, *supra* note 9, at 7. L'Enfant's original plan was for a city of 800,000 souls, the size of Paris at that time. See *Kennedy Memorandum*, *supra* note 74, at 347.

¹⁶⁶See Best, *supra* note 44, at 25.

¹⁶⁷Senator Bayh, a stalwart supporter of District voting rights, apparently reached a like conclusion. In his opening statement at the 1978 Senate hearings he noted that "[f]or many of the Founding Fathers, national representation for the District would necessarily have precluded the establishment of exclusive Federal control over the capital site." 1978 *Senate Hearings*, *supra* note 67, at 2 (statement of Sen. Bayh).

¹⁶⁸See *supra* pp. 42-43.

A separate and independent enclave to accommodate the fledgling federal government was proposed and adopted to secure the independence of the federal government, providing a place of refuge (where it and not the states would control basic services and security), and avoiding the specter of a competing sovereignty in the national capital as well as the undue influence of the city and state chosen as the site. In explaining the genesis of the District reference is inevitably made to the Philadelphia Mutiny which took place in June of 1783. Accordingly, the events of that summer merit close examination.

On Thursday, June 19, 1783, Congress received information from Pennsylvania's executive (at the time an executive Council of State) that some 80 Continental soldiers, despite the "expostulations of their officers," had left their barracks at Lancaster and were approaching the city. The troops, unpaid, declared that they would "proceed to the seat of Congress and demand justice."¹⁶⁹ Alexander Hamilton, Oliver Ellsworth, and Richard Peters were charged with conferring with the Pennsylvania Council and "taking such measures as they should find necessary."¹⁷⁰ They were politely informed that the Pennsylvania militia would probably not be disposed to take action against the mutineers unless and until "their resentments should be provoked by some actual outrage."¹⁷¹

The disgruntled soldiers arrived the next day professing "to have no other object than to obtain a settlement of Accounts."¹⁷² On Saturday, the soldiers drew up before Independence Hall, where Congress was in session. A request for aid was again made to the Pennsylvania Council of State, which was at the time sitting upstairs. The Congress was once more informed that without some actual outrage to persons or property the militia could not be relied upon. The members then agreed to remain until the "usual hour of adjournment," but without conducting further business. As the nervous congressmen paced about inside, the Continentals remained in position "occasionally uttering offensive words and wantonly point[ing] their Muskets to the Windows of the Hall of Congress."¹⁷³ At three, the usual hour, Congress adjourned. The

¹⁶⁹25 Journals of the Continental Congress 971 (G. Hunt ed. GPO 1922).

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³*Id.* at 973.

members were allowed to pass through the soldiers' line, although, "in some instances," mock obstructions were offered. For the next two days Congress negotiated with the Pennsylvania Council while reports circulated that the mutineers were planning to kidnap the members, or to raid the bank. On Tuesday, at about 2 o'clock, Congress was finally adjourned and summoned to meet at Princeton.¹⁷⁴ The members quietly scuttled out of town.

Unquestionably, this incident made a deep impression on the members, several of whom attended the Convention in 1787. The Philadelphia revolt of 1783 impressed upon the Congress the need for control of its immediate surroundings, for its own protection. Within weeks James Madison was appointed to chair a committee to investigate a permanent seat for the national government, where it would not have to rely upon the goodwill of its host state. The committee reported in September and recommended that the Congress be granted exclusive jurisdiction over an area no less than three, nor more than six, miles square for the purpose of a permanent seat of government.¹⁷⁵

In Madison's view, a federal enclave where Congress could exercise complete authority, insulating itself from insult and securing its deliberations from interruption, was an "indispensible necessity."¹⁷⁶ It is argued, however, that today the federal government "[is] well beyond the point of requiring a special sanctuary to protect its authority and to secure its general proceedings."¹⁷⁷ As a result, some assert that "the federal district is not indispensable, it is a mere tradition."¹⁷⁸ This argument states too much. It assumes that the District was created merely as a response to the Philadelphia Mutiny, and that since the government is no longer in danger of being seized by a handful of disgruntled soldiers, the District is no longer necessary.¹⁷⁹ The purpose of the District, however, was more subtle than merely to protect the persons of the Members of Congress

¹⁷⁴*Id.* at 973-74.

¹⁷⁵See Caemmerer, *supra* note 3, at 5.

¹⁷⁶Federalist No. 43, *supra* note 138, at 288.

¹⁷⁷Best, *supra* note 44, at 64.

¹⁷⁸*Id.*

¹⁷⁹"The Founders' judgment that a special district, a sanctuary, was necessary to protect a fledgling government finds support in the early history of the regime. The struggles of the new regime to secure its position, to gain the respect of nations abroad and its people at home, are well documented in any basic American history text. But the

from physical violence. Pennsylvania's failure to act against the mutineers in 1783 was but one manifestation of the problem of competing sovereignties inherent in our federal system. The location of the national government in a federal town, outside of the jurisdiction of any state, was meant to remove it from dependence upon the states, and from the unequal influence of any one of the states. As Madison wrote, "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."¹⁸⁰ As a leading scholar observed, in the Founders' view, "to place a permanent capital within the jurisdiction of one state was to imperil the influence of every other. The surest way of avoiding that risk was to vest in Congress rights of 'exclusive legislation' over the capital and a small area about it."¹⁸¹

Thus, a federal enclave was created to ensure the independence of the new government, to avoid, in George Mason's words, "a provincial tincture to ye Natl. deliberations."¹⁸² The basic concern 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, is as valid today as it was two hundred years ago at the Convention. Ours is a union of states of almost infinite diversity. Our common heritage, self interest, and the Constitution bind us together, but the states are as proud, diverse, and often quarrelsome, as they were at the Founding. The federal government, in some sense, is the supreme arbiter. It cannot be dependent upon any one of the states to ensure its smooth operation. Further, no one state is entitled to a greater voice in the national councils than any other. Each is represented in the Congress, regardless of its population, economic power and importance by only two Senators. None has a just claim to be the seat of the national government over another.

Were the District elevated to statehood, it would be granted that to which each of the other states have an equal claim. The location of the national capital was a source of great controversy during the Republic's

regime is now mature, and the independence of the national government does not rest on its refuge in the District of Columbia." See Best, *supra* note 44, at 17.

¹⁸⁰Federalist No. 43, *supra* note 138, at 289.

¹⁸¹Green, *supra* note 9, at 9.

¹⁸²*Notes on the Federal Convention*, *supra* note 14, at 378.

early years. Farsighted men understood the vast benefits to be gained by a region from the location of the national capital there, and that the location of the capital in a particular state would cause jealousy and division.¹⁸³ Madison recognized the new capital's potential in 1789 when, as a member of the 1st Congress, he said, "[t]he seat of government is of great importance; if you consider the diffusion of wealth, that proceeds from this source. I presume that the expenditures which will take place, where the Government will be established, by those who are immediately concerned in its administration, and by others who may resort to it, will not be less than a half a million dollars a year."¹⁸⁴ (Today, these expenditures are rather more.) He also recognized the potential divisiveness of this issue. At the Virginia ratifying convention he noted, "I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states."¹⁸⁵

If the capital is now to be in a state, each state has as good a claim to the location, and consequent benefits, of the federal government as does the State of Columbia. (Certainly the convenience of the District's location, as more or less in the center of the Nation, has long since disappeared.) The federal district was created to solve this very dilemma. If the District of Columbia is now to be a state, with all of the attendant benefits, then there is no just reason why it should remain the seat of the Nation's government. Indeed, the priceless national treasure to be accumulated in the capital city was foreseen by the Founders, and was considered to be too important a charge to be left in the hands of any one

¹⁸³ Even the location of the temporary seat of the federal government was fought over; it was suspected and feared that Congress would, when actually faced with the prospect of moving to the new federal city, decide to remain where it was then meeting. In August, 1788, Alexander Hamilton wrote to Governor William Livingston of New Jersey, encouraging New Jersey to vote for New York as the meeting place of the 1st Congress (instead of Philadelphia) as, "[t]he Northern States do not wish to increase Pennsylvania by an accession of all the wealth and population of the Foederal City." 5 *Hamilton Papers*, *supra* note 136, at 209.

¹⁸⁴ 1 *Annals of Cong.* 862 (1789). The Founders understood, as Mr. Justice Story wrote a few years later, that locating the capital within the borders of one of the states, "might subject the favoured state to the most unrelenting jealousy of the other states, and introduce earnest controversies from time to time respecting the removal of the seat of government." Story, *supra* note 133, at 1213 *reprinted in* 3 *The Founders' Constitution* 236 (P. Kurland & R. Lerner eds. 1987).

¹⁸⁵ 3 *Elliot's Debates*, *supra* note 135, *reprinted in* 3 *The Founder's Constitution* 222-23 (P. Kurland & R. Lerner eds. 1987).

state. As Madison wrote, "the gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State."¹⁸⁶

Further, the growth of federal power has not extinguished the immediate concern revealed to Congress by the Philadelphia Mutiny. Unquestionably, "[t]he Army of the United States . . . is not only powerful enough to secure the independent operations of the national government, it now secures the operations of the state governments as well."¹⁸⁷ This was also true in 1783. With the withdrawal of British troops at the end of the War for Independence, the victorious Continental Army was left as the most powerful armed force in the former Colonies. It was as capable of securing the operations of the national government as are the Armed Forces of today. The problem in 1783 was that the mutineers were closer to the seat of Congress than were General Washington's loyal troops. In fact, word was dispatched to the Commander-in-Chief, who was directed "to march a detachment of troops towards the city."¹⁸⁸

The District was not an expedient adopted until such time as the federal government would be militarily powerful enough to defend itself. Congress was granted exclusive legislative authority over the district that would be the seat of government so that it would ultimately control the basic services needed by the national government. The passing years have, if anything, increased the need for ultimate congressional control of the federal city. Today, the federal government depends upon a much more complex array of services, utilities, transportation facilities, and communication networks, than it did at the Founding. The District is an integral part of the operations of the Nation's government. As a practical matter it would be impossible to separate all of the support services necessary for the smooth operation of the federal government. If the District were to become a state, all of the basic services needed by the federal government would be affected. The financial problems, labor troubles, and other concerns of the District would still effect the government's operations, but it would be deprived of a direct, controlling voice in the resolution of such problems. In a very real sense, the federal government would be largely dependent upon the State of Columbia for

¹⁸⁶Federalist No. 43, *supra* note 138, at 289.

¹⁸⁷Best, *supra* note 44, at 64.

¹⁸⁸24 Journals of the Continental Congress 419 (G. Hunt ed. GPO 1922).

its day to day existence. In the event of any civil disturbance, and the history of the last two decades certainly shows that civil disorder is still a possibility today, federal authority over local police agencies must be paramount to ensure that the operations of the federal government are not interrupted.¹⁸⁹ In short, if the District were granted statehood, or indeed retroceded to Maryland, the Congress would lose control over the immediate services necessary to the government's smooth day to day operation. The national government would again be dependent upon the goodwill of another sovereign body.

2. *The Terms of the Maryland Cession*

There is also a substantial question whether, before the District could be admitted to the Union as a state, the permission of Maryland would have to be secured. The cession of the territory now comprising the District of Columbia was for the specific purpose of the establishment of a seat for the national government, not for the creation of a new state. The initial act gave the Maryland delegation in the House of Representatives authority "to cede to the congress of the United States, any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States."¹⁹⁰ If the district were to be granted statehood, the specific terms of Maryland's cession would be violated, and the cession's continuing validity put in question. Further, unless Maryland's permission were secured, admitting the District into the Union would appear to conflict with Article IV, section 3 of the Constitution, which provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."¹⁹¹ Thus, unless Maryland

¹⁸⁹ As an example, in the much more common occurrence of demonstrations before foreign embassies (virtually all located outside of the proposed "national capital service area"), Columbia state police would be primarily responsible for embassy security and crowd control. The federal government, however, is responsible to the foreign states involved. Here, because it is the federal capital, the state of Columbia would, to some extent, be in a position to pursue its own foreign policy.

¹⁹⁰ An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, 2 Kilty Laws of Md. Ch. 46 (1788).

¹⁹¹ U.S. Const. art. IV, § 3, cl. 1. In 1977, Assistant Attorney General Wald also questioned whether the District could be admitted as a state without the consent of Maryland. She noted that, "[i]t is at least questionable -- I don't suggest that we know

consented to erecting the District into a state, this provision would also have to be amended.

3. *The District of Columbia Lacks the Fundamental Requisites of a State of the American Union*

The Constitution should not be amended to grant statehood to the District of Columbia because it effectively lacks the minimum requirements to become a state. The Constitution does not itself articulate the prerequisites for statehood, but merely provides that “[n]ew States may be admitted by the Congress into this Union.”¹⁹² There are, however, certain effective minimum requirements defining a “state” eligible for admission to the Union, which are not found in the Constitution. Over time, three in particular have been articulated. In its report on Alaskan statehood, the House Committee on Interior and Insular Affairs identified them as: (1) the residents of the new state must be “imbued with and sympathetic toward the principles of democracy as exemplified in the American form of government;” (2) the majority of the electorate must desire statehood; and (3) the new state must have “sufficient population and resources to support a State government and to provide its share of the cost of the Federal Government.”¹⁹³

While there is little question that District residents meet the first criteria, and assuming that a majority of them desire statehood (a question to be decided by the electorate), the District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government. The District contains barely 63 square miles of land area. Rhode Island, the smallest state, encompasses some 1,212 square miles, 19 times as large. In land area, the District of Columbia is the tiniest federal possession by a wide margin. Only the minute island of Guam, with 77 square miles, comes close. Puerto Rico has 3,515 square miles, the Virgin Islands have 132, the

the definitive answer -- whether a new State could be created from that land [the Maryland Cession] even after the ensuing passage of all of this time without the consent of the Maryland State government.” *1977 House Hearings, supra* note 69, at 127.

¹⁹² *Id.*

¹⁹³ See *Providing for the Admission of the State of Alaska into the Union*, H.R. Rep. 624, 85th Cong., 1st Sess. 11 (1957). In 1957, for instance, the House Committee on Interior and Insular Affairs found the Territory of Alaska “ready and qualified” for statehood by “each of these historic standards.” See also Sheridan, *supra* note 116, at 386; Best, *supra* note 44, at 71-72.

Pacific Trust Territories have 533, and the Northern Marianas are 184 square miles.¹⁹⁴ Further, the population of the District, a principal tax base, is declining. It peaked in the years following the end of the Second World War; 802,000 persons lived in the District in 1950. By 1960 that number had declined to 764,000. In 1970 it was 757,000, and in 1980 the District's population had dwindled to 638,000.¹⁹⁵ The Census Bureau estimates that, in 1986, only 626,000 people called the District their home.¹⁹⁶ Thus, a significant part of the tax base from which the District must support a state government, *and* contribute to the national government, is rapidly eroding. Today, according to Census Bureau estimates, Delaware has moved ahead of the District, and its population is greater than only three states, Vermont (541,000), Alaska (534,000), and Wyoming (507,000).¹⁹⁷ In the 1970s, while the District lost some 118,000 residents (15.6 percent of its 1970 population), each of these states reported significant gains.¹⁹⁸ Between 1980 and 1986, while the District's population continued to fall, Alaska's population rose by 32.8 percent, Wyoming's rose by 8.0 percent, and Vermont's population grew by 5.8 percent.¹⁹⁹ If current trends continue, the District of Columbia may have a population smaller than any of the states as early as the next

¹⁹⁴ *Statistical Abstract*, *supra* note 152, at 194. There are, in fact, many national parks and recreation areas which cover more territory than the District of Columbia. Examples in the Washington, D.C. region include the Blue Ridge Parkway (128 square miles), and the Shenandoah National Park (304 square miles). This is to say nothing of giants such as Yellowstone (3,469 square miles), Yosemite (1,189 square miles), and the Grand Canyon (1,903 square miles). *Id.* at 224.

¹⁹⁵ *Id.* at 10-11.

¹⁹⁶ See *The Big Shift*, National Journal, Feb. 7, 1987, at 321 [hereinafter *The Big Shift*].

¹⁹⁷ *Id.*

¹⁹⁸ *Almanac of the 50 States* 422 (A. Gardiner ed. 1986) [hereinafter *Almanac*]. During this period the population of these three states increased as follows:

| <i>State</i> | <i>1970</i> | <i>1980</i> |
|--------------|-------------|-------------|
| Vermont | 444,732 | 511,456 |
| Wyoming | 322,416 | 469,557 |
| Alaska | 302,583 | 401,851 |

Id. Between 1970 and 1980 the District of Columbia, on the other hand, reported the largest percentage of population loss in the nation, 15.6 percent. *Id.* at 423.

¹⁹⁹ See *The Big Shift*, *supra* note 196, at 321.

reapportionment in 1990.²⁰⁰ As the District's population shrinks, it will be even less able to support a state government, and contribute to the national government, without federal assistance. In fact, the District's population is only some 0.27 percent of the nation's population as a whole. This number has not changed significantly since 1800, when District residents made up only 0.26 percent of the population.²⁰¹

Economically, the District of Columbia is dependent upon the support of the federal government. Annually, in addition to all other federal aid programs, the District receives a direct payment from the federal treasury of a half billion dollars; some \$522 million was budgeted for the District in Fiscal 1987, \$445 million in the form of a direct payment to the District local government.²⁰² District residents outstrip the residents of the states in per capita federal aid by a wide margin. The District, in 1983, received \$2,177 per capita in federal aid. The next closest was Alaska, which received \$1,129 per capita. States with populations comparable to that of the District received barely a quarter as much federal money.²⁰³ The national average was only \$384 federal dollars per capita. Thus, the District of Columbia received five and one-half times the national average in federal funds.²⁰⁴

Quite clearly, in the absence of massive federal assistance and the continuing presence of the national government, the District is not a viable economic unit. It lacks any significant industry, farming or natural resources. Only 0.09 percent of the nation's manufacturing jobs are located in the District. In 1982 the District was dead last in terms of the value of its manufacturing shipments.²⁰⁵ As Senator S. I. Hayakawa pointed out during the hearings on the 1978 Amendment, because it is the capital:

²⁰⁰ See *Almanac*, *supra* note 198, at 424.

²⁰¹ Best, *supra* note 44, at 4.

²⁰² Office of Management and Budget, *The Budget of the United States Fiscal Year 1987* 5-151 (GPO 1986).

²⁰³ In 1983, South Dakota, with 690,768 people, received only \$516 per capita; North Dakota, with 652,717 people, received \$547 for each; Delaware, with 594,338 residents, received \$507 per capita from the federal treasury; and Vermont, with 511,456 people, received \$594 per capita. See *Almanac*, *supra* note 198, at 436.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 446.

The economics of Washington, D.C., make it a unique place. There is no seaport, no industry, no agriculture. There are no major money-making businesses, only one money-spending one -- the federal government. A majority of those working in the District of Columbia work for the federal government, or the closely related service industry, whose workers service those who work for the government. Add to that all of the lobby groups and law firms who are here because the federal government is here, and one begins to understand what is meant by the term "federal city."²⁰⁶

Not surprisingly, Washington Mayor Marion Barry has plainly stated that the District would still "require the support of the Federal Government" if statehood were granted.²⁰⁷ The continuation of federal support is ordinarily justified because of the percentage of federal land in the District of Columbia which cannot be taxed by the local government. However, the federal payment is not recompense from the federal government to the District of Columbia, but the amount Congress chooses to add to the funds collected by the District to support the local government. It is a grant in the truest sense. Moreover, the federal government owns only 32.2 percent of the District's land. It owns a greater percentage of the land area of 10 states -- Alaska (88.0%), Nevada (85.5%), Idaho (65.1%), Utah (63.3%), Oregon (52.3%), Wyoming (49.3%), California (45.8%), Arizona (44.1%), Colorado (36.0%) and New Mexico (33.3%),²⁰⁸ each of which bears the full burdens of statehood without the sort of massive federal support which would be needed by the State of Columbia. If the District aspires to statehood, it must be prepared to give up the special federal payment, to stand as an equal with the other states in its fiscal affairs.

There is a further requirement for statehood, unarticulated but just as binding, that the District fails to meet; every state has satisfied it. To be a member of the American Union an area must be more than a geographic and/or political entity, it must be what has been termed "a proper Madisonian society,"²⁰⁹ that is, a society composed of a "diversity

²⁰⁶ 1978 Senate Hearings, *supra* note 67, at 150 (statement of Sen. S. I. Hayakawa).

²⁰⁷ See 1985 House Hearings, *supra* note 156, at 59 (testimony of Hon. Marion Barry, Mayor, Washington, D.C.).

²⁰⁸ See *Almanac*, *supra* note 198, at 421.

²⁰⁹ Best, *supra* note 44, at 78.

of interests and financial independence.”²¹⁰ The hallmark of each of the several states is diversity and fierce independence. Even the smallest has a broad base of diverse industries and interests. It is this diversity of competing interests which guards the liberty of the individual and the rights of minorities. As Madison wrote:

Whilst all authority in [the federal republic] will be derived from and dependent upon the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the *multiplicity of interests*, and in the other, in the *multiplicity of sects*. *The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.* (Emphasis added.)²¹¹

The District of Columbia lacks this essential political requisite for statehood. It has only one “industry”, government. As a result, the District has only one substantial interest group, government workers. Historically, the national government is, of course, the City’s only reason for being. It is not a crossroad of commerce or the center for the development of vast natural resources. It is not naturally situated astride any important trade routes or port, as are the other great capitals of the world. This city was an artificial political creation, and has remained a political creature, as it was intended to be. Close to two-thirds of the District’s workforce is employed either directly or indirectly in the business of the federal government.²¹² To again quote Senator Hayakawa:

²¹⁰ *Id.* at 72.

²¹¹ The Federalist No. 51, 351-52 (J. Madison) (J. Cooke ed. 1961) [hereinafter Federalist No. 51].

²¹² Best, *supra* note 44, at 74. A full 36.2 percent of the District’s wage and salary employment is directly by the federal government. See U.S. Bureau of the Census, *Statistical Abstract Supplement: State & Metropolitan Data Book - 1986* 536. Indeed, in 1982, Mayor Barry maintained that, in the Washington Metropolitan area, for every federal worker laid off as a result of government reductions in force, one person would be thrown out of work in the private sector. See *Reduction in Force: Oversight Hearing Before the House Committee on the District of Columbia*, 97th Cong., 1st Sess. 58

The people in the states of the union work to make money, a certain amount of which they send in the form of taxes to Washington, D.C., for us to spend. Our [the District's] major economic concern, then, is not how much wheat we can grow, or chickens we can hatch, or shoes we can manufacture, but rather how much money we can get the wealth-creators of the 50 states to send us. We live and work here only on the strength of other people's taxes. If there were to be voting Representatives from the District of Columbia in Congress, they would then be in the position of representing the interests of the federal government to the federal government.²¹³

It is sometimes argued that because federal workers living in the Washington suburbs enjoy full voting rights, federal workers who make their home in the District should also be allowed full participation in congressional elections. Federal employees living in Maryland and Virginia, however, have chosen to live in a state. They accept the responsibilities of state citizenship, and concomitantly enjoy the full rights attached to it under the Constitution. Further, these employees do not elect their senators alone. They are but one of a multitude of interests represented by the Senators from those states. For example, while a Senator from Virginia may be impelled to support a massive federal spending program in the interests of his Northern Virginia constituents, he must also consider the interests, and reaction, of his constituents living in the Tidewater, along the Blue Ridge and in the Shenandoah Valley. A greater balancing of interests is involved. The Senators from the District of Columbia would have no such competing concerns to temper their judgment.

