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The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole

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Abstract. A variety of proposals have been made in the 110th Congress regarding granting the Delegate of the District of Columbia voting rights in the House. On January 24, the House approved H.Res. 78, which changed the House Rules to allow the D.C. delegate (in addition to the Resident Commissioner of Puerto Rico and the delegates from American Samoa, Guam, and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. A bill introduced by Delegate Eleanor Holmes Norton, H.R. 1905, the District of Columbia House Voting Rights Act of 2007, would give the District of Columbia Delegate a vote in the Full House. On April 19, 2007, H.R. 1905 passed the House by a vote of 241 to 177. A similar bill, S. 1257, was considered by the Senate on September 18, but a motion to invoke cloture failed by a vote of 57-42.

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Prepared for Members and
Committees of Congress

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Summary

A variety of proposals have been made in the 110th Congress regarding granting the Delegate of the District of Columbia voting rights in the House. On January 24, 2007, the House approved H.Res. 78, which changed the House Rules to allow the D.C. delegate (in addition to the Resident Commissioner of Puerto Rico and the delegates from American Samoa, Guam, and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. A bill introduced by Delegate Eleanor Holmes Norton, H.R. 1905, the District of Columbia House Voting Rights Act of 2007, would give the District of Columbia Delegate a vote in the Full House. On April 19, 2007, H.R. 1905 passed the House by a vote of 241 to 177. A similar bill, S. 1257, was considered by the Senate on September 18, but a motion to invoke cloture failed by a vote of 57-42.

These two approaches appear to raise separate, but related, constitutional issues. As to H.R. 1905, it is difficult to identify either constitutional text or existing case law that would directly support the allocation by statute of the power to vote in the full House to the District of Columbia Delegate. Further, that case law that does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation. In particular, at least six of the Justices who participated in what appears to be the most relevant Supreme Court case on this issue, *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, authored opinions rejecting the proposition that Congress's power under the District Clause was sufficient to effectuate structural changes to the federal government. Further, the remaining three Justices, who found that the Congress could grant diversity jurisdiction to District of Columbia citizens despite the lack of such jurisdiction in Article III, specifically limited their opinion to instances where the legislation in question did not involve the extension of fundamental rights or substantially disturb the political balance between the federal government and the states. To the extent that H.R. 1905 would be found to meet these distinguishing criteria, all nine Justices in *Tidewater Transfer Co.* would arguably have found the instant proposal to be unconstitutional.

H.Res. 78, on the other hand, is similar to amendments to the House Rules that were adopted during the 103rd Congress and survived judicial scrutiny at both the District Court and the Court of Appeals level. It would appear, however, that these amendments were upheld primarily because of the provision calling for a revote by the full House when the vote of the delegates was decisive in the Committee of the Whole. In conclusion, although not beyond question, it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the Delegate from the District of Columbia as contemplated under H.R. 1905. As the revote provisions provided for in H.Res. 78 would render the Delegate's vote in the Committee of the Whole largely symbolic, however, the amendments to the House Rules would be likely to pass constitutional muster.

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Proposed Legislation and Rule Change

A variety of proposals have been made in the 110th Congress regarding granting the Delegate of the District of Columbia voting rights in the House. On January 19, 2007, Representative Hoyer introduced H.Res. 78,[1] which proposed House Rule changes allowing the District of Columbia delegate (in addition to the Resident Commissioner of Puerto Rico[2] and the delegates from American Samoa, Guam, and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. H.Res. 78 was approved by the House on January 24, 2007.[3] Then, on April 19, 2007, Congress passed a bill introduced by Delegate Eleanor Holmes Norton, H.R. 1905,[4] the District of Columbia House Voting Rights Act of 2007, which would grant the District a voting representative in the full House.[5] A similar bill, S. 1257,[6] was considered by the Senate on September 18, but a motion to invoke cloture failed by a vote of 57-42.

Under H.R. 1905, the House would be expanded by two Members to a total of 437 Members, and the first of these two positions would be allocated to create a voting Member representing the District of Columbia.[7] Although it is generally

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[1] 110th Cong, 1st Sess.