The federal system is based upon the presumption that the states and the federal government are independent and competing sovereignties. The states are independent of the federal government, as it is of the states. In this manner the power of government is dispersed and the

(1982) (statement of Ivanhoe Donaldson, Acting Director, D.C. Dept. of Employment Services) Appendix I.

²¹³ 1978 Senate Hearings, *supra* note 67, at 150 (statement of Sen. S. I. Hayakawa). Senator Stennis of Mississippi was addressing this concern during the Senate debate on the 1978 Amendment when he asked of the proposed Senators from the District, "How do they stand on soybeans?" 124 Cong. Rec. 27,209 (1978).

liberty of the individual preserved.²¹⁴ It is this very factor that distinguishes our federal republic. As Madison wrote, “[i]n the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”²¹⁵ Were the District to become a state it would not be independent of the federal government. It is dependent on the federal government for much of its revenue and the majority of its jobs. In short, the District of Columbia, “is a Federal City. Its interests, its economics, its future are tied to the Federal Government. It has none of the characteristics of a State. It is not a State, nor was it ever meant to be.”²¹⁶

The Supreme Court has recently decided that this delicate balance between state and federal authority is to be guarded primarily by the intrinsic role the states play in the structure of the national government. In *Garcia v. San Antonio Metropolitan Transit Authority*,²¹⁷ the Court overturned its decision in *National League of Cities v. Usery*,²¹⁸ and upheld the application of federal minimum wage laws to state transit authority workers. In doing so it noted that:

Of course, we continue to recognize that the states occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal government

²¹⁴ Hamilton writes, “the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government.” The Federalist No. 28, 179 (A. Hamilton) (J. Cooke ed. 1961).

²¹⁵ Federalist No. 51, *supra* note 211, at 351.

²¹⁶ 124 Cong. Rec. 27,100 (1978) (remarks of Sen. Harry F. Byrd, Jr.). This point was also made by Senator Bayh when he noted that, “[t]he District of Columbia, very clearly, is a local government. It is a city. It has a city structure.” *Id.* at 27,101.

²¹⁷ 469 U.S. 528 (1985).

²¹⁸ 426 U.S. 833 (1976).

action. The political process ensures that laws that unduly burden the states will not be promulgated.²¹⁹

The congressional delegation from the District of Columbia, however, would have little interest in preserving the balance between federal and state authority entrusted to it by *Garcia*. The continued centralization of power in the hands of the national government, and the expansion of its operations, would be to the direct benefit of their state and constituents. The system of competing sovereignties designed to preserve our fundamental liberties would be compromised.

Further, as the states are independent of the federal government, so the federal government must be independent of the states. The Founders settled upon the device of a federal district as the means by which the federal government might remain independent of the influence of any single state. If the District of Columbia were now admitted to statehood, it would not be one state among many. Because the federal government is located there it would be *primus inter pares*, first among equals. The "State of Columbia . . . could come perilously close to being the state whose sole business is to govern, to control all the other states. It would be the imperial state; it would be 'Rome on the Potomac.'"²²⁰

The influence that would be enjoyed by the State of Columbia should not be underestimated. In the area of federal judicial selection, for example, Columbia would wield far more power than its sister states. Traditionally, a state's senators are consulted on the nominations of federal judges who will sit within its boundaries.²²¹ As a matter of "senatorial courtesy," a nominee opposed by the senators from the state where he will sit stands little chance of confirmation by their fellows. The senators from Columbia could expect like deference. However, two of the nation's most influential courts, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit, are located in the District. Because they are located in the capital, with jurisdiction over federal agencies, as well as exclusive jurisdiction granted by Congress in many other areas, these two courts have an unusual influence over the determination and development of federal law. "Unique among the lower federal courts, the

²¹⁹ *Garcia*, 469 U.S. at 556.

²²⁰ Best, *supra* note 44, at 77.

²²¹ Hatch, *supra* note 45, at 530.

decisions of these courts routinely have had broad national impact.”²²² Under the current system, if it were granted statehood, “the senators from the District will be in a position to exert an unprecedented degree of influence over national regulatory policies,” merely because they represent the capital.²²³ This is illustrative of the point that the District of Columbia, were it granted statehood, would automatically obtain more influence in the federal government than any other state, merely because it is the site of the national capital.

As it is, the problems of the District, though its population is smaller than that of 47 states, occupy the attention of one congressional committee, and three subcommittees.²²⁴ This preoccupation with the problems and welfare of the city of Washington does not arise merely because Congress has exclusive legislative authority over the District, but because the national capital is located there. *A priori*, Washington’s problems are the Nation’s problems. If the District were to become a state these problems would remain the Nation’s problems, but Congress would be denied a direct voice in their resolution.

Finally, in a very real sense the District belongs not only to those who reside within its borders, but to the Nation as a whole. Because of this unique status it receives far more from the bounty of the fifty states than merely the annual payment needed to keep the city afloat.²²⁵ In addition to tens of thousands of recession-proof jobs (the per capita personal income of District residents in 1983 was \$16,409, second only to Alaska, and \$4,700 above the national average),²²⁶ the District and its

²²²*Id.* at 530-31.

²²³*Id.* at 531. Another interesting question is how nominations to the United States Claims Court and the United States Court of Appeals for the Federal Circuit would be treated. Both courts are based in the District of Columbia, but have a national jurisdiction. The senators from Columbia could hardly expect deference respecting nominations to these courts.

The status of the D.C. Circuit would also be called into question if the District were granted statehood. No one state has a circuit court of its own. The State of Columbia would more properly be placed within the jurisdiction of the Court of Appeals for the Fourth Circuit, which currently covers Maryland, Virginia, West Virginia, and the Carolinas.

²²⁴*See supra* p. 45.

²²⁵It should be remembered that no other state, even though the land in many is largely owned by the federal government, receives such lavish support. *See supra* p. 62.

²²⁶*See Almanac, supra* note 198, at 442.

residents benefit from all of the monumental federal building projects which, over the past hundred and ninety years, have made Washington one of the most attractive cities in the world. It enjoys a mass transit system to be envied by every other American city, and which was, in large part, paid for by the federal government.²²⁷ District residents daily enjoy numerous federal parks and facilities which belong to every citizen of the United States. This concern prompted former Senator Birch Bayh, an otherwise ardent proponent of direct congressional representation for District residents, to oppose statehood for the District of Columbia. During the debates on H.J. Res. 554 he eloquently summed up the objection: "I guess as a Senator from Indiana I hate to see us taking the Nation's Capital from [5,000,000] Hoosiers. It is part ours. I do not see why the District should be a State because it is, indeed, the Nation's Capital."²²⁸

Conclusion

The District of Columbia should not be admitted to the Union as a state. It is an integral part of the federal government and lacks the basic independence that is a fundamental characteristic of each of the states. Under our system of federalism, the states and the national government were designed as independent and competing sovereignties. Self-government, individual liberty, and the rights of minorities were all secured by dispersing power in this manner. This system would be fundamentally altered by the admission of a state which is dependent upon the federal government.

The District of Columbia simply lacks the resources to function as a state, independent of the national government. Its total land area is smaller than any other federal territory or commonwealth; it is in fact smaller than many national parks. Its economy is dependent upon the federal government, and its local government survives only with annual infusions of massive federal aid. The city of Washington could not

²²⁷ Best, *supra* note 44, at 76-77. According to Department of Transportation figures, the federal government contributed some \$4.8 billion to the construction of the Washington Metrorail system. The District's contribution was only an estimated \$360 million. Amounts were also contributed by Virginia and Maryland. Telephone interview with Jerry Fisher, Regional Desk Officer, Urban Mass Transportation, Department Head of Allocation Department, Washington Metropolitan Transit Authority (February 19, 1987).

²²⁸ 124 Cong. Rec. 27,101 (1978). See Appendix F.

support a state government and shoulder its fair share of the national burden. If it were granted statehood, it would be the first state dependent on the federal government for its very support.

Not only is the District government financially dependent upon the federal government, but so are a majority of its residents. Close to two thirds of the District's workforce is employed either directly or indirectly in the business of the federal government. Because it is the federal city, Washington lacks not only the economic, but also the political independence and diversity which characterize the states. There would be no diverse interests competing for the attention of the senators and representative from the District of Columbia. They would represent the federal government to the federal government. This would further threaten the balance between federal and state authority.

The District of Columbia, however, was created specifically to secure this balance between the federal government and the several states. Congress was granted the authority to control its immediate surroundings in order to ensure the independence of the federal government. The Founders deliberately avoided placing the national capital in one of the states, which would have compromised this independence and awarded one state more influence in the national deliberations than the others. There is no sound reason why the District of Columbia should now be made a state and allowed those privileges which the other states were intentionally denied. This would serve to undermine the federal system which has successfully guarded our liberties now for two hundred years.

In any case, while the constitutional issues raised by proposals to grant statehood to the national capital are difficult, our considered opinion is that amendment of the Constitution would be required before the District of Columbia can be admitted to the Union as a state. The clause creating the District of Columbia gives Congress exclusive legislative authority over the district that was to become the seat of the federal government, not merely over the seat of government. The authority of Congress, thus, extends over that entire district -- the District of Columbia. Further, the ratification of the Twenty-third Amendment in 1961 gave the District additional constitutional recognition as a unique juridical entity. Accordingly, it does not appear that Congress has the power to abdicate its exclusive authority over any part of this district, absent an amendment to the Constitution. This objection cannot be answered by retaining a truncated federal district as the seat of

government. Such would contravene the language of the Constitution as well as the intentions of the Founders.

The proposals for allowing District residents to participate in congressional elections, other than statehood, do not appear to offer viable alternatives. Granting the District representation in the House of Representatives would require a constitutional amendment. Retroceding the District to Maryland would work a basic change in our federal structure. Retrocession would compromise the independence of the federal government, as would admitting the District to the Union as a state. In addition, retrocession to Maryland would require Congress to relinquish its exclusive legislative power over the district which became the seat of the federal government. For this a constitutional amendment is needed.

The third alternative, an amendment granting the District representation as if it were a state, has been soundly rejected by the states. Proposed in 1978, in seven years this amendment was adopted by only sixteen states, less than half the number needed for ratification. Moreover, the amendment would have altered the character and composition of the Senate, allowing representation in that body to a non-state, possibly requiring the unanimous consent of the states. Under Article V no state may be deprived of its equal suffrage in the Senate without its consent. Granting representation in the Senate to an entity which is not a state could be said to deprive each state of its equal vote, since senatorial representation would then be shared between the states and a non-state. While a more carefully drafted amendment might answer some of the objections raised to this measure, any plan to give the District of Columbia representation in the Senate, short of statehood, would still be subject to this "equal suffrage" challenge.

The fourth alternative suggests that the District remain intact, under federal control, but that its residents be allowed to participate in Maryland congressional elections. Proponents suggest that this could be accomplished by a complex set of arrangements between Maryland and the Congress. After all, they argue, the residents of other federal enclaves enjoy such voting privileges in the states where those enclaves are located. However, a constitutional amendment might be necessary to adopt this alternative as well. Although not precisely on point, the leading Supreme Court decision, allowing the residents of other federal enclaves to vote in federal and state elections, does not appear to establish

the ability of Congress to allow District of Columbia residents to vote in Maryland congressional elections.

Aside from the truly byzantine, and most likely impractical, arrangements that would have to be made to achieve this result, this approach would contradict the terms of the Twenty-third Amendment by entitling District residents to vote for presidential electors from Maryland, rather than in accordance with that amendment. In creating a separate voting procedure for District residents, the Twenty-third Amendment demonstrates that they are not and cannot be considered part of the Maryland body politic. Therefore, an amendment would most likely be necessary even to effect this assignment of voting rights.

Lastly, the Constitution might be amended to grant statehood to the District of Columbia. This approach would avoid the very serious constitutional questions raised by plans to grant the District statehood by statute alone. However, the policy reasons that led the Founders to create the District of Columbia as the seat of the national capital in the first place argue strongly against such a measure. If the federal system is to continue to ensure our fundamental liberties, as it has for the past two centuries, then the federal government must remain independent of the states, and each state must remain independent of the federal government. Only then can each act as a check upon the other. Admitting a state as dependent upon the federal government as is the District of Columbia would compromise this essential independence. It could not act as a check upon the federal government since it would be largely a federal dependency. At the same time, because the national capital is located in the District of Columbia, as a state it would be in a position to exercise far more influence over the federal government than any state has ever enjoyed in the past.

In all, the issues presented by plans to give the residents of the District of Columbia direct participation in congressional elections, and in particular by proposals to grant the District statehood, are complex and the answers are far from clear-cut. Scholars can, and do, disagree over the answers to these questions. What is clear, however, is that the constitutional and policy questions raised are fundamental questions about the nature of our national government and the federal structure. Before any action is taken, these issues must be fully and carefully explored.

However, it appears that the sensible course is to accept the wisdom of the Founders and to maintain the status quo. While Washingtonians may not vote in congressional elections, they have in exchange for this right received the multifold benefits of living in the national capital. Because of thousands of recession-proof jobs, unequalled public facilities of all sorts, and per capita federal aid equaling five and one-half times the national average, the residents of Washington, D.C., enjoy a quality of life to be envied by other Americans. In exchange for these benefits, District residents have adopted the entire Congress as their representatives.

Appendix

- A. Excerpts from *A Simple Case of Democracy Denied: A Statement of Why it is Undemocratic and Contrary to the Intent of the Constitution for the Residents of the District of Columbia to Remain Disenfranchised*, reprinted in *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978).
- B. Excerpts from W. Fauntroy, *Viewpoints: Voting Rights for D.C.*, Board of Trade News, Jan., 1978, reprinted in *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978).
- C. Excerpts from *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) (statement of Sen. Edward M. Kennedy).
- D. Excerpts from *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) (statement of Assistant Attorney General John M. Harmon, Office of Legal Counsel).
- E. Excerpts from *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) (statement of Assistant Attorney General Patricia M. Wald, Office of Legislative Affairs).
- F. Excerpts from *Statements of Sen. Birch Bayh During the Senate Debates on H.J. Res. 554*, 124 Cong. Rec. 26,382-26,383; 27,101-27,102 (1978).
- G. Excerpts from *Representation of the District of Columbia in Congress: Hearings on H.J. Res. 280 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 29 (1975) (testimony of Mayor Walter E. Washington).

- H. Excerpts from *Granting Representation in the Electoral College to the District of Columbia*, H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1 (1960).
- I. Excerpts from *Reduction in Force: Oversight Hearing Before the House Committee on the District of Columbia*, 97th Cong., 1st Sess. 58 (1982) (statement of Ivanhoe Donaldson, Acting Director, D.C. Dept. of Employment Services).
- J. Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1963, *reprinted in Home Rule, Hearings on H.R. 141 Before Subcommittee No. 6 of the House Committee on the District of Columbia*, 88th Cong., 1st Sess. 341, 345 (1964).

DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

HEARINGS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S.J. Res. 65

JOINT RESOLUTION TO AMEND THE CONSTITUTION TO PRO-
VIDE FOR REPRESENTATION OF THE DISTRICT OF COLUMBIA
IN THE CONGRESS

APRIL 17, 27, AND 28, 1978

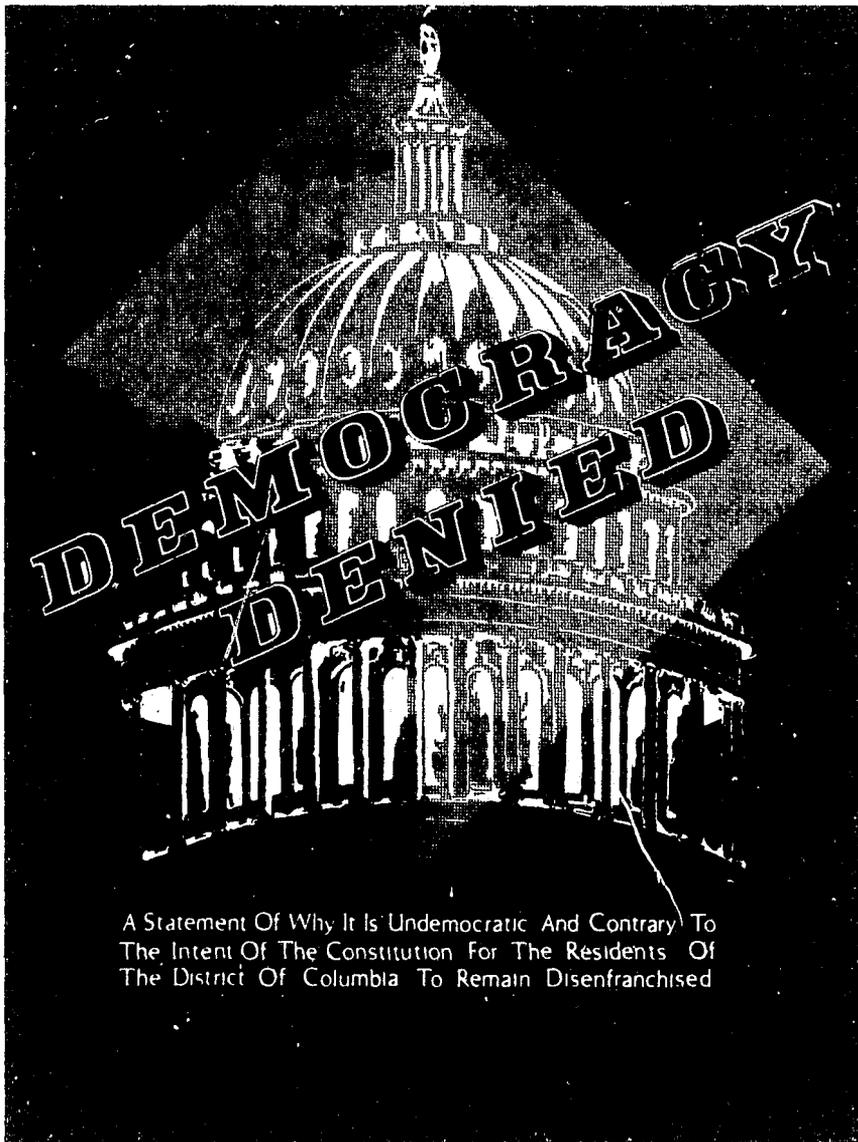
Printed for the use of the Committee on the Judiciary



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WASHINGTON : 1978

29-287 O



A Statement Of Why It Is Undemocratic And Contrary To
The Intent Of The Constitution For The Residents Of
The District Of Columbia To Remain Disenfranchised

INTRODUCTION

. . . governments are instituted among men, deriving their just powers from the consent of the governed.

Declaration of Independence

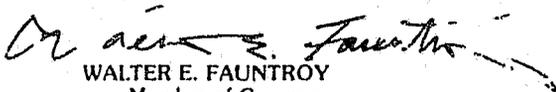
America has made great strides in its development as a premier democracy, based on the enduring principles of the Founding Fathers. It, therefore, seems astonishing that the birthright of the American people—that of electing Members of Congress and enjoying representation by them—a right normally taken for granted—is denied to three-quarters of a million Americans residing at the very seat of the government. Residents of the District of Columbia are relegated to the status of second-class citizens. According them full voting representation in the Congress is a glaring piece of unfinished business that would finally mend the crack in the Liberty Bell.

Is it really possible that the Founding Fathers, who fought so desperately to win independence from "taxation without representation," would turn around and purposefully disenfranchise a segment of the population? The evidence certainly does not support such a contention. Oversight by the Continental Congress, pressed with the creation of the laws of a new nation, seems clearly to have accounted for the inadvertent disenfranchisement.

Throughout history our government has espoused the virtues of democracy to the world. Unfortunately, for 700,000 residents, and for the nation as a whole, that democracy comes to a halt at the borders of the District. The gates to equality are closed within view of the Washington Monument.

House Joint Resolution 554, which passed the House on March 2, 1978, by an overwhelming vote of 289-127, proposes an amendment to the Constitution which would enable District of Columbia residents to elect two voting Senators, as well as the number of voting representatives to which they would be entitled if the District were a state. H.J. Res. 554 *is not* a statehood bill. It would simply complete the rights of the Twenty-Third Amendment—enacted in 1961, which enabled District residents to vote for the President and Vice President—to include representation in Congress.

The Constitution of the United States does not expressly deny Congressional representation to District residents. However, the principles of democracy—the essence of our Constitution, laboriously etched by the blood and sacrifice of Americans throughout the years—demand that we extend, during the 95th Congress, full voting representation to the people of the District of Columbia. To further delay this fundamental right is to deny democracy. I ask for your support in this effort.


WALTER E. FAUNTROY
Member of Congress

Allowing the District to participate in the ratification of proposed constitutional amendments is sound policy—well grounded in logic and fundamentally fair.

The process of amending the Constitution involves a series of succeeding steps, as set forth in Article V. Members of Congress submit a proposed amendment to the states for their approval, the states ratify and within a reasonable time the Congress then determines the efficacy of those ratifications.

H.J. Res. 554 would permit the District to participate in every step of the ratification process. This full participation does not present a Constitutional issue. It is a policy judgment that the District should participate in the entire ratification process. There is no justification for less than full participation.

ISSUE:

Is it proper to repeal the 23rd Amendment and allow the District electors based upon its Congressional representation?

ANSWER:

This is a matter of policy and not a constitutional issue.

The number of electors to be chosen by the District is limited by the 23rd Amendment to the number to which the least populous state is entitled (three). If the District is granted a total of four representatives in Congress—two senators and two representatives—then the District would, if it were a state, be entitled to four electors. There is no reasonable basis for denying the residents of the federal district their full entitlement to participation in the choice of the President.

Further, the wording of H.J. Res. 554 is sufficiently flexible to provide full District participation in presidential elections regardless of what may be the future of the electoral college. The resolution simply states that "for purposes of . . . election of the President and Vice President . . . the District constituting the seat of government of the United States shall be treated as though it were a state." Thus, so long as there is an electoral college, the District will take part in its deliberations on the same basis as if it were actually a state. If the electoral college is abolished, the District will participate on an equal basis in whatever system is established in its place.

ISSUE:

Is statehood a preferred method of providing full voting representation to residents of the federal district?

ANSWER:

Statehood for the District would defeat the purpose of having a federal city, i.e., the creation of a District over which the Congress would have exclusive control. (Article I, Section 8, clause 17 of the Constitution.)

As a state, the District would receive its proportionate share of representation in Congress. This conflicts, however, with the intent of Article I, Section 8, clause 17 to establish a federal district under the exclusive control of the Congress.

The statehood alternative is frequently suggested because presumably it could be effected by legislation rather than a constitutional amendment. It is not clear, however, whether Article I is an obstacle to a decision by Congress to convert the District to a state. This difficulty might be overcome by carving out a federal enclave, but this raises substantial practical problems.

No state should have responsibility for and control over the critical parts of the federal power structure. Preserving a federal triangle or federal territories separate from, but located in a state would pose enormous problems. Rather than statehood, the constitutional amendment to allow voting representation in the Congress seems to be a perfect compromise. It recognizes that citizens throughout the country should have a voice in what happens in the District of Columbia but that citizens of the District of Columbia should also have a voice in federal programs that have as much impact in the District as in any state.

It should be emphasized that it would be unfair to say that the District is seeking the benefits but not the burdens of statehood. The District bears unique burdens and receives special benefits. It is different from a state; but no difference justifies the denial to District citizens of the fundamental right of voting representation in Congress.

Moreover, the precedent that was set when a portion of the District was ceded back to Virginia in 1846 (the Virginia legislature passed an act consenting to the retrocession) as well as the implications of Article IV, Section 3 of the Constitution (which states in pertinent part, "... no new state shall be formed or erected within the jurisdiction of any other state) strongly suggests that the consent of Maryland would be required. This point is buttressed by the language of the Maryland Act of Cession which gave the land to the United States for the sole purpose of creating a federal district.

Statehood also presents a troublesome problem with the 23rd Amendment if the federal district were to be wiped out by legislation.

ISSUE: Is full retrocession—ceding the District back to the state of Maryland—a viable alternative for gaining full voting rights?

ANSWER: *Full retrocession is not a viable alternative. First, it would destroy the unique character of the District which was contemplated by the Framers and which has been accepted*

Appendix B

**DISTRICT OF COLUMBIA
REPRESENTATION IN CONGRESS**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-FIFTH CONGRESS

SECOND SESSION

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The split in opinion was reported in the American University Poll, which was released yesterday and directed by Robert Hitlin, associate professor of government at AU.

According to the poll there is a noticeable split in opinion between blacks and whites over the issue of statehood for DC. Blacks in each area are more in favor of statehood for the district than whites, the poll showed.

In the District "there is considerable racial difference on this issue," Hitlin said. Blacks are in favor of statehood, by 59 per cent to 22 per cent. (20 per cent not sure). The white vote on the issue was somewhat closer, with 35 per cent in favor of the move and 46 per cent against (19 per cent not sure).

There are also political divisions involved in the questions. The poll showed that Democrats in each area were in favor of statehood, while Republicans were opposed to the move. In DC, political opinion on the issue breaks down as follows: Democrats, 55 per cent in favor, 24 per cent opposed; Independents, 50 per cent in favor, 34 per cent opposed; and Republicans 39 per cent in favor, 44 per cent opposed.

The total figures of the poll showed that DC residents favor the statehood proposal by 51 per cent to 28 per cent (21 per cent not sure). Maryland residents were also in favor, but by a closer margin with 41 per cent in favor and 31 per cent against (26 per cent not sure). Virginia was the only area polled that opposed the move, with 31 per cent in favor and 44 per cent against (25 per cent not sure).

The poll was taken between Feb. 23 to 28. The pollsters interviewed 1,126 residents of DC, Montgomery and Prince Georges Counties, Alexandria, Arlington, Fairfax County, Fairfax City and Falls Church. The respondents, all of whom were 18 or older, were selected at random in a size designed to insure accuracy to within four to six per cent. Demographic characteristics were also adjusted to match their respective areas.

In other areas, the poll showed that DC residents were in favor of a tax on commuters by two to one, while Virginia and Maryland residents oppose that tax by five to one. The poll also showed that residents in all of the three areas were strongly in favor of completion of the Metro system, with support from 62 to 72 per cent in favor.

[From the Board of Trade News, January 1978]

VIEWPOINTS: VOTING RIGHTS FOR D.C.

A RESOLUTION TO THE CONSTITUTION WILL GIVE FULL VOTING RIGHTS TO THE DISTRICT

(By WALTER E. FAUNTROY, Congressman (D-D.C.))

The Declaration of Independence—that revolutionary document of human principles—which serves as one of the underpinnings of American society, states: ". . . governments are instituted among men, deriving their just powers from the consent of the governed."

That is true for all American citizens except those of us who live in Washington, D.C.—the capital of the U.S. and the "Free World." We are the only citizens in our great country who cannot elect our own voting representatives to the United States House of Representatives or to the United States Senate. It is simply a case of democracy denied.

It is now time to complete the work of our Founding Fathers and provide liberty and justice for three-quarters of a million District of Columbia residents who have no voting voice in Congress. The means of achieving this justice is a Constitutional Amendment/Resolution (H.J. Res. 554) which, if passed, will give the District of Columbia two Senators, the number of House members and presidential electors commensurate with its population, and participation in the ratification of Constitutional Amendments.

STATEHOOD NOT RECOMMENDED

This resolution does not recommend statehood for the District of Columbia in order to achieve full voting representation—this would be in direct defiance of the prescriptions of the Founding Fathers. When the capital city was formed, the legislators sought to provide for the creation of a site completely removed from the control of any state. Article I, Section 8, Clause 17 of the Constitution states that Congress would "exercise exclusive legislation in all cases whatsoever over such district."

Nothing about the exclusive jurisdiction of Congress is incompatible with District voting representation. There would be absolutely no threat to continued Congres-

sional authority over the Federal District were an amendment granting such representation adopted. In addition to this fundamental purpose of a neutral Federal City, the convention prescribed that the inhabitants "will have had their own voice in the election of the government which is to exercise authority over them as a municipal legislature for all local purposes, derived from their own suffrages, will, of course, be allowed them. . . ."

Within this unique governmental entity, then, the framers of the Constitution included in their grand design of a democratic government, a federal municipality which would equally reflect the state-federal relationship while carrying out the broader democratic principle of representation for all citizens. The state was set 186 years ago, but the details have yet to be implemented.

In addition to specific Constitutional prescriptions involved, consideration of statehood for the Federal District would require an enormous expenditure of time and effort—Alaska's statehood drive took 24 years; Hawaii's 34 years. A mandate from the District citizens would be the first step in such a process, and this is not evident at present. What is evident, though, is the long-standing mandate from the District citizenry to be granted full representation in the political community.

THE DISTRICT IS TREATED AS A STATE

The District's unique lack of statehood does not warrant its exclusion from Congressional representation. The House and Senate were created to provide a balance of votes between large and small states and entities. The District is a geographical and political entity as are the states and should be represented accordingly. In fact, the long-time inclusion of the District in several governmental contexts normally reserved for the states not only illuminates the similarity between the functions of the District and the states, but also gives precedence for the proposed amendment on voting representation in Congress. Without actually being a state, the District already participates in such statehood activities as paying federal taxes, having the commerce between the District and other states regulated by Congress, and being included in the right to a trial by jury.

The facts are:

The per capita tax payment for District residents is \$77 above the nation's average—a payment only exceeded by seven states.

The population of the District of Columbia is larger than that of ten states. District residents have fought and died in every war since the War for Independence, and, during the Vietnam War, District of Columbia casualties ranked fourth out of 50 states.

Of the 17 Federal Districts in the world community, only two, other than Washington, D.C., are not represented in their national legislatures.

QUESTION OF RETROCESSION

Two other suggestions for District representation, which are not acceptable or practical, concern the retrocession of the original Maryland part of the District back to Maryland or allowing District residents to vote in Maryland.

Although the land which Virginia ceded to the Federal District was subsequently retroceded in 1840, Maryland's ceded land remained to comprise the District. The Maryland Legislature, in the Act of December 19, 1791, concerning the territory of the Columbia and the City of Washington, "Forever ceded and relinquished to the Congress and the Government of the United States, the full and absolute right and exclusive jurisdiction of soil as well as of persons residing or to reside thereon, pursuant to the tenor and effect of the eight sections of the First Article of the Constitution of the United States." Since that time, the District has developed a unique character which appropriately reflects the concept of a Federal District. Furthermore, retrocession would seriously dilute this concept as well as destroy a culturally rich and politically unique governmental entity. Retrocession would also sacrifice the autonomy of residents and substantially reduce the federal interest in the planning and development of the Capital City.

In regard to allowing District residents to vote in Maryland, it simply would not be advantageous because it would not give them the representation due them. Under this plan, District residents would be sharing delegates whose constituencies are already suitably apportioned to the optimal number of citizens according to the most recent census data. If this plan were implemented, the affected delegates would have to assume additional burdens of representing citizens who are not Maryland residents, who would not vote in Maryland state elections, and who live in a city unlike any other in the country. Furthermore, the Maryland legislature has expressed strong sentiment against this plan.

The split in opinion was reported in the American University Poll, which was released yesterday and directed by Robert Hitlin, associate professor of government at AU.

According to the poll there is a noticeable split in opinion between blacks and whites over the issue of statehood for DC. Blacks in each area are more in favor of statehood for the district than whites, the poll showed.

In the District "there is considerable racial difference on this issue," Hitlin said. Blacks are in favor of statehood, by 59 per cent to 22 per cent. (20 per cent not sure). The white vote on the issue was somewhat closer, with 35 per cent in favor of the move and 46 per cent against (19 per cent not sure).

There are also political divisions involved in the questions. The poll showed that Democrats in each area were in favor of statehood, while Republicans were opposed to the move. In DC, political opinion on the issue breaks down as follows: Democrats, 55 per cent in favor, 24 per cent opposed; Independents, 50 per cent in favor, 34 per cent opposed; and Republicans 39 per cent in favor, 44 per cent opposed.

The total figures of the poll showed that DC residents favor the statehood proposal by 51 per cent to 28 per cent (21 per cent not sure). Maryland residents were also in favor, but by a closer margin with 41 per cent in favor and 31 per cent against (26 per cent not sure). Virginia was the only area polled that opposed the move, with 31 per cent in favor and 44 per cent against (25 per cent not sure).

The poll was taken between Feb. 23 to 28. The pollsters interviewed 1,126 residents of DC, Montgomery and Prince Georges Counties, Alexandria, Arlington, Fairfax County, Fairfax City and Falls Church. The respondents, all of whom were 18 or older, were selected at random in a size designed to insure accuracy to within four to six per cent. Demographic characteristics were also adjusted to match their respective areas.

In other areas, the poll showed that DC residents were in favor of a tax on commuters by two to one, while Virginia and Maryland residents oppose that tax by five to one. The poll also showed that residents in all of the three areas were strongly in favor of completion of the Metro system, with support from 62 to 72 per cent in favor.

[From the Board of Trade News, January 1978]

VIEWPOINTS: VOTING RIGHTS FOR D.C.

A RESOLUTION TO THE CONSTITUTION WILL GIVE FULL VOTING RIGHTS TO THE DISTRICT

(By WALTER E. FAUNTROY, Congressman (D-D.C.))

The Declaration of Independence—that revolutionary document of human principles—which serves as one of the underpinnings of American society, states: ". . . governments are instituted among men, deriving their just powers from the consent of the governed."

That is true for all American citizens except those of us who live in Washington, D.C.—the capital of the U.S. and the "Free World." We are the only citizens in our great country who cannot elect our own voting representatives to the United States House of Representatives or to the United States Senate. It is simply a case of democracy denied.

It is now time to complete the work of our Founding Fathers and provide liberty and justice for three-quarters of a million District of Columbia residents who have no voting voice in Congress. The means of achieving this justice is a Constitutional Amendment/Resolution (H.J. Res. 554) which, if passed, will give the District of Columbia two Senators, the number of House members and presidential electors commensurate with its population, and participation in the ratification of Constitutional Amendments.

STATEHOOD NOT RECOMMENDED

This resolution does not recommend statehood for the District of Columbia in order to achieve full voting representation—this would be in direct defiance of the prescriptions of the Founding Fathers. When the capital city was formed, the legislators sought to provide for the creation of a site completely removed from the control of any state. Article I, Section 8, Clause 17 of the Constitution states that Congress would "exercise exclusive legislation in all cases whatsoever over such district."

Nothing about the exclusive jurisdiction of Congress is incompatible with District voting representation. There would be absolutely no threat to continued Congre-

sional authority over the Federal District were an amendment granting such representation adopted. In addition to this fundamental purpose of a neutral Federal City, the convention prescribed that the inhabitants "will have had their own voice in the election of the government which is to exercise authority over them as a municipal legislature for all local purposes, derived from their own suffrages, will, of course, be allowed them. . . ."

Within this unique governmental entity, then, the framers of the Constitution included in their grand design of a democratic government, a federal municipality which would equally reflect the state-federal relationship while carrying out the broader democratic principle of representation for all citizens. The state was set 186 years ago, but the details have yet to be implemented.

In addition to specific Constitutional prescriptions involved, consideration of statehood for the Federal District would require an enormous expenditure of time and effort—Alaska's statehood drive took 24 years; Hawaii's 34 years. A mandate from the District citizens would be the first step in such a process, and this is not evident at present. What is evident, though, is the long-standing mandate from the District citizenry to be granted full representation in the political community.

THE DISTRICT IS TREATED AS A STATE

The District's unique lack of statehood does not warrant its exclusion from Congressional representation. The House and Senate were created to provide a balance of votes between large and small states and entities. The District is a geographical and political entity as are the states and should be represented accordingly. In fact, the long-time inclusion of the District in several governmental contexts normally reserved for the states not only illuminates the similarity between the functions of the District and the states, but also gives precedence for the proposed amendment on voting representation in Congress. Without actually being a state, the District already participates in such statehood activities as paying federal taxes, having the commerce between the District and other states regulated by Congress, and being included in the right to a trial by jury.

The facts are:

The per capita tax payment for District residents is \$77 above the nation's average—a payment only exceeded by seven states.

The population of the District of Columbia is larger than that of ten states.

District residents have fought and died in every war since the War for Independence, and, during the Vietnam War, District of Columbia casualties ranked fourth out of 50 states.

Of the 17 Federal Districts in the world community, only two, other than Washington, D.C., are not represented in their national legislatures.

QUESTION OF RETROCESSION

Two other suggestions for District representation, which are not acceptable or practical, concern the retrocession of the original Maryland part of the District back to Maryland or allowing District residents to vote in Maryland.

Although the land which Virginia ceded to the Federal District was subsequently retroceded in 1840, Maryland's ceded land remained to comprise the District. The Maryland Legislature, in the Act of December 19, 1791, concerning the territory of the Columbia and the City of Washington, "Forever ceded and relinquished to the Congress and the Government of the United States, the full and absolute right and exclusive jurisdiction of soil as well as of persons residing or to reside thereon, pursuant to the tenor and effect of the eight sections of the First Article of the Constitution of the United States." Since that time, the District has developed a unique character which appropriately reflects the concept of a Federal District. Furthermore, retrocession would seriously dilute this concept as well as destroy a culturally rich and politically unique governmental entity. Retrocession would also sacrifice the autonomy of residents and substantially reduce the federal interest in the planning and development of the Capital City.

In regard to allowing District residents to vote in Maryland, it simply would not be advantageous because it would not give them the representation due them. Under this plan, District residents would be sharing delegates whose constituencies are already suitably apportioned to the optimal number of citizens according to the most recent census data. If this plan were implemented, the affected delegates would have to assume additional burdens of representing citizens who are not Maryland residents, who would not vote in Maryland state elections, and who live in a city unlike any other in the country. Furthermore, the Maryland legislature has expressed strong sentiment against this plan.

EQUAL SUFFRAGE

One last rebuttal to those who are against District representation because it would deprive other states of their "equal suffrage" in the Senate. The Article V provision that "no state, without its consent, shall be deprived of its equal suffrage in the Senate" would not be violated by District representation in that body. "Equal suffrage" simply means that each state is entitled to the same number of Senators. This provision gives balance to the geographical entities' representation and prevents the more populous states from having greater say than the smaller ones. If "equal suffrage" were intended to mean that each state's percentage of the total number of Senators would never decline, then thirty-seven states could not have been admitted to the Union since the Constitution was adopted. In other words, each of the original states had one-thirteenth of the vote in the Senate, while it now has one-fiftieth of that vote.

CONCLUSION

In conclusion, District representation in Congress would swing the suffrage pendulum back to where it was before December 1800 when Congress moved to its Potomac site and inadvertently disenfranchised District residents. The resolution being considered is in no way incompatible with Congress' continued exclusive jurisdiction over the District. And, most importantly, it would further the principles of democracy that the Founding Fathers intended to have flourish among all citizens and thus give citizens of the nation's capital what their fellow Americans already have—full citizenship.

STATEHOOD GUARANTEES SELF-GOVERNMENT AS WELL AS FULL VOTING RIGHTS

(By HILDA M. MAEON, Councilmember at Large)

The people who live in the District of Columbia are entitled to the same political rights as those possessed by other citizens of the United States. I believe that entering the union as a state is the only way in which District residents can obtain irrevocably and fully those rights. The concept of statehood is not a new or radical concept. There is a well-defined process by which the rest of the states of the union have joined the original thirteen.

The proposed constitutional amendment which would grant the District of Columbia full voting representation in Congress is not self-determination. It would simply add two District of Columbia senators and probably two voting members of the House. It would not change the relationship between the District government and the Congress in any way. Congress would continue to exercise the power to review and disapprove legislation passed by the Council and signed by the Mayor. Congress would continue to have the final say to all District appropriations. Also the procedure for passage of such a constitutional amendment is a long, hazardous and uncertain one requiring a two-thirds vote of each house of Congress and ratification by three-fourths of the states. Statehood is a less cumbersome and less lengthy process requiring a simple majority vote in each house of Congress. And, unlike any form of home-rule, statehood could not be revoked.

PROCEDURE FOR OBTAINING STATEHOOD

Statehood can be made possible by the simple expedient of redefining the size of the district set apart as the seat of the government of the United States. Article I, Section 8, of the Constitution places a top limit on the size of the Federal District set apart as the seat of the government—not to exceed ten miles square—but places no minimum limit on its size. There is ample precedent for redefining the size of the District. In 1846 that portion of the District of Columbia known as the county of Alexandria was retroceded to Virginia.

Bill 2-1, the "District of Columbia Statehood Act," introduced in the Council by Julius W. Hobson, in January 1977, defines clearly that portion of the District which would remain under federal control. The "Federal District of Columbia" would include the area stretching roughly from the Supreme Court and the Library of Congress to the Lincoln Memorial and would include the White House, Lafayette Square, the U.S. Capitol, the Executive Office Building, etc. The White House is the only building on that strip of land which is used for residential purposes. The remainder of the District of Columbia would be granted statehood.

Naturally, such a change in the status of what is now the District of Columbia has aroused some criticism. One complaint is that statehood would somehow threaten the federal government's security in the nation's capital. However, numerous

**DISTRICT OF COLUMBIA
REPRESENTATION IN CONGRESS**

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NINETY-FIFTH CONGRESS
SECOND SESSION
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Senator BAYH. We are very fortunate to have here a man who has been fighting diligently for this right for a long period of time. He is a principal author of this measure which is now before us. That is the senior Senator from Massachusetts.

Senator Kennedy, I know how busy you are. I appreciate your being here on the initial day of these hearings.

**TESTIMONY OF HON. EDWARD M. KENNEDY, U.S. SENATOR
FROM MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to join all of my colleagues in commending you for having these hearings and for the work that you have done on this particular issue, and for your constancy in its support.

This is an issue which I think cries for action by the Senate and by the Congress of the United States.

Mr. Chairman, you pointed out the uniqueness of this day and made a very eloquent statement reminding all Americans about taxation without representation. You also pointed out that it is Marathon Day, along with the fact of the long battle that the people of the District of Columbia are faced with in terms of trying to seek full representation.

I would also point out that it is Patriot's Day. In my own State of Massachusetts, this day commemorates the day when Paul Revere sounded the alarm and was memorialized in that magnificent poem.

Perhaps, for all these reasons, coming together on this particular day—whether it be taxation without representation, or the marathon, or sounding the alarm—will magnify the importance of this issue.

So, I am pleased to be here before the Subcommittee on the Constitution to express, once again, my strong support of full representation in Congress for the people of Washington, D.C.

Mr. Chairman, the question is one of simple justice for the 700,000 citizens of the Nation's capital.

For decades, going back to the beginning of the 19th century, ordinary District citizens, concerned local leaders, and many Members of Congress have sought this basic goal. Indeed, the goal is remarkable and unusual only in the sense that it has been so flagrantly denied for so long to so many citizens.

In a Nation that was founded on the principle of representative government and that has prided itself for two centuries on the strength and vitality of its democracy, it is a travesty of history that the District of Columbia has no voice in Congress.

Now, however, the struggle for justice for the District of Columbia has entered a new and important phase. Last year, President Carter warmly endorsed the goal of full voting representation. No other action of the President has so clearly demonstrated the point that the administration's worldwide concern and sensitivity for human rights begins at home.

Last month by an impressive two-thirds vote, the House of Representatives approved a constitutional amendment—House Joint Resolution 554—to provide full voting representation for the District of Columbia in both the House and the Senate—two Senators

and two Members of the House of Representatives on the basis of recent population estimates.

Now, the spotlight is on the Senate. For the first time, we have a realistic opportunity to achieve the goal, and we should not let the opportunity slip away.

Nowhere in America should the principles of democracy be more firmly established than in the Nation's capital. The time has come to remove the cloud of "America's Last Colony" from the District of Columbia.

As a practical matter, the goal will be best achieved by moving the debate out of the cloakrooms of the Senate and into the arena of national debate. In my view, voting representation for the citizens of the District of Columbia deserves a top priority as one of the most important issues of civil rights and human rights in this election year of 1978.

I am here today to speak in support of Senate Joint Resolution 65, the constitutional amendment that I have introduced with the bipartisan support of you, Mr. Chairman; my colleague from Massachusetts, Senator Brooke; Senator Mathias; the late Hubert Humphrey; Senator Javits; Senators Leahy, Matsunaga, Metzenbaum, Riegle, and Weicker.

I also wish to give my equally strong support to House Joint Resolution 554, the companion measure that passed the House of Representatives a month ago.

The House-passed amendment is identical in its basic purpose to the Senate measure we have proposed. The House amendment is not technically before the committee today, because those of us who support it are taking the procedural steps required to place it directly on the Senate calendar.

In this way, the full Senate will have the opportunity to vote on it, regardless of the delaying tactics that have sometimes been used to prevent action on it by this committee.

We also must smoke out the unfair and disgraceful arguments sometimes found lurking in opposition to District of Columbia representation—arguments based on factors such as race, party affiliation, or political philosophy.