[2] Although Puerto Rico is represented by a "Resident Commissioner," for purposes of this report, such representative will be referred to as a delegate.

[3] Congressional Record, daily edition, vol. 153, January 24, 2007, p. H912.

[4] 110th Cong, 1st Sess.

[5] Congressional Record, daily edition, vol. 153, April 19, 2007, pp. H3577-78. The bill passed by a vote of 241 to 177. A predecessor of this bill, H.R. 1433, was reported out of the House Oversight and Government Reform Committee on March 13, 2007, by a vote of 24-5, and two days later was reported out of the House Judiciary Committee by a vote of 21-13. On March 22, 2007, the House began floor consideration of the bill, but postponed a vote after an amendment was proposed that would have repealed the city's gun control legislation.

[6] 110th Congress, 1st Sess.

[7] The second position would be allocated in accordance with the 2000 census data and existing federal law. H.R. 1905, § 3(b). It would appear that, if the bill was passed today,

(continued...)

accepted that the Delegate for the District of Columbia could be given a vote in the House of Representatives by constitutional amendment, questions have been raised whether such a result can be achieved by statute.

H.R. 1905 provides the following: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[8] The proposal also provides that regardless of existing federal law regarding apportionment,[9] "the District of Columbia may not receive more than one member under any reapportionment of members."[10] The proposal also contains a non-severability clause, so that if a provision of the act is held unconstitutional, the remaining provisions of H.R. 1905 would be treated as invalid.[11]

In contrast, H.Res. 78 only grants the District of Columbia delegate a vote in the Committee of the Whole, a procedural posture of the full House which is invoked to speed up floor action. Specifically, the resolution amends House Rule III, cl. 3(a) to provide that "in a Committee of the Whole House on the state of the Union, the Resident Commissioner to the United States from Puerto Rico and each Delegate to the House shall possess the same powers and privileges as Members of the House."

An additional change to the House Rules, however, limits the effect of this voting power when it would be decisive. H.Res. 78 also amended House Rule XVIII, cl. 6 to provide that "whenever a recorded vote on any question has been decided by a margin within which the votes cast by the Delegates and the Resident Commissioner have been decisive, the Committee of the Whole shall automatically rise and the Speaker shall put that question de novo without intervening debate or other business. Upon the announcement of the vote on that question, the Committee of the Whole shall resume its sitting without intervening motion." Both of these provisions of H.Res. 78 are similar to amendments to the House Rules that were in effect during the 103rd Congress.

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[7] (...continued)
that the state of Utah would receive the second seat. Mary Beth Sheridan, *House Panel Endorses D.C. Vote: Bill Needs Approval From Judiciary Committee*, WASH. POST., May 19, 2006 at B1. *See, e.g., District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388*, 109th Cong., 2nd Sess. 2 (statement of Rep. Chabot). H.R. 1905, §3(c)(3) provides that such position would be allocated as an at-large seat. It should be noted that no such provision is contained in S. 1257.

[8] H.R. 1905, § 2(a).

[9] *See* 2 U.S.C. §2a.

[10] H.R. 1905, § 2(b).

[11] H.R. 1905, § 4.

Background

Residents of the District of Columbia have never had more than limited representation in Congress.[12] Over the years, however, efforts have been made to amend the Constitution so that the District would be treated as a state for purposes of voting representation. For instance, in 1978, H.J.Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The text of the proposed constitutional amendment provided, in part, that "[f]or purposes of representation in the Congress, election of the President and Vice President, and Article V of this Constitution,[13] the District constituting the seat of government of the United States shall be treated as though it were a State."[14] The Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.[15]

Since the expiration of this proposed Amendment, a variety of other proposals have been made to give the District of Columbia representation in the full House. In general, these proposals would avoid the more procedurally difficult route of amending the Constitution, but would be implemented by statute. Thus, for instance, bills were introduced and considered which would have (1) granted statehood to the non-federal portion of the District; (2) retroceded the non-federal portion of the District to the State of Maryland; and (3) allowed District residents to vote in Maryland for their representatives to the Senate and House.[16] Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.[17]

Unlike the proposals cited above, H.R. 1905 uses language similar to that found in the proposed constitutional amendment, but would instead grant the District of Columbia a voting member in the House by statute. As noted above, H.J.Res. 554 would have provided by constitutional amendment that the District of Columbia be

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[12] The District has never had any directly elected representation in the Senate, and has been represented by a nonvoting Delegate in the House of Representatives for only a short portion of its over 200-year existence. *See* CRS Report RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by Eugene Boyd.