There is no justification whatever for denying representation in Congress to the people of the District of Columbia for fear that the new Senators may be liberals or Democrats or blacks. Such arguments cannot stand the light of day. They are unworthy of the Senate or the Nation.

Other opposition to the proposed amendment has usually crystallized around three fallacious arguments that are easily rebutted.

THE STATEHOOD FALLACY

Some opponents of full representation claim that the District is a city, not a State, and that only States are entitled to representation in the House and Senate. They argue that there is no greater reason for this city to be represented in Congress than there is for other larger cities which are also denied this right.

But this argument ignores the obvious fact that other American cities are political subdivisions of the States. They already have

responsible representation in both the Senate and the House, while the citizens of the District have no representation at all.

The most recent population figures show, as you pointed out, Mr. Chairman, that seven States—Alaska, Delaware, Nevada, North and South Dakota, Vermont, and Wyoming—actually have populations smaller than the population of the District.

The citizens of these States are entitled to participate in the selection of the Senators and Representatives who write the Nation's laws. Yet the 700,000 citizens of the District have no such right.

Moreover, for years the District of Columbia has traditionally been treated as a State in virtually every major grant legislation. In program after program, in statute after statute, all of us in Congress are familiar with the well-known clause in legislation, "For the purposes of this legislation, the term 'State' shall include the District of Columbia."

The statehood argument is no more than a thinly veiled excuse to perpetuate the denial of congressional representation to the people of the District.

The District is neither a city nor a State. In fact, statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical status of the Nation's Capital.

But such debate should not be allowed to mask the basic fact that, 200 years after the Nation was founded, the people of Washington are second-class citizens, deprived of the right to participate in the making of the laws by which they are governed.

THE ARTICLE V CONSTITUTIONAL FALLACY

Another occasional objection to District of Columbia representation in Congress rests on the proviso in article V of the Constitution which declares that "no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It is far too late in our history, however, to argue that granting representation in Congress to the District of Columbia would deprive any State of its "equal suffrage in the Senate."

Since the ratification of the Constitution by the original 13 States, 37 additional States have been admitted to the Union. As a result, the suffrage of the original 13 States in the Senate has been "diluted" nearly fourfold, from 2/26 to 2/100. Yet, no one seriously argues that any of the older States has been deprived of its equal suffrage in the Senate by the admission of new States.

The principle is clear. So long as the District of Columbia is represented in the Senate equally with every other State, representation for the District of Columbia will not offend the provisions of article V. Each State will still have two votes in the Senate, and each State will still have the same proportionate vote as every other State.

During extensive hearings by the House Judiciary Subcommittee on Civil and Constitutional Rights, leading constitutional scholars strongly endorsed full voting representation for the District, including representation in the Senate as well as in the House.

DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

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It was certainly not intended by the Senator from Indiana that you should not be allowed to make your statement.

I would point out that although we have differing opinions here on the merits of this legislation, as far as the chairman is concerned, there is no perfidity in his efforts to move this legislation.

Shall we move on?

Our next witness this morning is the Honorable John M. Harmon, Assistant Attorney General of the Office of Legal Counsel, representing the position of the President of the United States.

Mr. Harmon, we appreciate your coming before the committee. You are the President's strong right arm in many instances and have been of great service to the Members of the Senate.

Our committee owes you an apology for the inconvenience you have been put through over this last weekend. I do not know who is responsible for the mail not reaching you before Thursday, but certainly we sent the notice sometime prior to that.

I appreciate that you did not get notice until the 13th, and that has caused you a significant amount of anticipation over this weekend.

TESTIMONY OF JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. HARMON. Mr. Chairman and members of the subcommittee, I am grateful for this opportunity to appear before you for the purpose of presenting the views of this administration on the representation of the District of Columbia in Congress.

I wish to express the strong support of the President and his administration for the principle of full voting representation for the District of Columbia.

As you are well aware, the House of Representatives passed House Joint Resolution 554 on March 2, 1978. That resolution proposes a constitutional amendment which resembles Senate Joint Resolution 65 in its most important features.

The House's action followed the issuance on September 21, 1977, of an announcement by Vice President Mondale of this administration's support for full voting representation for the District. The Vice President made his statement after examining the issues with a task force composed of Members of Congress, including Senators Leahy and Mathias, officials of the District of Columbia Government, and representatives of the executive branch.

Simply stated, the administration supports full voting representation in Congress for the District as a matter of simple justice for the citizens of the District of Columbia.

The administration favors the general approach to representation of the District of Columbia in Congress taken both by Senate Joint Resolution 65 and House Joint Resolution 554. Because these proposals raise many of the same issues, much of my testimony today will parallel statements made by Assistant Attorney General Patricia Wald in her testimony before the House Subcommittee on Civil and Constitutional Rights when it was considering House Joint Resolution 554.

Before discussing the provisions of Senate Joint Resolution 65 in detail, however, I would like to explain why the administration

prefers this approach to other methods of providing representation for the District which have been proposed in the past.

ALTERNATIVE WAYS OF PROVIDING DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

One alternative which has been the subject of extensive discussion in the past is the possibility of providing for the District of Columbia to enter the Union as an actual State.

Some of those who favor this option have argued that new States can be admitted to the Union by means of a simple majority vote in both Houses of Congress, thereby avoiding the cumbersome process of amending the Constitution.

We believe, however, that any attempt to make the District a State without an amendment to the Constitution would present both legal and practical problems. See *Coyle v. Smith*, 221 U.S. 559, 567, 1911.

Article I, section 8, clause 17 of the Constitution provides that Congress shall have power:

To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .

If admitted to the Union as a State, the District of Columbia would be on an equal footing with the other States with respect to matters of local government.

We do not believe that the power of Congress vested by Article 1, section 8, clause 17 of the Constitution to exercise plenary legislative jurisdiction over the District could be thus permanently abrogated by a simple majority vote of both Houses of Congress. That could only be accomplished, in our view, by a constitutional amendment.

One suggested method of overcoming this difficulty advanced by proponents of statehood would be to carve a "Federal enclave" out of the District, over which the Congress would continue to exercise exclusive legislative jurisdiction.

The creation of such an enclave could presumably take place by one of two methods. First, Congress might, in effect, redraw the map of the Federal District to include only the areas in which Federal installations are located. The remainder of what is now the District could then be admitted as a State.

At this point, a practical problem is presented.

The impact of the Federal presence in the District is far greater than the impact of the Federal presence in any single State. More than half the District's land area is covered by Federal facilities which are scattered throughout the area.

Any concentrated "Federal enclave" would be very difficult to circumscribe and would have to be geographically fragmented. This would give rise to complex arrangements for sewers, police and fire protection, and other services. Moreover, it is questionable whether such a geographical entity could fairly be characterized as a single District at all.

A second method Congress might use would be to leave the present boundaries intact but designate as Federal installations the land and buildings already located there. These would have the

same status as Federal installations in other States, which are also governed under article I, section 8, clause 17.

Although this clause gives Congress the same substantive powers over Federal installations in the States as over the District, the State's consent is a precondition to exclusive jurisdiction.

As in the case of Alaska and Hawaii, a statehood act could condition admission as a State on the consent of the people of the District to the retention of Federal jurisdiction over selected areas. (See Hawaii Statehood Act, §§ 6(b)(3), 16(b), 73 Stat. 4; Alaska Statehood Act, §§ 8(b)(3), 10(b), 11, 72 Stat. 339.)

This would leave the problem of future acquisitions unsettled. Moreover, it was the intent of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities. (See "the Federalist," No. 43.)

If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the framers' intentions.

Conferring statehood on the District without amending the Constitution would also raise questions about the effects upon the 23d amendment. That amendment provides that in choosing the President and Vice President, the District shall be entitled to no more electors than the least populous State; at present it chooses three.

If the District were to become a State, however, it might be entitled at its current population level to four electors under article II, section 1, clause 2.

It has been argued that since the 23d amendment refers by its terms to "the District constituting the seat of Government of the United States" it will simply become a dead letter when a District ceases to exist.

We do not believe, however, that Congress is entitled under the Constitution to take any action which would make part of that document a dead letter, short of amending it according to the processes it provides.

We also note that article IV, section 3, clause 1 states that no new States may "be formed by * * * parts of States, without the consent of the legislatures of the States concerned as well as the Congress."

When Maryland ceded what is now the District to the Federal Government, it consented only to creation of a Federal District, and not to the creation of a new State.

To make the District a State at this time by congressional enactment alone raises serious questions of whether the spirit and perhaps the language—of that clause would be violated.

While it may indeed be in the best interests of the District and the Nation for the District eventually to become a State, the many financial and practical as well as constitutional concerns that would accompany its total divorce from Federal controls would, we feel, delay unduly the rights of the District's citizens to be represented in Congress.

On the other hand, if the District is now given representation in Congress by a constitutional amendment which provides that it shall be treated like a State without actually becoming a State, Congress reserves the right to redefine the scope of home rule in

the future while assuring that District citizens will have an effective voice in any such future decision.

Another suggestion that has been made as a method of bringing the citizens of the District of Columbia into full participation in the Federal political process without the necessity of a constitutional amendment is for Congress to cede the District back to Maryland.

District residents could then participate in the political life of that State, including the election of Senators and Congressmen. However, there are definite problems with this approach.

A substantial question exists as to whether the Maryland legislature would have to vote to accept this cession. Article IV, section 3 of the Constitution appears intended to enunciate the general principle that the borders and land areas of States are not to be changed without their consent.

Thus, in 1846, when the land area that is now Alexandria County was ceded back to Virginia, the Virginia Legislature did vote to accept the territory. We are aware of no substantial sentiment in Maryland favoring the return of the District which would lead that State's legislature to consent to retrocession.

Moreover, there is no indication that the people of the District desire to become citizens of Maryland. The District has become a distinct political entity, with its own leaders, its own political, social, and economic life.

We strongly question the desirability of submerging that identity in a larger political unit such as that of the State of Maryland.

Because of these difficulties, the administration favors the approach taken by S.J. Res. 65: A constitutional amendment to provide in effect that, for purposes of representation in Congress, the District shall be treated as though it were a State.

The residents of the District would thus be empowered to elect two Senators and the number of Representatives to which its population would be entitled.

A constitutional amendment is necessary under this approach because article I, section 2 of the Constitution provides that the House of Representatives "shall be composed of Members chosen by the people of the several States."

The 17th amendment provides that the Senate shall be "composed of two Senators from each State." If the District is not to be a State, then an amendment is required. One of the fundamental purposes of article I is to structure the various levels and forms of government within the United States.

The article very clearly contemplates that there is to be a Congress and there are to be States, with specific powers allocated to each. The article just as clearly contemplates that a third unit of Government—the Federal District—is to exist in a form separate and distinct from that of the States.

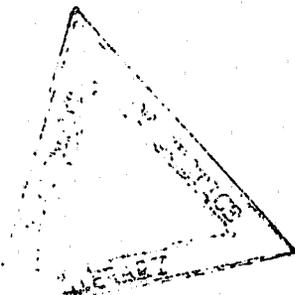
Because article I was in part intended precisely to distinguish the Federal District from the States, we do not believe that the word "State" as used in article I can fairly be construed to include the District under any theory of "nominal statehood."

Cf. P. Raven-Hansen, "Congressional Representation for the District of Columbia; A Constitutional Analysis," 12 Harv. J. Legis. 167 (1975). If "nominal statehood" is not a viable possibility, then a constitutional amendment is necessary.

In our view, the constitutional amendment is necessary.

REPRESENTATION FOR THE DISTRICT OF COLUMBIA

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS



FIRST SESSION

ON

PROPOSED CONSTITUTIONAL AMENDMENTS (H.J. RES. 139, 142,
392, 554, AND 565) TO PROVIDE FOR FULL CONGRESSIONAL
REPRESENTATION FOR THE DISTRICT OF COLUMBIA

AUGUST 3, SEPTEMBER 14, 21, OCTOBER 4 AND 6, 1977

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But the District would have no voice beyond this. Apparently, there is a good reason for this irony. It is not clear that the elected governing body of the District is the equivalent of a State legislature. Therefore, it is not clear that Congress should trust the elected governing body of the District to ratify in the name of the District a constitutional amendment. Over time more responsibilities may be given to the District government and confidence in its capacity to make decisions may grow. My proposed fifth Section would recognize that Congress should have the power to include the District in the ratification process in a manner that it deems desirable. There is little reason now to shut the door on the possibility that the District can effectively participate in the amendment process in the future. And there is scarcely more reason to undertake a debate now on the current state of local government in the District of Columbia.

One final red herring needs to be disposed of before I conclude. The argument has been made that persons who would vote for members of Congress in the District have roots that do not run deep enough to warrant the same kind of representation given to citizens of the States. In this mobile society it is questionable whether most people have roots that run very deep in the community in which they vote. Assuming, however, that citizens in most States have drawn sustenance from the places in which they vote for a longer period than have District residents, the fact remains those who are in the District, even for a period of only a few years, have an interest in common with those who have been there for a longer period of time. One who resides in the District and can satisfy residency requirements has the same problems as any other District resident and the same stake in voting. What difference does it make whether someone is spending two, three or ten years in the District? Federal legislation that extends beyond the States to reach the District affects people who are in the District even for a short period. And more importantly, the legislation that Congress many enact with specific reference to the District has a particular impact on those who reside there for any length of time. The Supreme Court has made it quite clear that it is permissible for States to attempt to differentiate people who have been present for a short period from those who have been present for a long period when it comes to voting. The Congress paved the way for this view in its voting rights legislation. Those who have sufficient connection with the District qualify as voters and deserve a vote no matter how long or how short a period they have been present.

A carefully conducted census should assure that only those who are permanent residents of the District are counted for apportionment purposes.

Mr. EDWARDS. Thank you very much Professor Saltzburg. Our final panel member is Patricia M. Wald. Ms. Wald is the Assistant Attorney General of the Office of Legislative Affairs and I might add that the subcommittee staff has always found it a privilege to work with Ms. Wald.

We are delighted to have you here and you may proceed.

TESTIMONY OF PATRICIA M. WALD, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

Ms. WALD. Thank you Chairman Edwards, Congressman Butler. If I may, I would like to very briefly summarize some of the points from my longer statement which is in the record.

As the subcommittee knows, a task force consisting of Members of Congress, District of Columbia officials, and administration officials met over a period of several months and arrived at several positions outlined in Vice President Mondale's statement of September 21.

The administration endorsed in that statement "the principle of full voting representation for the citizens of the District." This morning I would like to discuss briefly the administration's thinking as to how best fulfill that goal of full voting representation.

It has been eloquently argued by Professor Miller here that the District could be given by act of Congress instant statehood thereby

avoiding a more time consuming and relatively cumbersome process of constitutional amendment. Although we are not expressing any opinion on the ultimate desirability of statehood, we cannot agree that it can be achieved without constitutional amendment.

We do see article I, section 8, clause 17, as according Congress the power to exercise exclusive legislation in all cases whatsoever over such District as may become the seat of the Government of the United States as an obstacle to the unilateral decision by Congress to convert the District into a State.

It has, of course, been suggested that a Federal enclave might be carved out of the District to encompass all Federal buildings and land over which Congress would continue to exercise jurisdiction while the rest of the District of Columbia would become a State.

This presents practical and even theoretical problems. More than half of the District's land area is occupied by Federal facilities, but those facilities are scattered throughout the District so as to make any geographically concentrated Federal enclave an impossibility.

Complex arrangements for fire, power, police, and sewer services would be required. I agree with Professor Miller that presumably such arrangements could be arrived at eventually. But we think there is a more basic issue.

Would the remaining non-Federal area constitute in any real sense a geographically homogeneous entity that justifies statehood? We don't suggest an answer in either the affirmative or in the negative for all time, but only that legitimate questions might be raised as to the political wisdom and sincerity of a congressional enactment which attempted in effect to Balkanize the District so as to create a new State by building it around Federal land and installations.

One variation on the statehood proposal is to leave the present District boundaries intact and convert them into a State, then utilize the provisions of article I, section 8, clause 17 pertaining to Federal installations within State boundaries in order to retain congressional control over the Federal property.

There are problems with this approach. First, we believe the consent of the State legislature must, under article I, section 8, clause 17, be obtained to permit the location of such installations. And, second, we believe the syntax of the constitutional provision is such that the drafters meant for the District not to be located within the borders of any State.

It would seem at odds with that intent to treat the seat of Government just like any other Federal facility in a State.

There are, finally, two other objections to conferring statehood upon the District by congressional resolution. The 23d amendment, to which Professor Saltzburg referred, provides that the District shall choose a number of electors for President and Vice President no greater than the number chosen by the least populous State.

If the District became a State it would be entitled to four electors under article II, section 1. Perhaps, as some people have argued, the 23d amendment would simply become a dead letter since it applies to the District which would then cease to exist and become a State.

Still, the question of whether Congress could lawfully make a dead letter out of a constitutional amendment would almost surely be raised and become the subject of litigation.

Article IV, section 3, clause 1, also states that no new State shall be formed by parts of old States without the consent of those States. When Maryland in 1791 ceded land to the Federal Government it was for the creation of a District as a Federal seat, not for a new State.

It is at least questionable—I don't suggest that we know the definitive answer—whether a new State could be created from that land even after the ensuing passage of all of this time without the consent of the Maryland State government.

Aside from constitutional concerns with other alternates, however, there are in our opinion some cogent reasons why we should press now for full congressional representation, leaving the problem of statehood for a later time.

We are afraid that bringing that question to focus now would inevitably involve more delay in working out the financial home rule question.

Another suggestion for solving the problem of full D.C. representation has been to have Congress cede the District back to Maryland thereby allowing D.C. residents to vote as Maryland citizens.

This presents the issue, again, of whether Maryland must itself consent to accept any such retrocession. We think it would have to, under article IV, section 3. We believe more basically that such a course would do injustice to the political, social, and economic life of the District and its inhabitants which has taken its own unique developmental course over the past 200 years.

This option would also require a constitutional amendment, in our view, in view of the exclusive legislation clause.

One last variation on this proposal would be to retain congressional governance of the District but to permit D.C. residents to vote in Maryland.

We believe that this, too, would require a constitutional amendment because, as I believe Professor Saltzburg has pointed out in his statement, there is language in article I, section 2, and in the 17th amendment limiting Members in the House and Senate to those elected by people of the several States.

Under such a plan, too, District residents would not be able to vote for Maryland governors or legislators even though those officials would determine the qualifications of voters for Federal elections and even the places where elections are held as well as the drawing of election districts and the appointment of interim Congressmen.

Thus, it would not only be politically artificial, but it would fall short of giving D.C. residents full representation.

In sum, we think the most straightforward and direct route to full representation is through a constitutional amendment such as H.J. Res. 554 and 565. Those proposed amendments would treat the District as if it were a State for purposes of electing members to the House and Senate, and for other purposes.

We don't think article V of the Constitution would be violated so as to require assent by all 50 States, since no State would, in effect, be deprived of its equal suffrage in the Senate. The District's position would be no different than that of any of the dozens of new States that have entered the Union.

We don't think any precedent would be set that would affect the very different situation of territories whose inhabitants are not U.S. citizens, many of whom are destined for independence or statehood.



Congressional Record

PROCEEDINGS AND DEBATES OF THE 95th CONGRESS, SECOND SESSION

SENATE—Wednesday, August 16, 1978

(Legislative day of Wednesday, May 17, 1978)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by Hon. HARRY F. BYRD, JR., a Senator from the State of Virginia.

PRAYER

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

And above all put on love, which binds everything together in perfect harmony.—Colossians 3: 14.

Eternal Father, the strength of our lives from generation to generation, our morning prayer ascends from grateful hearts and wistful spirits. Enter Thou our hearts and in this one fleeting moment make us deeply aware of Thy presence. Assure us that with Thy help we are ready for every responsibility this day brings.

Make our hearts Thy dwelling place. Cast out everything which obstructs Thy presence. Fill our hearts with love that there may be no room for hate or jealousy or resentment. Fill our minds with truth that there may be no room for falsehood. May Thy grace so abide in our souls that the time of prayer and the time of work may be indistinguishable.

When the shadows of evening fall upon us, give us a consciousness of work well done for our fellow man.

We pray in His name who went about doing good. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. EASTLAND).

The assistant legislative clerk read the following letter:

U. S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., August 16, 1978.

To the Senate:

Under the provisions of rule I, section 3 of the Standing Rules of the Senate, I hereby appoint the Honorable HARRY F. BYRD, JR., a Senator from the State of Virginia, to perform the duties of the Chair.
JAMES O. EASTLAND,
President pro tempore.

Mr. HARRY F. BYRD, JR., thereupon assumed the chair as Acting President pro tempore.

THE JOURNAL

Mr. MORGAN. Mr. President, I ask unanimous consent that the Journal of yesterday be approved.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

SPECIAL ORDER

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from North Carolina (Mr. MORGAN) is recognized for not to exceed 15 minutes.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield?

Mr. MORGAN. I yield.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that I may proceed for 1 minute, the time not to be charged against the time of the Senator from North Carolina.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER TO CONVENE AT 9:30 A.M. TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate convenes tomorrow, it convene at 9:30 a.m.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

CIVIL SERVICE COMPLIANCE WITH COURT ACTION IN CONNECTION WITH FEDERAL EMPLOYEES

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 1006.

The ACTING PRESIDENT pro tempore. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (H.R. 8771) to amend title 5, United States Code, to authorize the Civil Service Commission to comply with the terms of a court decree, order or property settlement in connection with the divorce, annulment, or legal separation of a Federal employee who is under the civil service retirement system, and for other purposes.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. STEVENS. Mr. President, marriage

is a partnership in which each spouse makes a unique and vital contribution. Each spouse has a right in the earnings of the other, in the property acquired with those earnings and in the management of such property. This right should be recognized as surviving the marriage in event of its termination by divorce, annulment, or legal separation. Under existing law, payments under the civil service retirement system are not assignable or subject to execution, attachment, or garnishment, except as may be provided by Federal laws. Due to this provision, court orders, decrees or property settlements are not honored by the Civil Service Commission.

I thus support H.R. 8771. This bill will give the Civil Service Commission the authority to comply with the terms of a valid State court decree, order, or property settlement in connection with the divorce, annulment, or legal separation of a Federal employee who is entitled to payments under the civil service retirement system. This bill will not only eliminate the obstacles presented by existing law to the enforcement of State court decrees, but it will reinforce what is already the law in many jurisdictions of this country.

As a future note, I hope that in an upcoming session we will be able to expand on this initiative so that survivor benefits may also be made available to a spouse after a marriage has been dissolved.

H.R. 8771 is a definite beginning step in bringing justice and attention to a group that is often ignored. I commend the chairman of the Subcommittee on Civil Service and General Services, Senator Sasser, for his diligence in pursuing a solution to this problem.

The bill (H.R. 8771) was ordered to a third reading, read a third time, and passed.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. STEVENS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to have printed in the Record an excerpt from the report (No. 95-1084), explaining the purposes of the measure.

There being no objection, the excerpt

Statements or insertions which are not spoken by the Member on the floor will be identified by the use of a "bullet" symbol, i.e., •

totally incompatible with, the role the District now plays in the overall structure and functioning of our federal system of government.

Our Constitution provides a framework in which the individual sovereign states would form a more perfect union. At the same time though, the Framers of the Constitution recognized "the indispensable necessity of complete authority at the seat of government," (Madison, Federalist No. 43). Without it they feared that the state encompassing the seat of government might unduly influence the national governing body. They wanted each state to be truly equal with the others, not one state more equal.

From this we clearly see the Founding Fathers' intention to carve out an area of land that was to be unique and special in every respect vis-a-vis any other state of the union. It was not to be a state. It was to be a solely federal district. It was to be responsible only for itself, the seat of the federal government. Unlike a state, the District was to have no legislature and no constitution. Most importantly, its peculiar character would deny it those qualities that make a state, any state, sovereign.

The special nature of the District is illustrated in another way. Every year it receives a direct grant from the federal government that supplements locally generated revenue; something the states do not get. For Fiscal Year 1977 this amounted to \$270,357,000. In addition, it can borrow directly from the federal treasury to finance capital projects; something the states can not do. Loans for such outlays in 1977 came to \$101,292,000. The District also participates in federal grant programs. In Fiscal Year 1978 it will receive roughly \$300 million through such grants.

Appropriately enough, in Fiscal Year 1978, 47% of the total resource available to the District will come from federal sources. And these figures do not even include federal outlays for national parks, the Smithsonian Institution, the Kennedy Center, the National Zoo, St. Elizabeth's Hospital or the benefits the District receives from the large number of tourists brought to the area to see Washington's many federal attractions.

These financial privileges were granted to the District pursuant to the notion, first established by the Framers of the Constitution and later accepted by the several states, that it would be maintained by the Federal Government for the federal government's operations as compensation for its waiver of any claim to the incidents of sovereignty. It seems reasonable to me then that any attempt to remove the special political status of dependency of the District of Columbia must be accompanied by concomitant steps to remove its financial status of dependency. If the District now wishes to take its place among the several states, it should be willing to join a state such as Maryland and forego the federal largesse which has flowed as a result of its very special status.

Under our constitutional scheme of government the several states are to be treated with a modicum of equality. This scheme, in my opinion, cannot tolerate a situation in which one "hybrid state" is more equal than the others. There is, then, a serious question whether, by allowing federal representation of an entity which does not possess the attributes of statehood, we are not in fact treating the states less equally and depriving them of the exercise of their distinct measure of individual sovereignty, in violation of constitutional, as well as historical, mandates.

U.S. Senators and Congressmen from the District would be in the seemingly paradoxical, but at least unique, position of representing the interests of the federal district to the Congress which has the constitutional responsibility for the District, but not the states.

It is true that District residents pay federal taxes. But it is also true that because of the District's special status they enjoy distinct advantages not available to the residents of the sovereign states. Granting full voting representation to the District would in effect simply add another layer of cake to the one its residents already savor. In this instance the blessing of statehood would not be accompanied by the burdens generally associated with it.

In sum, the reasons for maintaining and insisting upon a unique federal district are no less compelling today than they were in 1789. But if we are going to legislate into existence this new "Hybrid state," then at the very least we should demand that its umbilical cord to the federal treasury be severed.

Mr. BARTLETT. Mr. President, I yield the floor.

Several Senators addressed the Chair. The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. I will be glad to yield to the Senator from Nebraska.

Mr. CURTIS. I wanted the floor in my own right.

Mr. BAYH. I rise to offer my support enthusiastically for House Joint Resolution 554, a constitutional amendment to establish full voting representation for the more than 750,000 citizens of the District of Columbia.

Before I present my substantive argument in support of this resolution, let me at Joint Resolution 65, a similar measure make it clear that despite the fact that hearings were held in my Subcommittee on the Constitution, on Senate which has been introduced and sponsored by several of us in the Senate, I, nevertheless, feel that the House version is a far better vehicle by which to bring political equity to the citizens of the District of Columbia.

For that reason, I decided not to try to report out Senate Joint Resolution 65, but instead to join my very distinguished colleague (Mr. KENNEDY) in getting House Joint Resolution 554 expeditiously passed by the necessary two-thirds vote.

If, indeed, the Members of this body feel there is a substantive and equitable reason behind this effort, it seems to me that we cannot be blind to the procedures of the Senate Judiciary Committee, which would make the movement of the Senate bill through the subcommittee and the Judiciary Committee, for all intents and purposes, impossible, given the time constraints on the Senate at this time in our session.

Mr. President, let me look at the basic reasoning, the substantive reasoning, and suggest that if anyone desires to debate the procedure, I am prepared to do that as well. The substance, it seems to me, is the most important matter to consider in any legislative effort, and we should not let procedural differences stand in our way of accomplishing substantive equity.

Mr. President, it may appear strange to some observers that the senior Senator from Indiana has chosen to champion the cause of citizens living approximately 600 miles from his home State. But I chose to champion this cause out of a grave concern for an injustice that transcends State boundaries. That injustice has to do with a living paradox in the American scheme of government.

Right here in the Nation's Capital, which is the seat of the greatest representative democracy the world has ever known, the democratic values and principles that we all cherish and protect are abused. Right here in Washington, D.C., nearly three-quarters of a million citizens are denied the right to representation as it is commonly granted in the 50 States of the Union.

I listened with a degree of understanding and patiently as my colleagues on the other side of this argument expressed their opposition. One can look at all the reasons for not supporting this amendment, but in no way can one deny the fact—that in Washington, D.C., we have nearly three-quarters of a million citizens who are denied the right of full representation as it is commonly granted in the 50 States of the Union. Second-class citizenship exists for three-quarters of a million Americans who live in the District, and there is no way to explain that away.

Residents of the District, though citizens of the United States subject to all obligations of such citizenship, have not had voting representation in Congress since 1800; and only since 1984, and the ratification of the 23rd amendment to the Constitution, have District residents been entitled to vote for electors for the offices of President and Vice President of the United States. It was not until April 1971 that they were given the right to elect a nonvoting delegate to the House of Representatives. And let me add that the citizens of the District have been extremely well represented in the person of Delegate Walter Fauntroy for the past 7 years.

I wondered, as I listened to the arguments against giving representation to the citizens of the District, if indeed one is to follow that rationale for denying full citizenship in the congressional branch, that, to be consistent, those same voices should have been raised in opposition to letting the citizens of the District vote for the President; because much of the rationale, to be consistent, would have to apply across the board.

I had the good fortune, as the minority floor leader of the Indiana House, to be the principal sponsor of the ratification petition in the Indiana General Assembly.

It seems to me that we are talking about the rights of citizenship, and they are not visible. They have the right to vote for President but not the right to be heard as to those issues decided in Congress.

But more must be done and it must be done now. No more delays. No more talk of retrocession, or of studies to determine the feasibility of retrocession.

I respect the position of those who might suggest this alternative, but the time has come to act. We must go forward in extending full representation to the citizens of the District. I say this because I firmly believe that the circumstances leading to the disenfranchisement of the District's citizens have drastically changed. Let us look at history and lay it on the facts of life as they exist today.

The Founding Fathers were intent on providing a site over which the Federal Government would exercise exclusive

control. That has been discussed at some length by the opponents to this amendment. The Founding Fathers wanted a separate capital which would not only protect the national image, but which would be immune from both jurisdictional disputes as well as potentially harassing incidents. For many of the Founding Fathers, national representation for the District would necessarily have precluded the establishment of exclusive Federal control over the capital site. As James Madison so eloquently stated in the Federalist Papers, "Complete Federal authority at the seat of government" was necessary to avoid the "dependence of the members of the general government on the State comprehending that seat for protection in the exercise of their duties." Clearly, the founders perceived the need for a strong Federal territory, free of State encroachment, and secure from domestic unrest.

However, it should be noted that while the framers fully intended to establish a separate capital city, they never fully decided to exclude the residents of that city from political representation. As a matter of record, it is important to note that between 1790 and December 1800, residents of the District participated in State and National elections, including the Presidential election of November 1800, by voting in either Maryland or Virginia. However, when Congress finally assumed control of the District late in 1800, the lame-duck administration of John Adams rushed to take over the administration of the District before President-elect Thomas Jefferson's administration came to power. As Pulitzer Prize-winning historian Constance Green points out, the Federalists neglected to give the franchise to District residents when legislating the takeover. After the Federalists left office, attempts were made immediately to rectify the problem. Unfortunately, as the fight to retrieve suffrage for the District residents began in February 1801, the measure was lost in the shuffle of the Jefferson-Burr electoral college deadlock controversy which plagued that particular Congress. Since that time, there have been more than 150 attempts to provide representation for the District. Most of these measures have also been victimized by what was then considered much more pressing business before Congress.

So, Mr. President, it seems to me that we must realize that circumstances have changed. There is no longer the question concerning the harassment by citizens of the Nation's Capital, as was the major reason for the creation and concern for independence of a Capital City, as expressed earlier in my remarks, by President Madison.

Also, I emphasize again that our Founding Fathers did not desire—it was not in their thoughts—that the residents of the Capital City would not have a chance to be heard and represented in the Congress of the United States.

We must not overlook a very basic reason why the District failed to receive representation in the early years of the Republic. Its population was simply too small. In 1801, the District had only 14,000 residents, far fewer than the

50,000 required of territories that wanted to enter the Union at that time. Quite naturally, such a small population could be easily overlooked. Yet, during the 1801 debates on District suffrage, many Members of Congress spoke of providing representation for the District when its population reached the appropriate size.

Today, the population of the District is entirely appropriate for representation. Given its size alone as criterion, representation is essential. The District's present population is larger than 7 of the 50 States in the Union—and larger than that of any of the original 13 States during the first years of the Republic.

Finally, I must state what to me is the most important consideration in this discussion. There is nothing more abhorrent to the American people than the idea of taxation without representation. One of the fundamental principles enunciated by our Founding Fathers was the firm belief that those citizens who contributed to the public coffers should and would have the right to elect their leaders. Over 200 years ago, the injustice of taxation without representation served as one of the major elements which drove our forefathers to revolution. We will fail to be consistent with the dictates of our forefathers if we do not provide representation to a portion of our citizens who are law-abiding taxpayers.

So let us put an end to this glaring contradiction in our philosophical principles. Let us not make a mockery of our democracy. We have the means by which to make the dreams that our forefathers fought and died for a reality. It is a basic premise of our system of government that each deserves a chance to be heard and to express his or her political views through a freely elected representative or representatives. That is all the citizens of the District are asking. The irony of these proceedings is that they have to take place at all. Therefore, it is our responsibility and duty as members of the most democratic governmental unit in the world to correct this wrong, through the immediate passage of House Joint Resolution 554.

Mr. PELL. Mr. President, will the Senator yield for a question?

Mr. BAYH. I yield.

Mr. PELL. I have long been interested in this subject. I notice that originally, a substantial part of what is now Virginia, on one side of the river, and the District of Columbia, on the other, were in a 10-mile square. Then, some years ago, the part that was residential, which was on the other side of the river, was ceded back to Virginia as Arlington County.

I often have had the thought that the Federal Triangle itself obviously should not be under any State's rule—the Federal Triangle being that section bounded by the State Department, the Lincoln Memorial, and the Capitol—but that the rest of the area is really a residential city. It is not much different than the situation between Chevy Chase, Md., and the suburb on this side of the border. If it were part of Maryland, for example, it would then be the largest city, I guess, in Maryland. It would be Washington, Md.

Why was the idea never taken seriously of having it become part of Maryland? With the huge affectionate regard for the proponent of the bill, I am sure he can satisfy my curiosity.

Mr. BAYH. It seems to me, that the most immediate response or direct response is to say that there is no way I think of that we can constitutionally do this without the concurrence of the State of Maryland, and from talking with Members of Congress as well as the State government in Maryland they like things as they are now. They view the District of Columbia as a city within its boundaries and see no reason why they should suddenly have to assume responsibility and consider this as a part of the State of Maryland.

Mr. PELL. Have they ever been directly asked if they are interested in doing this?

Mr. BAYH. They certainly have been indirectly asked, and the response has been as I suggested to my friend from Rhode Island.

Mr. PELL. Will there be an amendment offered to that effect mandating its return to Maryland as the largest city in Maryland in the course of this debate?

Mr. BAYH. There is nothing to prevent anyone from doing that. I understand that is one of the proposals before us and that such a proposal will be offered. I do not know whether it is possible really to cut the heart out of a body and have much left. It seems to me most of us who have come to this city and many of our constituents who find themselves coming for the first time have come to think of the District of Columbia as more than just a Federal triangle but indeed as a geographical area that incorporates the entire city of Washington, D.C.

Mr. PELL. But what is the difference, for instance, between Wesley Heights, to take a very high income area, and Chevy Chase next door; or on the other side of Maryland between southeast Washington and the line over into the Maryland frontier? Would that not be the same?

Mr. BAYH. I suppose that is the difference between East Chicago, Ind., and Chicago, Ill. There is a boundary line separating it, and that is the distinction that exists right here.

Mr. PELL. It would still leave the Federal triangle. And basically should not the Federal buildings be a separate Federal establishment? And it would give the other people the right of representation. This could be one way to give them representation.

Mr. BAYH. I point out to my friend from Rhode Island when our Founding Fathers established this as a capital city, if one is to look at what happened then, they did not just establish a place that should be the Federal city and say this is where the Federal buildings are. But they envisioned this as a viable city, a capital city with people who work, have businesses, and have transportation lines, and homes. The essential establishment of the Nation's Capital was not an establishment of the Nation's Federal buildings but the Nation's city.

SENATE—Monday, August 21, 1978

(Legislative day of Wednesday, May 17, 1978)

The Senate met at 9:30 a.m. on the expiration of the recess, and was called to order by Hon. KANEASTER HODGES, JR., a Senator from the State of Arkansas.

PRAYER

The Reverend Dr. Robert B. Harriman, director, the Presbyterian council for Chaplains and Military Personnel, Washington, D.C., offered the following prayer:

Heavenly Father, we thank Thee for continually raising up from among the people those who have dedicated themselves within the halls of government. We pray now for those who serve within this Senate. Grant wisdom to discern Thy will so that they may be wise in all their judgments. Open eyes and minds to see and comprehend that which is right. Grant health and energy for arduous tasks and long hours of deliberation. Give patience and thoroughness in efforts to understand the complex and difficult. Deliver them from words or action which would foster prejudice or encourage division. May desire for the Nation's welfare surpass any self-seeking or narrow-visions concern for a privileged few. Let no deception destroy trust, but rather may honesty firmly establish confidence. When we are right, keep us from gloating pride. When we are wrong, may our admission be followed by correction.

We pray for all entrusted with the guidance and welfare of the Nation. May those engaged in creating, administering, and judging our laws be so led by Thy wisdom that they shall faithfully lead the people in ways of righteousness and peace. Through Jesus Christ our Lord. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. EASTLAND).

The assistant legislative clerk read the following letter:

U. S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., August 21, 1978.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable KANEASTER HODGES, JR., a Senator from the State of Arkansas, to perform the duties of the Chair.

JAMES O. EASTLAND,
President pro tempore.

Mr. HODGES thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF LEADERSHIP

The ACTING PRESIDENT pro tempore. Under the previous order, the ma-

jority leader, the Senator from West Virginia, is recognized.

THE JOURNAL

Mr. ROBERT C. BYRD, Mr. President, I ask unanimous consent that the Journal of the proceedings be approved to date.

The ACTING PRESIDENT pro tempore. Without objection it is so ordered.

THE ARGUMENTS AGAINST A DEEP TAX CUT NOW

Mr. ROBERT C. BYRD, Mr. President, the serious problems that could befall the American economy if a very deep tax cut were enacted in fiscal year 1979 were examined in an article by Seymour Zucker which appeared in the August 7, 1978 issue of *Business Week*. The author provides data suggesting that a tax cut over the next 3 years on the order of \$124 billion would not pay for itself through increasing the tax base. To the contrary: The deficit would soar to \$100 billion by 1983, according to one study cited by Mr. Zucker. At the same time, the rate of inflation would be almost 2 percentage points higher with such a cut by 1982. The weight of the economic evidence is against a very deep tax cut at this moment in our economic recovery.

Mr. President, I ask unanimous consent that the article, "The Fallacy of Slashing Taxes Without Cutting Spending," be printed in the Record.

There being no objection, the article was ordered to be printed in the Record, as follows:

THE FALLACY OF SLASHING TAXES WITHOUT CUTTING SPENDING
(By Seymour Zucker)

Arthur B. Laffer first drew the curve on a napkin in a Washington restaurant back in 1974. It popped into his head as he was trying to persuade an aide of former President Ford that U.S. tax rates were so high that they were stifling economic growth. Lower tax rates, he maintained, would send employment and investment soaring to the point where tax revenues would actually rise, despite the lower rates. Laffer has been preaching that gospel ever since. And the Laffer curve—which purports to show the perverse effects of a high tax rate on government revenues—is being advanced as the economic rationale for the Kemp-Roth bill, the biggest tax-cut proposal in history.

Riding in the wake of Proposition 13, which cut California property taxes by 60%, Kemp-Roth is picking up strong support, especially among congressional Republicans. No one expects it to pass this year, but it stands a good chance of becoming the key domestic issue in the Republican congressional campaign in November and could also play a role in the Presidential election in 1980. The bill, introduced by Representative Jack Kemp (R-N.Y.) and Senator William V. Roth Jr. (R-Del.), would reduce everyone's taxes over the next three years by one-third, thus costing about \$124 billion in tax revenues. Its sponsors are pushing the Laffer argument that the tax cut will gen-

erate an economic boom of such proportions that in a few years the government will recoup all the initial revenue loss and then some. The reason: The huge tax cut will spark the incentive to work and invest, thus increasing the tax base. The effect is to shrink the deficit without cutting government spending by as much as a nickel.

Elementary. Laffer may have sold some politicians, but not his fellow economists. The economics profession—including some leading Republican economists who support Kemp-Roth—think Laffer would have done well to leave the napkin behind for the waiter to dispose of. They see huge debt and a rip-roaring inflation if Kemp-Roth is enacted without offsetting cuts into expenditures. To Harvard's Martin Feldstein, the theoretical principal that at some point reducing rates actually increases tax revenues "is something we teach in the first week of the course in public finance." The critical empirical question is to determine when the tax schedule gets into that range, he notes.

"The Laffer curve is more or less a tautology," says conservative economist George J. Stigler of the University of Chicago, where Laffer taught before going to the University of Southern California in 1976. "It has to be right at some level. If enterprise is not discouraged at 95%, then move it to 105% and Laffer would be right by definition." But in Stigler's view, Laffer has failed to show that the current tax structure—where the highest rate on earned income is 50%—has such an adverse effect on incentives that reducing rates would actually increase revenue. "Laffer is no longer a very serious scholar," says Stigler. "He is playing the role of a propagandist, and as such he is performing some service. But I would not base a \$125 billion tax cut on his work."

Feldstein and Stigler are not alone in their criticism of Laffer. Alan Greenspan, chairman of the Council of Economic Advisers under President Ford, favors Kemp-Roth—with some changes—because he holds that the only way to cut the growth of government spending is to cut taxes. "I'm for cutting taxes, but not for Laffer's reasons. I don't know anyone who seriously believes his argument."

Just how far off base is Laffer on the tax-revenue effects of Kemp-Roth? Otto Eckstein, president of Data Resources Inc., has run the Kemp-Roth proposal through his huge computer forecasting model. Assuming that it takes effect in 1979 and that there are no compensatory spending cuts, the *DR* model shows that the deficit will grow progressively worse. By 1983, the red ink in the budget—including additional interest payments—will increase to a mind-numbing \$100 billion. So rather than recouping the entire tax cut, as Laffer argues, *DR* finds that the Treasury gets only about \$25 billion of it.

OVERWHELMING EVIDENCE

To be sure, economists agree that a tax cut would increase total demand and national income and thus partly offset the initial revenue loss. But to offset the effect of lower tax rates fully, total income would have to rise by some four times the original amount of the cut. And the evidence is overwhelming that no cut in taxes could generate a rise in spending and income of that size. A \$10 billion tax cut, for example, produces roughly an extra \$15 billion of gross national product. The current marginal tax rate against total *GNP* works out to 25%, so the \$15 billion creates \$3.75 billion in new taxes—thus recovering barely a third of the initial

Statements or insertions which are not spoken by the Member on the floor will be identified by the use of a "bullet" symbol, i.e., •

Washington, D.C. is not a State, it is a city. A fine city, but still a city.

There is no diversity of interest, there is no rural population, there are no small towns, there is no agricultural area.

In brief, Washington, D.C., is a densely populated city of 690,000 persons in a 67-square-mile area.

I shall vote against giving two Senators to Washington, D.C., which action would simultaneously distort the Constitution, set a dangerous precedent of city representation, and diminish the influence in the Senate of each of the 50 States.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER (Mr. ROBERTS). The Senator has 2 minutes remaining.

Mr. HARRY F. BYRD, JR. I yield that additional 2 minutes to the Senator from Montana (Mr. MULLIN) when his time comes to speak.

Mr. MELCHER. I thank the Senator.

The PRESIDING OFFICER. Under the previous order the Senator from Idaho is recognized to offer his amendment.

UP AMENDMENT NO. 1685

(Purpose: To grant statehood to the District of Columbia)

Mr. McCURE. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Idaho (Mr. McCURE) proposes an unprinted amendment numbered 1685.

On page 2, strike out lines 2 through 10 and insert the following:

"Section 1. The District constituting the seat of government of the United States is hereby admitted into the Union as a State of the United States on an equal footing with the other States in all respects.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

Mr. McCURE. Mr. President, during the debate on the previous amendment, which would have retroceded the non-Federal Government in the District to the State of Maryland so that the people of the District might have the opportunity to have full civil rights, it was argued by the distinguished Senator from Massachusetts that we should instead grant them statehood, or at least that that would be more logically consistent.

Without conceding the fact as to where logical consistency might lie as between those two alternatives, certainly the arguments raised by the Senator from Indiana with regard to the difficulties of interpretation and application of voting rights as though they are a State without granting statehood is inherent to the pending resolution granting voting rights without statehood and would be completely solved by granting statehood.

(Mr. SASSER assumed the chair.)

Mr. McCURE. This, at least, Mr. President, would be logically consistent with the stated thrust and purpose of the sponsors and floor managers of this House Joint Resolution 554.

In my opinion, this is the only way to provide a permanent solution to the issue of extending the full rights of political participation to all citizens of the District and at the same time avoid the insurmountable constitutional objections that mar other proposals, including House Joint Resolution 554.