[13] U.S. CONST. Article V provides that

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

[14] *See* Johnny H. Killian, George Costello, Kenneth R. Thomas, *United States Constitution: Analysis and Interpretation* 49 (2002 ed.).

[15] CRS Report RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by Eugene Boyd, *supra* note 12, at 6.

[16] Id. at 6-12.

[17] Id. at 8-12. D.C. Hearing, *supra* note 7 at 78 (Testimony of Hon. Kenneth W. Starr).

treated as a state for purposes of representation in the House and Senate, the election of the President and Vice President, and ratification of amendments of the Constitution. H.R. 1905, is more limited, in that it would only provide that the District of Columbia be treated as a state for purposes of representation in the House. Nonetheless, the question is raised as to whether such representation can be achieved without a constitutional amendment.

As noted previously, a resolution similar to the H.Res. 78 was adopted in the 103rd Congress. It was soon challenged, but it was upheld at both the District Court[18] and the Court of Appeals[19] level. It would appear, however, that the proposal was upheld primarily because of the provision calling for a revote when the vote of the delegates or residents was decisive in the Committee of the Whole.

The Meaning of the Term "State" in the House Representation Clause

As Congress has never granted the Delegate from the District of Columbia a vote in the full House or Senate, the constitutionality of such legislation has not been before the courts. The question of whether the District of Columbia should be considered a state for purposes of having a vote in the House of Representatives, however, was considered by a three-judge panel of the United States District Court of the District of Columbia in the case of *Adams v. Clinton.*[20] In *Adams*, the panel examined the issue of whether failure to provide congressional representation for the District of Columbia violated the Equal Protection Clause. In doing so, it discussed extensively whether the Constitution, as it stands today, allows such representation.

The court began with a textual analysis of the Constitution. Article I, § 2, clause 1 of the Constitution, the "House Representation Clause," provides

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

The court noted that, while the phrase "people of the several States" could be read as meaning all the people of the "United States," that the use of the phrase later in the clause and throughout the article[21] makes clear that the right to representation

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[18] Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), *affirmed*, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

[19] Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

[20] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[21] *See, e.g.*, U.S. Const. Art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* at Art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.*

(continued...)

in Congress is limited to states. This conclusion has been consistently reached by a variety of other courts,[22] and is supported by most, though not all, commentators.[23] The plaintiffs in *Adams v. Clinton*, however, suggested that even if the District of Columbia is not strictly a "state" under Article I, § 2, clause 1, that the citizens of the United States could still have representation in Congress.

The plaintiffs in *Adams* made two arguments: (1) that the District of Columbia, although not technically a state under the Constitution, should be treated as one for voting purposes or (2) that District citizens should be allowed to vote in the State of Maryland, based on their "residual" citizenship in that state. The first argument was based primarily on cases where the Supreme Court has found that the District of Columbia was subject to various constitutional provisions despite the fact that such provisions were textually limited to "states."[24] The second argument is primarily based on the fact that residents of the land ceded by Maryland continued to vote in Maryland elections during the period between the act of July 16, 1790, by which Virginia and Maryland ceded lands to Congress for formation of the District, and the Organic Act of 1801,[25] under which Congress assumed jurisdiction and provided for the government of the District.

Whether the District of Columbia can be considered a "state" within the meaning of a particular constitutional or statutory provision appears to depend upon the character and aim of the specific provision involved.[26] Accordingly, the court in

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[21] (...continued)
("each State shall have at Least one Representative"); *id.* at art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* at art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives).