While statehood is possible by means of a simple majority vote in both Houses of Congress, under article IV, section 3, any attempt to admit the District to the Union as a State without amending the Constitution would pose major legal problems. For one thing, statehood by legislative enactment would abrogate the "exclusive legislation" power of the Congress over the District under article I, section 8, clause 17. Moreover, article IV, section 3, clause 1 makes the consent of the legislatures concerned a prerequisite for forming new States. When Maryland ceded lands to the Federal Government for establishing the District of Columbia, it consented only to the creation of a Federal district, not the creation of a new State. Thus, to make the District by congressional enactment alone would violate that provision of the Constitution.

Under amendment XXXIII the District has three votes in the electoral college, that is, no more than the number of electors accorded to the least populous State, however, it could be entitled to as many as four electors, according to the most recent census. Amendment XXXIII would become a virtual dead letter since the District would cease to exist. Such a change in the Constitution should be made by amendment, rather than by legislation.

Granting statehood to the District would not only guarantee to D.C. residents voting representation in both Houses of Congress, under article I of the Constitution, they would also be able to participate in the process of ratification of proposed amendments to the Constitution, article V; they would be entitled to as many electors for President and Vice President as they have Senators and Representatives, article 2, section 1; they would be assured of territorial integrity and protection against absorption into other States, article IV, section 3; and they would have complete legislative control over internal matters, free of congressional veto. All congressional authority over the District now provided in article I, section 8, clause 17 would be effectively turned over to the people of the District acting through their elected representatives in a State legislature.

This amendment would not only assure to D.C. residents equal citizenship rights with other Americans; it would grant to the District complete self-government according to the wishes of its own people, without Federal interference. It would free the Federal Government of the responsibilities of providing special treatment for the District at a tremendous expense to other U.S. citizens. The people of the District would not only enjoy the rights and powers of statehood, they would also assume the full burden and responsibilities of citizens of a State of the Union. No longer would

District citizens be considered second-class Americans or be victims of "taxation without representation."

Full representation is consistent with the principles of democracy upon which our Nation was founded. Statehood would attest to our commitment to equality and freedom for all American citizens and our concern for the transcending human rights throughout the world.

Mr. President, I reserve the remainder of my time.

Mr. BAYH. Mr. President, I have listened to my good friend and distinguished colleague from Idaho struggling with how this business of representation for the people of the District, some 750,000 of them, can be accomplished. I know he is sincere about this desire. But I say with all respect that it seems to me he is making it an overcomplex issue, a more difficult one to resolve than it really need be.

First of all, those of us who are supporting and have supported for some time the right of representation for the District citizens, have said from the beginning that the District of Columbia is a unique part of the United States of America. It is a unique bit of geography. It is a capital city. For reasons that have already been thoroughly discussed, basically size and security, our Founding Fathers established it to be separate and different from States early on.

Just as this unique characteristic exists, it seems to me that there is no need to go the statehood route in providing representation for the citizens of the District.

As I said earlier, I guess as a Senator from Indiana I hate to see us taking the Nation's Capital from 500,000 Hoosiers. It is part ours. I do not see why the District should be a State because it is, indeed, the Nation's Capital.

As I said earlier, there is no need to go the statehood route in order to resolve the inequities which exist here.

I will not belabor the Senator or the Senate with some of the distinctions between means of approaching statehood and the thrust of the Senator's remarks. The question of statehood is very much up in the air in the District of Columbia.

There is a core of support for statehood here. But nothing approaching the clear majority wishes of the people for representation short of statehood, the majority support for the very resolution which we now have before us.

I say to my good friend from Idaho, it seems to me, if one gets into the whole fundamental study of government, we can see why the approach recommended by the Senator from Massachusetts, the Senator from Indiana and the rest of us in this resolution is more appropriate to the need than statehood.

We have three levels of government, and we are all aware of this, local government, State government, and National Government. The District of Columbia, very clearly, is a local government. It is a city. It has a city structure. Imperfect as it is, it is chosen by the people of this city. The city government controls the confines, the geographic limits of this city, which also happens to be the Nation's Capital.

So there is adequate government, there is representation. Some say it is inadequate, and you could make a good case of that. But at least, there is a participation in the representative process at the local level. I see no reason to have a State government, which would cover the same identical geographic description as the local government. That would be an absolute duplication of governmental responsibilities.

There is no other State in the United States that has a city which covers the total geography of the State; yet we would be establishing one if we went along this particular route.

No, it seems to me that what we are after here is not to create a State level of bureaucracy to deal with problems that are already dealt with by the local government, but to see that the citizens of the District are fully represented at the national Government level. They have the right to vote for the President now, as of the 23d amendment. What we are saying is give the citizens of the District the right to vote for and be represented in this body and our other body, the House of Representatives, to have the chance to affect the outcome of national decisions, national decisions that affect the lives of the people who live here.

Mr. McCLURE addressed the Chair.

Mr. BARTLETT. Will the Senator yield?

Mr. McCLURE. I am happy to yield to the Senator from Oklahoma.

Mr. BARTLETT. Mr. President, I ask unanimous consent that Edward King of my staff may be accorded the privilege of the floor during any vote on this bill and the transportation bill. I further ask that this request not interfere with the dialog that the Senator from Idaho is having.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. McCLURE. Mr. President, I shall be very brief. I suspect we can either terminate the debate at this moment or debate for the next week. We cannot adequately cover the subject in a few brief moments and to attempt to cover it in much less than a week, in all of its ramifications, must be an exercise in frustration.

Let me respond to my friend from Indiana in this way: It seems to me that the arguments that have been used by the Senator in opposition to my amendment are really the arguments that the opponents of the resolution have been using. All of the arguments that have been raised against statehood are equally applicable against House Joint Resolution 554. I do not understand the distinction that says they are to be granted full voting rights without voting responsibilities. The effort to establish in people rights unassociated with responsibilities has been proven to be destructive of individual fiber, and it certainly is destructive of government structure as well.

It seems to me that this is really the crux of part of the dilemma, that there is the effort to invest the District of Columbia with all the rights of statehood with none of the responsibilities of state-

hood. It seems to me that has led us into the impasse of trying to find a way to give them something without giving them everything. We end up saying we are going to give them full civil rights, but we do not give them full civil rights; we give them some civil rights.

My friend from Indiana has indicated that this would be taking something away from the people of Indiana, because they own this Capital City. There are two answers to that. First of all, we could, by legislation, construct a Federal enclave within the city, which would then be a State, and allow them to have statehood and full rights and responsibilities of citizenship under statehood; at the same time, guaranteeing to the people of Indiana their sole share of the hold on the city as a seat of Government.

At the same time, my friend from Indiana is saying that we must pass the resolution granting representation in order to give them their rights as citizens, but whatever tenuous hold the people of Indiana have on the seat of Government is sufficient reason to deny them full rights as citizens.

I wonder if, really, the people of Indiana want to deny the people of the District of Columbia their right to full citizenship, full participation, full civil rights under the Constitution in exchange for, or as the price of, a tenuous hold on some nebulous concept of the Nation's Capital. I do not think the rights of citizenship are to be sold or bartered for such a small consideration as is implied by that statement.

Mr. President, if the Senator from Indiana is prepared to yield back the remainder of his time, I shall yield back the remainder of my time.

Mr. BAYH. I should like to respond.

Mr. McCLURE. Then I shall reserve the remainder of my time.

Mr. BAYH. I should like to say that, although the Senator from Indiana may not be as articulate as the Senator from Idaho, I should hate to see his argument used as my own argument against the resolution, as a cosponsor of the resolution.

I think what we are trying to do here is to say that whenever there is a process of Government that affects the lives of people, the people affected ought to have a right to have some influence on that process. We have wrangled over several things; some of them have been voted up and some have been voted down here this year.

About all the things we have discussed are going to affect the lives of the citizens of the District, but they will not have any representative here to help resolve that problem. That is what we are after. Inasmuch as there are not State responsibilities as far as the citizens of the District of Columbia are concerned, I do not know that we ought to give them States rights. What we are after is to see that they are represented in this form of Government which affects their lives, as far as taking their sons in war and taking their taxes in times of peace.

Mr. WALLOP. Will the Senator yield for a question?

Mr. BAYH. I am glad to yield. I do

not know how much time I have; this is a one-sided apportionment. I am not complaining, but recognizing the facts of life.

Mr. WALLOP. I just have one question, on hearing what he is saying and the Senator from Idaho is saying. How do we square what the senior Senator from Virginia asked rhetorically: What do we now do, granting this on this basis, about the citizens of American Samoa, of Puerto Rico, or the Virgin Islands, who are subject to draft, who have all the other problems, whose sons go to war and other things? How do we now say they are not entitled to voting representation on the same basis that the District is?

I really ask that in all sincerity.

Mr. BAYH. I must say that I have asked myself that same question as the chairman of the committee that handles constitutional questions. I frankly believe, if the Senator from Wyoming is asking the Senator from Indiana, I think they are entitled to have a chance to vote for President. Whether they should be represented in Congress or not depends upon the size of the entity involved and the disposition of the people involved.

The fact of the matter is, we have a distinction here. We do not have any other territory urging to be heard as a State. We have had territories that have asked to be included in this direct popular vote amendment so they will have a chance to vote for President. Frankly, I think they ought to be. From a practical standpoint, I do not think there is any way of including them in there.

If the Senator would address himself to the real distinction, in all but Puerto Rico, there is a real distinction of size. That was one of the distinctions that caused the Founding Fathers to treat the District differently than they did other States.

Another distinction is that they are not a contiguous part of the United States. You could say the same thing about Alaska and Hawaii, but there again, you get into distinct size situation, with the exception of Puerto Rico.

If the time comes when the people of Puerto Rico can, by unanimous vote, decide that issue and then petition us and ask us to accept them, then I think we have a real question that we must deal with. Frankly, I would say we either have to fish or cut bait. I am not for having territories against their will.

Mr. BARTLETT. Will the Senator yield?

Mr. BAYH. Yes.

Mr. BARTLETT. As I understand it, the distinguished Senator from Indiana said that the citizens of the District need representation and need to have a person or two in this body representing them. As I understand it, at the present time, they are represented by all Members of this body and they are represented by specific Senators who serve on the District Committee.

My question is, if this resolution is passed and ratified by the States and becomes part of our Constitution and our basic law, then does it also provide that this extra representation that the Dis-

REPRESENTATION OF THE DISTRICT OF COLUMBIA IN THE CONGRESS

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.J. Res. 280

TO AMEND THE CONSTITUTION TO PROVIDE FOR REPRESENTATION OF THE DISTRICT OF COLUMBIA IN THE CONGRESS

JUNE 17, 23, AND SEPTEMBER 3, 1975

Serial No. 15



Printed for the use of the Committee on the Judiciary

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WASHINGTON : 1975

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The committee takes particular pleasure to welcome this morning a resident of the District of Columbia, the District's No. 1 resident, as a matter of fact; its first elected Mayor in over 84 years, Mayor Walter E. Washington.

Mayor Washington certainly is aware of the power of the vote, and what a difference it can make to a community or to an individual. Mayor Washington, we welcome you here this morning, and you may proceed.

**TESTIMONY OF HON. WALTER E. WASHINGTON, MAYOR,
WASHINGTON, D.C.**

Mayor WASHINGTON. Thank you very much, Mr. Chairman.

Before I proceed, I would, for the benefit of the committee, point out just one or two things that developed in the questioning, and then I'll proceed.

First is the eligible voters—I think Mr. Butler may have asked that question. It is estimated at about 500,000. The registered voters, based on purging the rolls from time to time, range between 250,000 and 300,000. The population is established by the last census, and updated in 1973, is 739,000, which is the basic population figure that would be used by any State or jurisdiction for determining congressional representation. The other figure that may interest you is that we estimated at the time of the home rule, pre-home rule time, that approximately 50,000 persons were residing in the District with registrations in their home States. Now, this is a fluctuating figure and was our best estimate.

Now, I thought in the background of this discussion it might be helpful to give you what our appraisal of the figures is.

Mr. Chairman and members of the committee, I am particularly pleased to appear before the Constitutional Rights Subcommittee of the House Judiciary Committee to support Joint Resolution 280 to amend the Constitution to give the District of Columbia full voting representation in Congress.

It is a simple enough proposition that is presented in this resolution:

The people of the District constituting the seat of government of the United States shall elect two Senators and the number of Representatives in Congress to which the District would be entitled if it were a State. Each Senator or Representative so elected shall be an inhabitant of the District and shall possess the same qualifications as to age and citizenship and have the same rights, privileges, and obligations as a Senator or Representative from a State.

This is not the first time, as you have pointed out, Mr. Chairman, so eloquently, that any of us have appeared before the Congress on behalf of full enfranchisement of the citizens of Washington, D.C. However, as you pointed out, it is the first time that I have presented this cause as an elected official, and the period is 104 years, not 84; that is the period of time. And it brings another impact, it seems to me, to this hearing in the sense that the District of Columbia is now a self-governing community, like all the other cities of this great land, and this gives added emphasis and meaning to this joint resolution. It would open the doors of the Congress to elected voting Representatives of this city's 740,000 residents. And as the chairman pointed out, as we look back to the experience the Founding Fathers must have had to draw from France, or England, we find London and Paris as Federal cities with the right of representation and the right to vote.

general tendency is to provide for the States and then to have a set-aside for the District of Columbia and for the territories, so that unless you are alert what happens is that you tend to be excluded, rather than tending to be included.

Mayor WASHINGTON. Absolutely right. You are absolutely right, and I know from which you speak. This is a constant vigilance to keep the city in the mainstream of the entire grant process.

Mr. BADILLO. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Mayor Washington, I have been particularly interested in your statement this morning as a former mayor of a small city. Our problems are very different.

I would like to ask, would you favor full statehood for the District of Columbia?

Mayor WASHINGTON. Well, I think there are problems inherent in that, that I can see at this time. I would be far more favorable, as I have indicated, to this process. I think you've got the Federal presence here, let's deal with that. And, in order to get statehood, you are going to either have to cut out an enclave, or in some way develop a configuration that is going to leave the Federal presence there. And you are going to have all kinds of problems with it because there are many people who think the Federal presence is simply Constitution Avenue, and Pennsylvania Avenue. But, you've got Walter Reed Hospital over here; and Anacostia, Bolling; you've got the forts and there is no way that you can see pulling those elements out that are really all around the city; the new home of the Vice President, the Naval Observatory. The city is basically ringed with old forts from the Civil War, and it's so physically, and economically and socially bound together that I would have problems with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city. So, that's where I come from.

Mr. KINDNESS. You referred to the horse and buggy concepts being updated. Isn't it sort of a horse and buggy concept, possibly, that we have to deal somehow, constitutionally, with the matter of Federal presence in an area. Throughout the United States we have other Federal facilities that are quite dominant in some communities.

Mayor WASHINGTON. Yes.

Mr. KINDNESS. The Congress has dealt with those problems—perhaps not fully satisfactorily in some cases—but I think, in line with your thinking, we could probably solve those problems with the State of Columbia, or whatever it might be called, if it were a matter of providing full statehood to the District.

I was interested in Mr. Badillo's question about whether the city of Washington received a fair share of funds under Federal programs, and assure you that I harbor the feeling about Ohio, that we do not quite net our fair share. But, do you not agree that there is some advantage, also, to the geographic proximity, or physical presence and acquaintance with officials who deal in the Federal Government with the various programs, whereby you probably have the ultimate in grantsmanship operating in the District of Columbia?

86TH CONGRESS : : : : 2D SESSION

JANUARY 6-SEPTEMBER 1, 1960

HOUSE REPORTS

VOL. 4

MISCELLANEOUS REPORTS ON
PUBLIC BILLS, IV

UNITED STATES
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WASHINGTON: 1960

GRANTING REPRESENTATION IN THE ELECTORAL
COLLEGE TO THE DISTRICT OF COLUMBIA

MAY 31, 1960.—Referred to the House Calendar and ordered to be printed.

Mr. CELLER, from the Committee on the Judiciary, submitted the
following

REPORT

[To accompany S.J. Res. 39]

The Committee on the Judiciary, to whom was referred the joint resolution (S.J. Res. 39) proposing amendments to the Constitution of the United States to authorize Governors to fill temporary vacancies in the House of Representatives, to abolish tax and property qualifications for electors in Federal elections, and to enfranchise the people of the District of Columbia, having considered the same, reports favorably thereon with amendments and recommends that the joint resolution do pass.

The amendments are as follows:

Amendment No. 1: Page 1, line 3, strike out all the language after the resolving clause and substitute the following:

"That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

"A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

Amendment No. 2: Amend the title to read:

"A joint resolution proposing an amendment to the Constitution of the United States granting representation in the Electoral College to the District of Columbia."

GRANT REPRESENTATION IN ELECTORAL COLLEGE TO D.C.

EXPLANATION OF AMENDMENTS

The amendments are in the nature of a substitute bill and are explained in the "Section Analysis of Resolution" set out later in this report.

PURPOSE

The purpose of this proposed constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors¹ who would be in addition to the electors from the States and who would participate in electing the President and Vice President.²

The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed constitutional amendment.

NEED FOR CONSTITUTIONAL AMENDMENT

Simply stated, voting rights are denied District citizens because the Constitution provides machinery only through the States for the selection of the President and Vice President (art. II, sec. 1). In fact, all national elections including those for Senators and Representatives are stated in terms of the States.³ Since the District is not a State or a part of a State, there is no machinery through which its citizens may participate in such matters. It should be noted that, apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so by becoming States as a result of the exercise by the Congress of its powers to create new States pursuant to article IV, section 3, clause 1 of the Constitution.

It was suggested that, instead of a constitutional amendment to secure voting rights, the District be made either into a separate State or its land retroceded to the State of Maryland.⁴ Apart from the serious constitutional question which would be involved in the first part of this argument, any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation

¹ The voters in the States do not vote directly for the candidates for President and Vice President. Instead they vote for members of the electoral college, who in turn vote for President and Vice President.

² The proposed amendment would give the District the same number of electors which it would have if it were a State but in no event more than the least populous State—probably three depending on the 1960 census and some other factors. There are at present 537 places in the electoral college (equal to the total of Senators and Representatives in Congress from each State). This total, if Congress does not change the present law, will be 535 after the 1960 census—the membership in the House of Representatives has been temporarily increased by two to provide one Representative each for Alaska and Hawaii. In any event, the electors from the District will be in addition to the total number of places reserved to the States.

³ Members of the House of Representatives and of the Senate are elected by the people of the respective States (art. I, sec. 2; 17th amendment). The electors who cast ballots for President and Vice President in December are elected by the people of their respective States at the preceding November election, this being the method of appointment of electors in each of the States (art. II, sec. 1).

⁴ In 1788 and 1789, Maryland and Virginia ceded territory to the Federal Government, and Congress, by acts which were approved on July 16, 1790 (1 Stat. 130) and March 3, 1791 (1 Stat. 214) established the District of Columbia which was finally proclaimed to be the National Capital after the elections of 1800. Jurisdiction over the District vested in the United States on the first Monday of December 1800. (See *U.S. v. Hammond*, Fed. Cas. No. 15293 (1801).) On July 9, 1846, all land ceded by Virginia for the District of Columbia was retroceded to Virginia (9 Stat. 35).

of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the "seat of Government" from the States and set it aside as a permanent Federal district.⁵ They considered it imperative that the seat of Government be removed from possible control by any State⁶ and the Constitution in article I, section 8, clause 17 specifically directs that the seat of Government remain under the exclusive legislative power of the Congress.⁷ This same reasoning applies to the argument that the land on which the District is now located be retroceded to the State of Maryland.

MINIMUM IMPACT; PRESERVATION OF ORIGINAL CONCEPT OF CONSTITUTION

The proposed amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its forms of government. It would not authorize the District to have representation in the Senate or the House of Representatives. It would not alter the total number of presidential electors from the States, the total number of Representatives in the House of Representatives, or the apportionment of electors or Representatives among the States. It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.

AMENDMENT NOT RELATED TO HOME RULE

This proposed constitutional amendment with respect to voting by citizens of the District in national elections is a matter entirely separate from questions as to possible changes in the form of local government which the Congress might establish for the District. The present constitutional provisions relating to the District already vest plenary power in the Congress to legislate in this respect and the present constitutional powers would not be modified by the amendment here proposed. Questions as to possible changes in the form of local government for the District, including local home-rule proposals and other possible changes in the structure of the District government, are

⁵ Art. I, sec. 8, clause 17 provides that the Congress shall have power "To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by Consent of particular States, and the Acceptance of Congress, become the Seat of Government of the United States . . ."

⁶ While the Continental Congress was meeting in Philadelphia on June 20, 1783, soldiers from Lancaster, Pa., veterans of the Revolutionary War, arrived at Philadelphia "to obtain a settlement of accounts." The harassment by the soldiers continued through June 24, 1783, on which date Congress, abandoning hope that State authorities would disperse the soldiers, removed itself from Philadelphia. It met successively in Princeton, Trenton, N.J., Annapolis, Md., and New York City.

While no repetition of the Philadelphia experience came about, the Continental Congress nonetheless did not lightly dismiss this Philadelphia incident and on October 7, 1783, the Continental Congress adopted a resolution providing for buildings and land to be under the exclusive jurisdiction of the United States. Records fail to disclose any action taken to implement this resolution. Probably, when the urgency diminished, the resolution was allowed to expire.

When the present Constitution was being debated in the Constitutional Convention of 1787, it was urged that some provision be made in the Constitution for a seat of government under the exclusive control of the Federal Government and that such seat be at a place away from any State capital because such a situation would tend "to produce disputes concerning jurisdiction" and because the intermixture of the two legislatures would tend to give "a provincial tincture" to the national deliberations. This suggestion was adopted and resulted in Art. I, sec. 8, clause 17 of the Constitution, providing for a permanent seat of government, now known as the District of Columbia (Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States (June 1957), GPO, pt. II, pp. 15-17).

⁷ See footnote 5

Appendix I

REDUCTION IN FORCE

DEPOSITORY

OVERSIGHT HEARING
BEFORE THE
COMMITTEE ON
THE DISTRICT OF COLUMBIA
HOUSE OF REPRESENTATIVES
NINETY-SEVENTH CONGRESS
FIRST SESSION

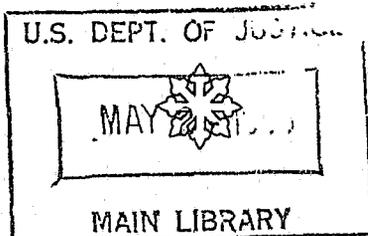
ON

IMPACT OF REDUCTION IN FORCE BY FEDERAL GOVERNMENT ON THE
METROPOLITAN WASHINGTON AREA

APRIL 27, 1982

SERIAL NO. 97-19

Printed for the use of the Committee on the District of Columbia



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1983

**STATEMENT OF IVANHOE DONALDSON, ACTING DIRECTOR, D.C.
DEPARTMENT OF EMPLOYMENT SERVICES, ACCOMPANIED BY
RITA DRESELL, CHIEF OF TECHNICAL SERVICES STAFF, UNEM-
PLOYMENT COMPENSATION OFFICE, DEPARTMENT OF EM-
PLOYMENT SERVICES**

Mr. DONALDSON. Mr. Chairman, I would first like to say that the last time I came to testify on a matter relating to employment services, USDOL took a dim view of it. That being the case, I shall once again express the Department's view on what is going on.