[22] *See* Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

[23] *See, e.g.,* Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands, U. HAW. L. REV. 445, 512 (1992). Even some proponents of D.C. voting rights generally assume the District of Columbia is not currently a state for purposes of Article I, § 2, cl. 1. *See, e.g.,* Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* 9 (2004) (report submitted to the House Committee on Government Reform) available at D.C. Vote website at [http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf]. *But see* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[24] *See, e.g.,* Loughran v. Loughran, 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds "courts of the District ... equally with courts of the States"); Callan v. Wilson, 127 U.S. 540, 550 (1888) (holding that the right to trial by jury extends to residents of District).

[25] 2 Stat. 103 (1801).

[26] District of Columbia v. Carter, 409 U.S. 418, 420 (1973) (application of 42 U.S.C. § (continued...)

Adams examined the Constitution's language, history, and relevant judicial precedents to determine whether the Constitution allowed for areas which were not states to have representatives in the House. The court determined that a finding that the District of Columbia was a state for purposes of congressional representation was not consistent with any of these criteria.

First, the court indicated that construing the term "state" to include the "District of Columbia" for purposes of representation would lead to many incongruities in other parts of the Constitution. One of several examples that the court noted was that Article I requires that voters in House elections "have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature."[27] The District, as pointed out by the court, did not have a legislature until home rule was passed in 1973, so this rule would have been ineffectual for most of the District's history.[28] This same point can be made regarding the clause providing that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof...."[29] Similar issues arise where the Constitution refers to the Executive Branch of a state.[30]

The court went on to examine the debates of the Founding Fathers to determine the understanding of the issue at the time of ratification. The court concluded that such evidence as exists seems to indicate an understanding that the District would not have a vote in the Congress.[31] Later, when Congress was taking jurisdiction over land ceded by Maryland and Virginia to form the District, the issue arose again, and concerns were apparently raised precisely because District residents would lose their ability to vote.[32] Finally, the court noted that other courts which had considered the

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[26] (...continued)
1983).

[27] U.S. CONST. art. I, § 2, cl. 1.

[28] *See* District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198 (1973).

[29] U.S. CONST. art. I, § 4, cl. 1.

[30] "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. Art. I, § 2, cl. 4.

[31] For instance, at the New York ratifying convention, Thomas Tredwell argued that "[t]he plan of the federal city, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote...." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted* in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[32] *See, e.g.*, 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights").

question had concluded in *dicta* or in their holdings that residents of the District do not have the right to vote for Members of Congress.[33]

The second argument considered by the court was whether residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. As noted above, this argument relied on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections for a time period after land had been ceded to Congress. The court noted, however, that essentially the same argument had been rejected by a previous three-court panel decision of the District of Columbia Court of Appeals,[34] and the Supreme Court had also concluded that former residents of Maryland had lost their state citizenship upon the separation of the District of Columbia from the State of Maryland.[35]

The court continued by setting forth the history of the transfer of lands from Maryland and Virginia to the federal government under the act of July 16, 1790. While conceding that residents of the ceded lands continued to vote in their respective states, the court suggested that this did not imply that there was an understanding that they would continue to do so after the District became the seat of government; it reflected the fact that during this period the seat of government was still in Philadelphia. Thus, upon the passage of the Organic Act of 1801, Maryland citizenship of the inhabitants of these lands was extinguished, effectively ending their rights to vote.

The Power of Congress to Provide Representation to Political Entities That Are Not States

The argument has been made, however, that the *Adams* case, which dealt with whether the Equal Protection Clause compels the granting of a vote to the District of Columbia, can be distinguished from the instant question — whether Congress has power to grant the District a voting representative in Congress. Under this argument, the plenary authority that the Congress has over the District of Columbia under Article I, Section 8, clause 17 (the "District Clause") represents an independent

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[33] Hepburn & Dundas, 6 U.S. (2 Cranch) 445, 452 (1805) (District of Columbia is not a state for purposes of diversity jurisdiction); Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (stating in *dicta* that "residents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in *dicta* that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government.")