As you know, the Employment Service principally is about the business of providing people with work. We of course are supporters of the initial concept of Humphrey-Hawkins.

Mr. Chairman and members of the committee, thank you for the opportunity to come here today to testify before you on the extent of reductions-in-force, which directly impacts on many of our residents and affects the economic conditions of the District of Columbia and to provide comments on the legislative proposals introduced by Congressman Fauntroy and Congresswoman Schroeder.

In light of the impact these RIF's are having on the major portion of our work force, the District of Columbia, and my Department as well, I welcome the opportunity to address this issue.

Federal employees deserve more than the callous treatment they are receiving from the Reagan administration. I support Congressman Fauntroy's bill, H.R. 4817, to require a compilation of a list of those RIF'd so that they can be considered for positions in the Federal Government when they become available. I also support Congresswoman Schroeder's bill, H.R. 5853, to institute voluntary reduced work time or furloughs as an alternative to RIF's.

The latter, as I am sure you know, is a procedure already in place in some agencies and one which may require the Federal Government to pay unemployment benefits.

Our statistics show that from January 1981 to March 1982 the number of new unemployment insurance payments filed by Federal employees has tripled as compared to new claims in 1980. We had only 3,703 Federal unemployment insurance claims in calendar year 1980, and I am referring to all local offices here in the District of Columbia. From January 1981 through January 1982, we had 9,052 new claims from Federal employees. In calendar year 1982, we have already taken 2,284 new claims from former Federal employees.

The total benefit payment has doubled from \$9,572,307 in 1980 to \$19,812,800 for 1981. Thus far in calendar year 1982, we have paid out \$4,290,000 in benefits to RIF'd Federal employees. We have processed these Federal unemployment insurance claims in addition to a substantial increase of claims by employees in the private sector who have been laid off due to economic downturns. We have done this with fewer staff due to the drastic budget cuts we, too, have experienced.

The Department of Employment Services, with our limited resources and drastically reduced staff, is doing its part to assist these former Federal workers. Unemployment is still going up; the lines of unemployment insurance claimers are getting longer. The number of people to administer unemployment insurance continues

education, jobless benefits. Mr. Morrow urged his audiences not to stand by and let this happen. He urged them to work their "friends in Washington" to restore some of the funding for social programs to bring defense spending and tax cuts to a more reasonable level.

Further, Mr. Morrow stated, and I quote, "combined with the tax cuts that benefit mostly hiring of people, these programs add up to a major redistribution of net money in our society."

As long as we are faced with an administration that cares only for the rich and the powerful at the expense of the poor and the working poor and the middle class, an administration that puts all the blame for the problems of big Government and bureaucracy on the employees of the Government, Congress must protect their workers who carry out their programs and their agendas.

Mr. Chairman, I am here to support this committee and others who undertake to assist RIF'd employees in operating and obtaining jobs. Washington, D.C., was once thought to be recession-proof. This year we have seen what the Federal RIF's have done to our local economy. Our division of labor market information published data a few weeks ago that shows that February 1982 there were almost 10,000 fewer people employed by the Federal Government in the District of Columbia as compared to February 1981. In February 1982, there was 219,500 employed by the Federal Government in the District of Columbia as compared to 228,200 in February 1981.

Mayor Barry has stated that in the Washington metropolitan area, for every Federal employee RIF'd, one person in the private sector will be laid off. The Mayor is particularly concerned that the District of Columbia already has a higher unemployment rate than that of the metropolitan area.

The unemployment rate in the District of Columbia in February 1982 is 10 percent, up from 9 percent in January 1982. The District of Columbia has experienced a disproportionate number of RIF's in comparison to the rest of the Nation. Mike Causey, in his column last week, stated that 3 of every 10 budget-related Federal job cuts are in the Washington area. The Office of Personnel Management released figures last week to show for the first 5 months of fiscal year 1982—October through February—5,450 have taken place. In fiscal year 1981, 2,739 people were RIF'd, bringing it to a total of 8,189. Most of the 2,739 RIF's in fiscal year 1981 were in the Public Health Service; most of those jobs were in the Washington, D.C., area. The city has also suffered major losses in income and sales taxes as a result of the RIF's, and companion losses in the private sector.

The D.C. Office of Finance and Revenue estimates that in fiscal year 1982 the city will lose \$3.5 million in income taxes, and one-half a million dollars in sales and revenues.

The Federal Government Service Task Force, of which I believe Congressman Fauntroy is a member, has data which shows that minorities and women have been disproportionately laid off from jobs in the Federal Government.

I would do anything possible to further assist the RIF'd employees. I would be happy to answer any questions.

Mr. FAUNTROY. I thank you again for the testimony that is chock full of valuable information and the kind of information we are

HOME RULE

HEARINGS
BEFORE
SUBCOMMITTEE NO. 6
OF THE
COMMITTEE ON
THE DISTRICT OF COLUMBIA
HOUSE OF REPRESENTATIVES
EIGHTY-EIGHTH CONGRESS
FIRST SESSION

ON

H.R. 141, H.R. 461, H.R. 501, H.R. 502, H.R. 503, H.R. 504,
H.R. 1576, H.R. 1805, H.R. 2579, H.R. 2893, H.R. 3352, H.R.
3568, H.R. 3963, H.R. 4237, H.R. 4821, H.R. 5564, H.R. 5732,
H.R. 5794, H.R. 8105, H.R. 9128, H.J. Res. 91, and
H.J. Res. 195

BILLS TO PROVIDE SOME FORM OF HOME RULE FOR THE
DISTRICT OF COLUMBIA

PROPONENTS' TESTIMONY

NOVEMBER 18, 19, AND 20, 1963, AND FEBRUARY 24, 1964



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1964

25-714

HOME RULE

Attorney General KENNEDY. Yes. I think that based on the statements that were made by the Founding Fathers and the fact that it was put into effect immediately and nobody raised any question about its constitutionality shows quite clearly that it is constitutional.

Mr. HORTON. It shows that the people at that time thought it was constitutional, but it does not show otherwise.

Attorney General KENNEDY. Finally, when it was passed on—when everybody thought that it was constitutional for 70 years including the Founding Fathers—it is now being raised here as to whether it was constitutional—it was passed on in 1953 by the Supreme Court which said unanimously that it was constitutional. I don't understand how anybody now can raise a question as to its constitutionality.

Mr. WHITENER. Are there any other questions, gentlemen? If not, thank you very much, Mr. Attorney General.

Attorney General KENNEDY. Thank you.

Mr. WHITENER. We are always very happy to have you here and we hope that you will have many more happy birthdays.

Attorney General KENNEDY. Thank you.

Mr. HAGAN of Georgia. I think that we could have some further comment in respect to this uniqueness as being the only reason for its existence in the first place. I do not imagine that if they intended that people be domiciled here to the extent that they are today, actually. I think that it was conceived and formed as the capital of a great, major nation. And I think that if there was any reason at all for its being unique and separate from others that would be the reason. The local government could have exercised control over the whole Nation if they could have amended their rules and regulations, such as for example if you stepped off the Capitol Grounds.

Attorney General KENNEDY. Of course, that is not what is being advocated in this legislation.

Mr. WHITENER. Thank you very much.

(The following letter and memorandum were subsequently received by the committee:)

DEPARTMENT OF JUSTICE,
December 13, 1963.

HON. BASIL L. WHITENER,
House Committee on the District of Columbia,
Washington, D.C.

DEAR MR. WHITENER: During the course of my testimony before your subcommittee on legislation to provide home rule for the District of Columbia, I undertook to supply for the record a memorandum discussing the constitutional questions presented by proposals to retrocede the District to Maryland. I attach such a memorandum, prepared in the Department of Justice, and ask that it be made a part of the record of your subcommittee's hearings.

Sincerely,

ROBERT F. KENNEDY,
Attorney General.

CONSTITUTIONALITY OF RETROCEDING THE DISTRICT OF COLUMBIA TO MARYLAND

I. INTRODUCTION

H.R. 5564, now pending before the 88th Congress, would retrocede and relinquish to the State of Maryland the entire District of Columbia, except for a small area extending from the Lincoln Memorial to the Supreme Court, together with East and West Potomac Parks. The area to be retained by the United States would consist of approximately 2.6 square miles (1,656 acres) and would contain about 75 residential dwelling units. A map showing the area to be retained is filed herewith.

HOME RULE

The present District of Columbia comprises an area of 68.7 square miles, and has a population of 763,956 (according to the 1960 census). Washington, D.C., is the ninth largest city in the United States. Its population exceeds that of 11 States, and is more than 3 times that of Alaska.¹

Retrocession would increase the population of Maryland (according to the 1960 census) from 3,100,689 to 3,864,645, an increase of 24.6 percent. Washington would become the second largest city in Maryland, and the combined population of Washington and Baltimore would constitute 44 percent of the population of Maryland.² Washington's population is greater than that of any existing congressional district in Maryland, and almost as large as the combined populations of the three smallest districts.³

The proposed transfer to Maryland of political jurisdiction over the ninth largest city in the United States, and the government of that city during the working out of the necessary rearrangements, would be a complex task. Provision would have to be made to establish a municipal charter and a city government for Washington, and to establish one or more new counties in Maryland. Functions now exercised by the District of Columbia government would have to be allocated between State, county, and city officials, since the District of Columbia presently exercises the functions of all three governmental units. Redistricting and reapportionment for State and congressional elections in Maryland would presumably be necessary. New governmental arrangements would doubtless be necessary in connection with utility, transportation, and other services to be performed in the retained Federal enclave by corporations chartered and regulated by Maryland. Significant differences between Maryland law and that applicable in the District of Columbia might present special problems of adjustment for particular businesses or classes of persons.

The working out of these practical problems would be greatly complicated by the fact that the legal validity of the proposed retrocession is subject to serious doubt, and hence any arrangements which were made might well be subject to litigation for a number of years and might ultimately have to be unmade if the retrocession were held invalid. The resulting uncertainties could affect not only the government of the city of Washington and any necessary electoral rearrangements in Maryland, but also the outcome of a presidential election, since the status of the three electoral votes provided for by the 23d amendment would be in doubt.⁴

This memorandum does not express any conclusion as to whether retrocession to Maryland is or is not constitutional. The final answer to that question is for the courts.⁵ The purpose of the present memorandum is simply to point

¹ See the following:

| | | | |
|--------------------|----------|----------------------------|----------|
| Alaska..... | 226, 167 | Hawaii..... | 632, 772 |
| Nevada..... | 285, 278 | Idaho..... | 667, 191 |
| Wyoming..... | 330, 066 | Montana..... | 674, 767 |
| Vermont..... | 389, 881 | South Dakota..... | 680, 514 |
| Delaware..... | 446, 292 | District of Columbia (1960 | |
| New Hampshire..... | 608, 921 | census)..... | 763, 956 |
| North Dakota..... | 632, 446 | | |

² See the following:

| | |
|-----------------|----------|
| Baltimore..... | 839, 024 |
| Washington..... | 763, 956 |

| | |
|---|-------------|
| Total..... | 1, 702, 880 |
| Total, State of Maryland plus Washington..... | 3, 864, 645 |
| ³ 1960 census: | |
| 1st District..... | 243, 570 |
| 2d District..... | 621, 935 |
| 3d District..... | 258, 826 |
| 4th District..... | 283, 320 |
| 5th District..... | 711, 045 |
| 6th District..... | 608, 666 |
| 7th District..... | 373, 327 |

⁴ It is quite conceivable that a presidential election could turn on three electoral votes. Three electoral votes would have been decisive in each of the following elections:

1876: Hayes, 185; Tilden, 184.

1800: Jefferson, 73; Burr, 73.

1796: Adams, 71; Jefferson, 68.

⁵ The question could be raised in any of a number of ways. For example: (1) The validity and effect of the acquisition by Maryland of over 760,000 citizens could arise as an issue in pending or future litigation over apportionment of the Maryland Legislature. See *Maryland Committee for Fair Representation v. Tawes*, U.S. Supreme Court, October term, 1963, No. 29; (2) a Maryland voter could challenge the registration as a Maryland voter of a resident of Washington on the ground that the cession was invalid. Cf. *Leser v. Garnett*, 250 U.S. 130; (3) a resident of Washington might bring an action for

out the nature and substantiality of the constitutional questions presented, and the resulting likelihood that, if H.R. 5564 were enacted and retrocession purportedly made pursuant to it, the governmental status of Washington and the legal validity of all governmental actions relating to it would remain in doubt for several years, pending definitive judicial determination of these questions.

II. THE CONSTITUTIONAL CONCEPT OF THE SEAT OF THE GOVERNMENT

Article I, section 8, clause 17 of the Constitution provides that "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding 10 miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States." The question for consideration is whether the existence of a Federal district constituting the seat of Government was intended to be a permanent feature of our constitutional system or whether Congress is free to eliminate such a district. That question has often been raised but never authoritatively settled. A substantial argument can be made for the proposition that the Federal district was intended to be a permanent feature of our Constitution, and that that district was intended to be large enough to serve as the location of a capital city having substantial population. This portion of the memorandum will indicate the basis for such an argument.

A. The power of Congress to retrocede the District of Columbia is not settled by any authoritative precedent

The issue whether Congress can eliminate the Federal district created in accordance with article I, section 8, clause 17 by retrocession to the States from which it was obtained, has often been raised but never authoritatively settled. Thus in 1803, 12 years after the District was established, Congress rejected by vote of 66-26, a bill to retrocede the District to Virginia and Maryland respectively; a considerable part of the debate was devoted to argument pro and con on the constitutionality of such a step (12 Annals of Congress, pp. 486-491, 493-507). Retrocession of the Virginia portion of the District was enacted by Congress in 1846 (9 Stat. 35) despite constitutional objections which had led the Senate Committee on the District of Columbia to recommend against passage (15 Congressional Globe, pp. 985-986 (1846)). Subsequently, in 1867, the House of Representatives approved, by vote of 111-28, a bill repealing the 1846 act of retrocession on the stated ground that it was unconstitutional. The bill died in the Senate Judiciary Committee, presumably because it was felt that decision as to the constitutionality of the retrocession to Virginia was properly a matter for the courts (77 Congressional Globe, pp. 26, 32 (1867)).

In 1875, the constitutionality of the retrocession to Virginia was raised in *Phillips v. Payne* (92 U.S. 130 (1875)), but the Supreme Court avoided decision of the constitutional issue and disposed of the case on the grounds that the plaintiff had no standing to raise the issue, that he was estopped from doing so by the passage of time, and that, in any event, the matter was concluded by the de facto control which had been exercised by Virginia for over a quarter of a century. In 1910, additional arguments against the constitutionality of the 1846 act of retrocession were raised in an opinion inserted in the Congressional Record (45 Congressional Record 672 (1910); S. Doc. 286, 61st Cong., 2d sess. (1910)).⁶

The Supreme Court's holding in *Phillips v. Payne*, *supra*, has, for all practical purposes, settled any question as to the status of the Virginia portion of the District. If the Supreme Court refused to consider a challenge to that retrocession in 1875, on the ground that it was too late to overturn a de facto situation which had existed for over 25 years, it is obvious that no court would now permit such a challenge. But neither the action of Congress in 1846 nor the Supreme Court's decision in 1875 with respect to the Virginia portion of the Dis-

declaratory judgment or mandamus to require the District of Columbia or the United States to perform any governmental service or function which it is presently required to perform; (4) such a resident might challenge the application to him of any tax or regulatory requirement of Maryland. Cf. *Phillips v. Payne*, 92 U.S. 130; or (5) a resident of Washington might invoke the jurisdiction of the District Court for the District of Columbia, or any successor to it, alleging that he continued to be a resident of the District notwithstanding the purported retrocession.

⁶ The opinion was by Mr. Hannis Taylor who was the author of a number of books on constitutional law: "The Origin and Growth of the American Constitution" (1911), "The Origin and Growth of the English Constitution" (1899-1904), "Jurisdiction and Procedure of the Supreme Court of the United States" (1905), "Due Process of Law and the Equal Protection of the Laws" (1917), "The Science of Jurisprudence" (1908).

trict is an authoritative precedent of the validity of retrocession of the remainder of the District to Maryland.

Clearly, the sole ground of the Supreme Court's decision in *Phillips v. Payne*—the long time which had elapsed since the retrocession—would be inapplicable if a judicial challenge were promptly made to the retrocession to Maryland. But of even greater significance is the factual difference between the two cases. The portion of the District ceded by Virginia had never been an integral part of the Federal City.⁷ One of the principal reasons for the retrocession was that the people of Alexandria, while being deprived of certain political rights, did not share equally in the benefits to be derived from those public works, civic improvements, and buildings which were wholly concentrated in the Maryland portion. The act of 1846 begins with the following recital.

"Whereas, no more territory ought to be held under the exclusive legislation given to Congress over the District which is the seat of the General Government than may be necessary and proper for the purposes of such a seat; and whereas, experience hath shown that the portion of the District of Columbia ceded to the United States by the State of Virginia has not been, nor is ever likely to be, necessary for that purpose; * * *" (9 Stat. 35).

The clear inference from the 1846 act is that Congress deemed retention of the part of the District on the Maryland side of the Potomac to be "necessary for that purpose"—i.e., for a seat of government. It would seem no less so today when both the Nation and the Federal Government have grown manifold.

The constitutional considerations applicable to a reduction in the size of the District by about one-third, through retrocession of a portion of the District which was not and was not expected to be an integral part of the Federal City, are very different from the considerations applicable to a retrocession of 96 percent of the area and substantially the entire population of the present Federal City.⁸

Decisions dealing with Federal enclaves are also not authoritative precedents on the present question. Article I, section 8, clause 17 deals with two subject matters—the district which may be cession of particular States and acceptance of Congress, become the seat of the government, and "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of * * * needful buildings." The Supreme Court has stated that exclusive jurisdiction acquired by Congress over places in the second category may be ended by retrocession, or by sale to private persons. *S. R. A. Inc. v. Minnesota*, 327 U.S. 558, 562-4 (1946).⁹ That statement does not dispose of the present issue, however, in view of the significant historical, practical, and legal differences between such Federal enclaves and the District forming the seat of the government.¹⁰ Thus for example, it has been held that in the case of ordinary Federal enclaves, the State may condition its consent on a reservation of concurrent jurisdiction. *James v. Dravo Contracting Co.*, 302 U.S. 134, 146-9 (1937). On the other hand, in *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109 (1953), the court emphasized that the provisions of clause 17 relating to the seat of government were so drafted as to "eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding States." Accord: *Cooley v. Board of Wardens*, 12 How. 299, 318 (1851).

Thus, in contrast to the situation with respect to home rule legislation such as H.R. 5794, the constitutionality of which was squarely settled by the Supreme Court in *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953), the pro-

⁷ Congress, in establishing the District of Columbia and accepting the land ceded by Maryland and Virginia had provided that no public buildings were to be built on the Virginia portion of the District (1 Stat. 214 (1791)). Major L'Enfant's master plan for the city, which includes an elaborate network of streets, avenues, squares, and circles, left the Virginia portion of the District totally uncharted.

⁸ The retrocession to Virginia covered about 31.3 square miles, or less than one-third of the 100-square-mile area of the then District; H.R. 5564 would retrocede about 66.1 square miles, or about 96 percent of the present 68.7 square mile area of the present District.

⁹ Chief Justice Stone and Justice Frankfurter, concurring, characterized this statement as dictum, unnecessary to the decision, 327 U.S. 571, 572.

¹⁰ In *Phillips v. Payne*, *supra*, counsel for the plaintiff pointed out that one significant difference between the two parts of clause 17 is that, under the second part, Congress' jurisdiction is attached to property purchased or otherwise acquired for ownership by the United States, and hence can be expected to terminate if the United States ceases to own the property, whereas the United States did not and does not own most of the land in the District of Columbia but rather exercises legislative power over land in private ownership. In the one case the United States is acting primarily in a proprietary capacity; in the other in a purely governmental one.

posed retrocession to Maryland would present issues, under article I, section 8, clause 17, concerning which there is no authoritative precedent in either judicial decision or history.

B. The constitutional status of the District constituting the seat of the government

The clause empowering Congress to exercise exclusive legislation over the District which was to become the seat of the government is one of a series of enumerations of legislative power. It is permissive in form, rather than mandatory. However, the question whether Congress can delegate to a State, or abdicate, the powers conferred on it by section 8 of article I is not susceptible of easy answer.

In the leading case of *Cooley v. Board of Wardens*, 12 How. 299, 317-8 (1851), the Court considered that question with respect to the commerce power. It said "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power." (P. 318.) It held that some aspects of interstate commerce were "of such a nature as to require exclusive legislation by Congress" while others were "local and not national" and hence Congress could authorize the States to regulate them. (P. 319.) The Court contrasted Congress' power over interstate commerce with its power of exclusive legislation over the District of Columbia, in these words (p. 318):

"The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them."¹¹

The conclusion expressed in this dictum is based on the nature of Congress power of legislation over the District of Columbia. Consideration of the nature of the act by which the District was created suggests a like conclusion. While Congress power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance or for retrocession. In this respect the provisions of article I, section 8, clause 17, are comparable to the provisions of article IV, section 3, which empower Congress to admit new States but make no provision for the secession or expulsion of a State. As the Supreme Court held in *Texas v. White*, 7 Wall. 700, 726 (1868), the relationship between a State and the United States is "indissoluble." While Congress was not required to admit a State, once it did so its act was "final." "There was no place for reconsideration, or revocation, except through revolution, or through consent of the States."

A similar argument was made in *Phillips v. Payne*, *supra*. Counsel for the plaintiff argued that Congress acted as agent for the American people in accepting the District of Columbia from the States, and that with the act of acceptance the purpose for which the agency was granted was carried out and the authority of the agent was exhausted.¹² The Supreme Court avoided passing on the merits of this argument.

¹¹ It should be emphasized that the Court, in *Cooley*, was dealing solely with the question of what power the States could exercise over the seat of the Federal Government, and not with the question of what powers Congress could delegate to a legislative body of the District of Columbia. The latter question was determined in *District of Columbia v. Thompson Co.*, 348 U.S. 100 (1953).

¹² Counsel stated: "This act of acceptance is not an ordinary act of legislation. It might, with just as much propriety, have been submitted to any other body of men, or to the judicial or executive branch; just as, in the case of the act of cession by Maryland, authority to make such cession was conferred upon the Members of the House of Representatives sent from that State to the next Congress; and just as Congress finally did authorize the President to make the selection within certain limits, and to declare in advance that such territory, so selected, should be deemed the district accepted. Congress, in this acceptance, acted rather as agents of the people, or as a commission for a particular purpose, and not necessarily as a legislative body, having a general power to accept districts for seats of government, as often as they should deem an occasion to arise for such an act. What they did in this capacity, they cannot undo or repeal, as the Congress of the United States, in its ordinary legislative capacity" (plaintiff's brief on appeal, pp. 22-23, *Phillips v. Payne*, 92 U.S. 130 (1875)).

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It is clear that the framers of the Constitution attached fundamental importance to the establishment of a permanent seat for the National Government which was not and could never be under the control of any State. Thus, Madison, in *Federalist Paper No. 43*, stated:

"The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted with impunity, but a dependence of the members of the general government of the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils, an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government, would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence."

As Story added in his "Commentaries on the Constitution," section 1218: "It never would be safe to leave in possession of any State the exclusive powers to decide whether the functionaries of the National Government should have the moral or physical power to perform their duties."

To the same effect see 3 Elliot's Debates 432-3 (Madison), 439-41 (Pendleton).

In short, the view of the framers appears to have been that it was indispensably necessary to the independence and the very existence of the new Federal Government to have a seat of government which was not subject to the jurisdiction or control of any State. This view was the direct result of the humiliation of the Continental Congress in Philadelphia where, despite threats by some 300 mutineering soldiers, the Pennsylvania government took the position that it would not provide protection and aid until some "actual outrages" occurred. Indeed, despite the urgent need for a fixed location for the new government, in contrast to the nomadic life which the weak central government had had during 1774-89,²³ Congress rejected numerous offers to locate the Capital in any of the major cities on the eastern seacoast, in favor of establishing the Federal City in a then deserted and swampy location where it could become an exclusively Federal city, free of control by any State.

This view of the framers, that establishment of a Federal district as the permanent seat of the government, which would be entirely free from control by any State, was an "indispensable necessity" to the effective functioning of the Federal Government lends strong support to the position that the District of Columbia, once created, could not thereafter be abolished.

The question was most recently considered in the report of the House Committee on the Judiciary, in 1960, on the resolution proposing what has become the 23d amendment. The report states:

"It was suggested that, instead of a constitutional amendment to secure voting rights, the District be made either into a separate State or its land retroceded to the State of Maryland. Apart from the serious constitutional question which would be involved in the first part of this argument, any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the 'seat of government' from the States and set it aside as a permanent Federal district. They considered it imperative that the seat of Government be removed from possible control by any State and the Constitution in article I, section 8, clause 17, specifically directs that the seat of government remain under the exclusive legislative power of the Congress. This same reasoning applies to the argument that the land on which the District is now located be retroceded to the State of Maryland" (H. Rept. 1698, 86th Cong., 2d sess. pp. 2-3).

²³ During these 8 years the Continental Congress moved 10 times and met in 8 different cities and towns: Philadelphia, Baltimore, Lancaster, York, Princeton, Annapolis, Trenton, New York.

C. The size of the District contemplated for the seat of the government

H.R. 5564 would retain, under exclusive Federal jurisdiction, a small Federal enclave comprised primarily of parks and Federal buildings. Such a small enclave clearly does not meet the concept of the "permanent seat of government" which the framers held. Rather, they contemplated a Federal city, of substantial population and area, which would be the capital and a showplace of the new Nation.

The initial proposal made at the Continental Congress was that a Federal district be established no less than 3 miles square and no more than 6 miles square over which Congress would exercise exclusive jurisdiction (XXV Journals of the Continental Congress 603 (Sept. 22, 1783)). Further consideration led to the designation in the Constitution of 10 miles square as the maximum area for the seat of government, and to the acceptance by the Congress of the cession of an area 10 miles square.¹⁴

As Major L'Enfant pointed out in a letter to President Washington, the creation of a Federal city represented a unique opportunity to erect a completely planned capital which would grow with the Nation and symbolize its aspirations:

"No nation ever before had the opportunity offered them of deliberately deciding upon the spot where their Capital City should be fixed, or of considering every necessary consideration in the choice of situation; and although the means now within the power of the country are not such as to pursue the design to any great extent, it will be obvious that the plan should be drawn on such a scale as to leave room for that aggrandizement and embellishment which the increase of the wealth of the Nation will permit it to pursue to any period, however remote." (September 11, 1789, copy in the L'Enfant-Diggs-Morgan papers, Library of Congress, reprinted in Caemmerer, *Life of Pierre Charles L'Enfant* (Washington, D.C., 1960).)

The plan for the city, executed by L'Enfant and submitted by President Washington to Congress on December 13, 1791, was at that time the most comprehensive plan ever designed for a city:

"[T]he whole city was planned with a view to the reciprocal relations that should be maintained among public buildings. Vistas and axes; sites for monuments and museums, parks and pleasure gardens; fountains and canals—in a word, all that goes to make a city a magnificent and consistent work of art were regarded as essential." Caemmerer, *Washington, The National Capital* 25 (1932) (S. Doc. No. 332, 71st Cong., 3d sess. (1931)).

The "seat of government" contemplated by the framers included extensive residential areas. One of the reasons for establishing the Federal City was evidently the inconvenience suffered by the Continental Congress as a consequence of the lack of adequate accommodations in some of the towns where they met.¹⁵ L'Enfant's plan, as originally drawn, was designed for a city of 800,000, the size of Paris at the time.¹⁶ L'Enfant had worked out a plan for establishing small pockets of residential areas at various points in the city which would, as he put it, provide roots from which a population would spread out and extend toward the center of the city.¹⁷

In 1800, the District's population was approximately 15,000 and it was assumed by Madison, Jefferson, Monroe, and others that the District would continue to have a sizable and increasing population. A like assumption clearly underlies Madison's statement, 12 years earlier, in the *Federalist*, No. 43, which stresses the interests of the "inhabitants" of the Federal City:

"* * * as the State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it, as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will

¹⁴The 2.6 square miles which H.R. 5564 would retain as the District constituting the seat of government for a nation of nearly 200 million people contrasts markedly with the initial proposal of an area of from 3 to 36 square miles, revised to 100 square miles, for a nation which then had less than 4 million persons.

¹⁵See e.g., letter from Samuel Huntington to the Governor of Connecticut, Oct. 22, 1783: "The appointment of the only place for their residence at or near Trenton did not give satisfaction, and for want of present accommodations it seemed necessary to remove to some other place for their session the ensuing winter. * * *" (Massachusetts Historical Society, *Collections*, seventh ser. III, 447, reprinted in VII Letter of Members of the Continental Congress 345-346 (ed. Burnett, 1934).)

¹⁶Caemmerer, *Washington, The National Capital* 29 (1932) (S. Doc. No. 332, 71st Cong., 2d sess. (1931)).

¹⁷Letter of L'Enfant, May 30, 1800, to the Commissioners of Washington, reprinted in 44-45 *Records*, Columbia Historical Society (1942-43) p. 193.

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have had their voice in the election of the Government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the constitution, every imaginable objection seems to be obviated."

Similarly President Monroe in his message to Congress of November 16, 1818, directed Congress' attention to the problems of governing the residents of the District:

"The situation of this District, it is thought, requires the attention of Congress. By the Constitution, the power of legislation is exclusively vested in the Congress of the United States. In the exercise of this power, in which the people have no participation, Congress legislates in all cases directly on the local concerns of the District. As this is a departure, for a special purpose, from the general principles of our system, it may merit consideration, whether an arrangement better adapted to the principles of our Government, and to the particular interests of the people, may not be devised, which will neither infringe the Constitution, nor affect the object which the provision in question was intended to secure.

"The growing population already considerable¹⁶ and the increasing business of the District, which it is believed already interferes with the deliberations of Congress on great national concerns, furnish additional motives for recommending this subject for your consideration" (33 Annals of Congress 18 (1818)). Monroe had taken a prominent part in the Virginia ratification convention and, therefore, his statement furnishes additional evidence that the framers contemplated a considerable population in the Federal City which would grow as the Federal Government grew. Reduction of the District to small strip of territory occupied almost wholly by Federal buildings is thus clearly inconsistent with the concept of the Federal City held by the framers.

The inadequacy, of the small area proposed to be retained by H.R. 5564, to meet the objectives of the framers and the inherent needs of our Federal system, is apparent. Thus, if H.R. 5564 were adopted, the Members of Congress, the heads of executive departments, and the employees of the legislative and executive branches, would have no alternative but to reside in the States of Maryland or Virginia. They would be dependent on one or the other State for the means of transportation to and from their Federal offices. Even transportation between Federal offices would probably be controlled by Maryland, since separate taxicab and bus service for the new District of Columbia would probably not be physically or economically feasible. All the foreign embassies would be located in Maryland, dependent on it for police protection, and subject to its zoning and other requirements. Indeed, even the present route of the inauguration parade and parades for foreign dignitaries would lie in Maryland; such parades, if held on the most direct route between the Capitol and the White House, would presumably require a license from Maryland authorities, and be dependent on Maryland for necessary police protection. The total inconsistency is evident between such a situation and the intention of the framers as reflected in the materials referred to above.

III. THE 23D AMENDMENT

The argument that a Federal district constituting the seat of government is a permanent part of our constitutional system is substantially strengthened by the adoption of the 23d amendment. The 23d amendment to the Constitution, proposed by Congress June 16, 1960, and ratified April 3, 1961, provides:

"SECTION 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

"A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the State, 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 12th article of amendment.

¹⁶ It was then approximately 30,000.

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"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."²²

By its terms, this amendment presupposes the continuing existence of a "District constituting the seat of government of the United States," having a population sufficient to entitle it to at least three electors.

The fundamental inconsistency between H.R. 5564 and the 23d amendment can be shown in several ways.

1. The 23d amendment provides that the District constituting the seat of government shall appoint a certain number of presidential electors. At present the District of Columbia is entitled to three electors, the same number as the least populous state. If H.R. 5564 were enacted, the District would still be entitled to appoint three electors, since that number is the minimum to which any State is entitled, regardless of population.²³

Three results appear to be possible, each of which produces an absurdity. First, the electors could be chosen, as Public Law 87-389 provides, by vote of the qualified residents of the geographic area designated in H.R. 5564 as retained by the United States. This would give to a handful of residents the same voting power, in a presidential election, as each of six States, a result which neither the Congress which proposed the 23d amendment nor the States which ratified it can possibly have intended. (See point 2, *infra*.) Second, Congress could provide some alternative means of appointing the electors. For example, they might be designated by the incumbent President, or the Speaker of the House of Representatives or by majority vote of one or both Houses of Congress. In effect, this would place three electoral votes at the disposition of whichever political party happened to be in power in Congress prior to a presidential election. It would be hard to imagine a result more opposed to our basic political traditions. And such a result would be inconsistent with the stated purpose of the amendment, which was, in the words of the House report, "To provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States." House Report 86th Congress, 2d session, page 1. (See point 4, *infra*.) Third, Congress could fail to provide any means of appointing the three electors, thus causing the 23d amendment to become a dead letter before it was ever used. This would do violence to the terms of the amendment. That amendment does not leave it up to Congress to determine whether or not the District of Columbia shall cast three electoral votes in a particular presidential election. It contains a clear direction that the District "shall appoint" the appropriate number of electors, and gives Congress discretion only as to the mechanics by which the appointment is made.

"It cannot be presumed, that any clause in the Constitution is intended to be without effect." *Marbury v. Madison*, 1 Cranch 1937, 174 (1803). Hence, it can well be argued that the Constitution does not permit Congress to take action which would reduce the 23d amendment to an absurdity.

2. Adoption of the 23d amendment was premised on the factual assumption that the District of Columbia had, and would continue to have, a population comparable in size to that of many States. Thus, the report of the House Judiciary Committee on the resolution proposing the amendment states, under the heading "Purpose,"—

"The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every

²² Congress has provided by statute for the election, in the District of Columbia, of presidential and vice presidential electors. Public Law 87-389, 75 Stat. 817 (Oct. 4, 1961). District of Columbia Code sections 1-1101 et seq. This law provides that any citizen of the United States, 21 years old (other than convicted felons and mental incompetents), who has resided in the District continuously for 1 year and who does not claim voting residence or the right to vote in any State or territory, is qualified to vote for presidential and vice presidential electors (sec. 1-1102). It prescribes in detail the procedure for registration, nomination of candidates, voting, counting votes, recount, etc. (secs. 1-1107 through 1-1114).

²³ The 23d amendment gives the District of Columbia a number of electors "equal to the whole number of Senators and Representatives in Congress to which the District of Columbia would be entitled if it were a State," not to exceed that of the least populous State. Article 1, section 2 of the Constitution provides that "each State shall have at least one Representative." Article 1, section 3 provides for "two Senators from each State." Each State is therefore entitled to three presidential electors, regardless of its population. Hence the District of Columbia, if it were a State, would be entitled to three presidential electors, regardless of its population.

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U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed constitutional amendment" (H. Rept. 1698, 86th Cong., 2d sess., p. 2).²¹

Similarly, in the Senate, Senator Keating, in proposing the resolution, emphasized that "the population of the District of Columbia exceeds the population of 12 States." 106 Congressional Record 1759.²²

The population of the District of Columbia and its bearing on the number of electoral votes to which the District should be entitled was discussed at length in the House. As passed by the Senate, the resolution (S.J. Res. 39) had provided that the District should have the same number of electoral votes which it would have if it were a State. As reported by the House Judiciary Committee, it also provided that the number of votes should not exceed that of the least populous State (H. Rept. 1698, supra). This limitation was supported, in part, because of questions raised as to how many residents of the District might currently be voting by absentee ballots in the States from which they came. 106 Congressional Record 12561 (Congressmen Whitener, Mason). It was opposed as unfair in that it gave the District a lower vote than that to which its population would entitle it. 106 Congressional Record 12563 (Congressman Lindsay). Detailed discussion was had of the number of electoral votes which the District would have on the basis of its then current population. 106 Congressional Record 12562 (Congressman Cramer). In short, the size of the population of the District of Columbia was a primary consideration to Congress both in deciding whether the amendment should be proposed, and in working out the detailed provisions of the amendment.

It is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a District of Columbia which has a population of 75 families or which had no population at all. It is equally inconceivable that Congress would have set in motion the cumbersome and arduous process of constitutional amendment, on a factual assumption which it anticipated might be utterly destroyed 3 years later.

3. Congress does not lightly invoke the process of constitutional amendment. Accordingly, when the resolution proposing the 23d amendment was under consideration, Congress considered carefully the availability of any alternative means of achieving its objective of giving the residents of Washington, D.C. an equitable voice in the election of the President and Vice President. The legislative history shows clearly that Congress considered the feasibility and legality of legislation either admitting the District of Columbia as a new State, or retroceding it to Maryland. Both alternatives were explicitly considered and rejected in the report of the House Committee on the Judiciary, quoted supra p. On the floor of the House, Congressman Meader urged that further consideration be given to retrocession as an alternative to constitutional amendment. 106 Congressional Record 10259, 10260. Congressman Matthews replied:

"As the gentleman may know, I am a member of the much-criticized District of Columbia Committee. When we have hearings about home rule we always bring up the idea: Why do we not retrocede part of the District to Maryland, contracting the Federal City? The gentleman I am sure will be interested to know that we could find no enthusiasm whatsoever for that point of view. I do want the gentleman to know, however, that the point of view has been thoroughly explored by the District Committee." 106 Cong. Rec. 12560.

Thus it appears reasonable to construe the action of that Congress in proposing, and the States in ratifying, the 23d amendment as a considered choice among three alternative means of affording electoral votes to the residents of the District of Columbia: (1) separate statehood, (2) retrocession to Maryland, and (3) the grant of electoral votes to the District of Columbia. Congress and the States embodied this choice in the form of a constitutional amendment. Hence it is arguable that the choice can now be reconsidered only by means of another constitutional amendment.

²¹ To the same effect, see H. Rept. 1770, 86th Cong., 2d sess., p. 2; 106 Congressional Record 12555, 12558. The population figure quoted above was an estimate, given prior to the availability of the 1960 census data.

²² There is no Senate committee report; in the Senate the provision relating to electoral votes for the District of Columbia was added to S.J. Res. 39 by amendment from the floor, 106 Congressional Record 1767, 1764.

4. The 23d amendment gave to the residents of the District of Columbia, as such, the constitutional right to choose three electors.²³ Retrocession would take away that right, and substitute a right to participate in Maryland's choice of the electors to which it is entitled. If the residents of Washington were denied the right to vote at the 1904 election, on the ground that they had not been residents of Maryland for 1 year (Maryland constitution, art. I, sec. 1) they would be effectively deprived of any voice in that election. If they were allowed to vote in Maryland, but Maryland's electoral votes were not increased to correspond to its increase in population, then both the residents of Washington and the other residents of Maryland would have had their electoral votes diluted. In any event, the right of the 764,00 residents of the District, after retrocession, to cast their votes for electors as part of a State of 3,800,000, would not be the same as their right, specifically granted by the 23d amendment, to cast their vote separately for 3 electors.

In view of these inconsistencies, a persuasive argument can be made that the adoption of the 23d amendment has given permanent constitutional status to the existence of a federally owned "District constituting the seat of government of the United States," having a substantial area and population. This is not to imply that the existing boundaries of the District of Columbia are immutable or that Congress could not move the seat of government to a different location, and there establish a new district which would be, or would be expected to become, comparable in size and population to the present one. It suggests only that the basic concept of a Federal district, at the seat of government, comprising an area substantially larger than that occupied by the Federal buildings, having a population comparable in size to that of a State, and entitled to cast three or more votes for presidential electors, can be said to have been adopted by the 23d amendment as a part of our Constitution, so that a constitutional amendment repealing the 23d amendment would be required to abolish that district.

IV. THE FIFTH AMENDMENT

Two arguments can also be urged against H.R. 5564 based on the guaranty of due process made by the fifth amendment.

The first arises by reason of the effect of H.R. 5564 on the electoral votes provided by the 23d amendment. In *Baker v. Carr*, 309 U.S. 185, 207-208 (1932) the Supreme Court indicated that a State's apportionment of votes which effects "a gross disproportion of representation to voting population" would violate the equal protection of the laws, guaranteed by the 14th amendment. See also *Gomillion v. Lightfoot*, 304 U.S. 359 (1930); *Gray v. Sanders*, 372 U.S. 383 (1933). While the fifth amendment does not expressly prohibit the denial of the equal protection of the laws, discrimination by the United States "may be so unjustifiable as to violate due process" *Hollings v. Sharpe*, 347 U.S. 407, 409 (1954). Hence it is at least arguable that the principles of *Baker v. Carr* and subsequent decisions of State and lower Federal courts applying it are applicable to the apportionment of votes by Congress.

In effect, H.R. 5564 would result in a redistricting so as to create a District of Columbia having at most a few hundred residents, with 3 electoral votes, as compared with Hawaii (pop. 682,772) or Delaware (pop. 466,292), also having 3 electoral votes. The disparity in voting strength would be more than 1,000 to 1. Accepting the fact that some disparity in voting strength is inherent in the electoral college system established by article II and the 12th amendment, see *Gray v. Sanders*, 372 U.S. 383, 376-378, a disparity of this magnitude would be impossible to justify on any rational basis. The irregular configuration of the retained area could be urged as a further factor showing unreasonable and

²³The amendment provides "The District . . . shall appoint." In the Senate version, it provided "The people of the District of Columbia shall elect." The change in language appears to have been made simply to conform to the language of the amendment as closely as possible to that of art. II, sec. 1. The House committee report states: "It should be noted that this language follows closely, insofar as is applicable, the language of article II of the Constitution." H. Rept. 1698, 86th Cong., 2 sess. p. 8. The entire legislative history shows clearly that Congress was concerned with giving the residents of the District of Columbia a vote for the President. The House committee stated: "The purpose of this proposed constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States." (H. Rept. 1698, p. 1). [Emphasis added.]

arbitrary action in violation of the due process clause. Compare *Gomillion v. Lightfoot, supra*.²⁴

It might be urged that these objections would be eliminated if Congress made no provision for appointing the three electors from the District of Columbia or provided for their appointment on a basis which did not purport to represent the residents of the District of Columbia. An answer to either suggestion may be found, however, in the fact that the 23d amendment appears to be a direction that the District of Columbia "shall appoint" 3 electors, and the further fact that the express intention of Congress, in proposing the amendment, was "to provide the *citizens* of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States" (H. Rept. 1698, *supra*, p. 1). [Emphasis added.]

The second question under the fifth amendment arises by reason of the fact that H.R. 5564 makes no provision for obtaining the consent of a majority of the residents of the District of Columbia to the proposed retrocession. In this respect it is in contrast to the 1846 act of retrocession to Virginia, section 4 of which expressly provided, "That this act shall not be in force until after the assent of the people of the county and town of Alexandria shall be given to it," and set forth detailed procedures for a vote on the issue of retrocession.

There would appear to be a serious question whether the residents of the District can, consistently with due process of law, be required, against their will, to become citizens of Maryland, and subject to its existing constitution and laws, in whose making they had no part. Citizenship in a State is normally a voluntary matter. It would seem entirely foreign to our constitutional system to transfer a substantial population from one political sovereignty to another without their consent. It may not be a sufficient answer to say that residents of the District, and businesses chartered there, are free to remove elsewhere if they prefer not to be citizens of Maryland; this freedom may be illusory in the case of individuals with property, associations, and roots in the District, and businesses with investments, established customers, and good will in the District.

V. CONCLUSION

The foregoing discussion establishes, it is believed, that the constitutionality of H.R. 5564 is subject to serious question. A persuasive argument can be made that article I, section 8, clause 17, of the Constitution established, as a permanent part of our constitutional system, a Federal district constituting the seat of the government, having a substantial area and population. The merits of this argument have never been directly passed on by the Supreme Court; dicta lend it some support. Adoption of the 23d amendment has greatly strengthened the argument. The effect of the 23d amendment in this respect has not been passed on by any court. Finally, H.R. 5564 may be open to objections based on the fifth amendment.

This memorandum does not express an opinion on these questions, or seek to predict the outcome of a judicial test of them. Its purpose is simply to point out that the constitutional questions presented are substantial, that the uncertainties which they create could probably not be resolved without several years of litigation, and that these uncertainties could affect not only the validity of the proposed retrocession and of governmental actions affecting the retroceded area, but also the electoral system of Maryland and the outcome of a presidential election.

Mr. WHITENER. We will next hear from the Honorable Elmer Staats, Deputy Director of the Bureau of the Budget, who is with us. Mr. Staats, we are glad to hear from you at this time. I am sorry that we have kept you so long this morning. We do appreciate you and your colleagues for being here with us this morning. If you do not mind, will you identify them for the record. We will appreciate that.

²⁴ In *Gomillion*, the Court referred to the new boundaries of Tuskegee as forming an "uncouth 28-sided figure." The District of Columbia, as it would exist if H.R. 5564 were enacted, could be described as 50-sided figure.