[34] Albaugh v. Tawes, 233 F. Supp. 576, 576 (D. Md. 1964), *affirmed* 379 U.S. 27 (1964) (per curiam) (residents of D.C. have no right to vote in Maryland).

[35] Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805).

source of legislative authority under which Congress can grant the District a voting Representative.[36]

Although the question of whether Congress has such power under the District Clause has not been directly addressed by the courts, the question of whether Congress can grant the District of Columbia representation under a different congressional power was also addressed by the United States Court of Appeals for the District of Columbia. In the case of *Michel v. Anderson*,[37] the court considered whether the Delegate for the District of Columbia could, by House Rules, be given a vote in the Committee of the Whole of the House of Representatives.

The primary objection to the rule in question was that, while Delegates have long been able to vote in Committee, only a Member can vote on the floor of the House. The district court below had agreed with this argument, stating that

> One principle is basic and beyond dispute. Since the Delegates do not represent States but only various territorial entities, they may not, consistently with the Constitution, exercise legislative power (in tandem with the United States Senate), for such power is constitutionally limited to "Members chosen ... by the People of the several States." U.S. Const. art. I, § 8, cl. 1.[38]

The Court of Appeals also agreed,[39] stating that

> [The language of] Article I, § 2 ... precludes the House from bestowing the characteristics of membership on someone other than those "chosen every second Year by the People of the several States."

Based on these statements, it is unlikely that these courts would have seen merit in an argument that the Congress could grant the Delegate a vote in the House.

An argument might be made, however, that the decision in *Michel v. Anderson* can be distinguished from the instant proposal, because *Michel* concerned a House Rule, not a statute. Under this argument, the House in *Michel* was acting alone under its power to "Determine the Rules of its Proceedings" pursuant to Article I, section

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[36] *See* Viet Dinh and Adam H. Charnes, *supra* note 23, at 12-13; D.C. Hearing, *supra* note 7, at 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, *Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate* at 7-12 (February 3, 2003) (analysis prepared for Walter Smith, Executive Director of DC Appleseed Center for Law and Justice).

[37] 14 F.3d 623 (D.C. Cir. 1994).

[38] Michel v. Anderson, 817 F. Supp. 126, 141 (D.D.C. 1993), *aff'd* 14 F.3d 623 (D.C. Cir. 1994).

[39] While accepting the premise that Membership in the House is restricted to representatives of states, the court found that the Delegate's vote in the Committee of the Whole was subject to a revote procedure which made the vote only "symbolic." 14 F.3d at 632.

5.[40] Arguably, the court did not consider the issue of whether the Congress as a whole would have had the authority to provide for representation for the District of Columbia under the District Clause. Under this line of reasoning, the power of the Congress over the District represents a broader power than the power of the House to set its own rules.

At first examination, it is not clear on what basis such a distinction would be made. The power of the House to determine the Rules of its Proceedings is in and of itself a very broad power. While the House may not "ignore constitutional restraints or violate fundamental rights ... within these limitations all matters of method are open to the determination of the House.... The power to make rules, ... [w]ithin the limitations suggested, [is] absolute and beyond the challenge of any other body or tribunal." In fact, the Supreme Court has found that in some cases, the constitutionality of a House Rule is not subject to review by courts because the question is a "political," and not appropriate for judicial review.[41]

It is true that the power of the Congress over the District of Columbia has been described as "plenary." To a large extent, this is because the power of the Congress over the District blends the limited powers of a national legislature with the broader powers associated with a local legislature.[42] Thus, some constitutional restrictions that might bind Congress in the exercise of its national power would not apply to legislation which is limited to the District of Columbia. For example, when Congress created local courts for the District of Columbia, it acted pursuant to its power under the District Clause and thus was not bound by to comply with Article III requirements which generally apply to federal courts.[43] Or, while there are limits to Congress's ability to delegate its legislative authorities, such limitations do not apply when Congress delegates its local political authority over the District to District residents.[44]

It is not clear, however, that the power of Congress at issue in H.R. 1905 would be easily characterized as falling within Congress's power to legislate under the

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[40] U.S. CONST., Article I, § 5.

[41] *Compare* Nixon v. United States, 506 U.S. 224, 237 (1993) (issue of whether Senate could delegate to a committee the task of taking testimony in an impeachment case presented political question in light of constitutional provision giving Senate "sole power to try impeachments") *with* Powell v. McCormack, 395 U.S. 486, 518-49 (1969) (Court reached merits after finding that power of House to judge elections, returns, and qualifications of its Members restricts House to qualifications specified in Constitution).

[42] National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., 337 U.S. 582, 604 (Justices Rutledge and Murphy); District of Columbia v. Thompson, 346 U.S. 100, 108-110 (1953).

[43] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, 111, 84 Stat. 475, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The status of the Article I courts were sustained in *Palmore v. United States*, 411 U.S. 389 (1973).

[44] District of Columbia v. Thompson, 346 U.S. 100, 106-09 (1953).

District Clause. While the existing practice of allowing District of Columbia residents to vote for a non-voting Delegate would appear to fall comfortably within its authority under the District Clause, giving such Delegate a vote in the House would arguably have an effect that went beyond the District of Columbia. Such a change would not just affect the residents of the District of Columbia, but would also directly affect the structure of and the exercise of power by Congress. More significantly, if the Delegate were to cast the decisive vote on an issue of national import, then the instant legislation could have a significant effect nationwide.

The Supreme Court has directly addressed the issue of whether the District Clause can be used to legislate in a way that has effects outside of the District of Columbia. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[45] the Court considered whether Congress could by statute require that federal courts across the country consider cases brought by District of Columbia residents under federal diversity jurisdiction. This case has been heavily relied upon by various commentators as supporting the proposed legislation.[46]

The Significance of the Case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*

The *Tidewater Transfer Co.* case appears to provide a highly relevant comparison to the instant proposal. As with the instant proposal, the congressional statute in question was intended to extend a right to District of Columbia residents that was only provided to citizens of "states." In 1805, Chief Justice John Marshall, in the case of *Hepburn v. Ellzey*,[47] had authored a unanimous opinion holding that federal diversity jurisdiction, which exists "between citizens of different states," did not include suits where one of the parties was from the District of Columbia.[48] Despite this ruling, Congress enacted a statute extending federal diversity jurisdiction to cases where a party was from the District.[49] The Court in *Tidewater Transfer Co.* upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.[50]

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[45] 337 U.S. 582 (1949).

[46] *See, e.g.*, Viet Dinh and Adam H. Charnes, *supra* note 23, at 11-13; Rick Bress and Kristen E. Murray, *supra* note 36, at 9-12. *But see*, D.C. Hearing, *supra* note 7, at 61 (statement of Professor Jonathan Turley).

[47] 6 U.S. (2 Cranch) 445 (1805).

[48] Id. at 452. Although, strictly speaking, the opinion was addressing statutory language in Act of 1789, the language was so was so similar to the language of the Constitution that it was an interpretation of the latter which was essential to the Court's reasoning. *See Tidewater Transfer Co*., 337 U.S. at 586.

[49] Act of April 20, 1940, c. 117, 54 Stat. 143.

[50] *See Tidewater Transfer Co.*, 337 U.S. at 600 (plurality opinion of Jackson, J.).

On closer examination, however, the *Tidewater Transfer Co.* case may not support the constitutionality of the instant proposal. Of primary concern is that this was a decision where no one opinion commanded a majority of the Justices. Justice Jackson's opinion (the Jackson plurality), joined by Justices Black and Burton, held that District of Columbia residents could seek diversity jurisdiction based on Congress exercising power under the District Clause. Justice Rutledge's opinion (the Rutledge concurrence) joined by Justice Murphy, argued that the provision of Article III that provides for judicial authority over cases between citizens of different states, the "Diversity Clause,"[51] permits such law suits, even absent congressional authorization. Justice Vinson's opinion (the Vinson dissent), joined by Justice Douglas, and Justice Frankfurter's opinion (the Frankfurter dissent), joined by Justice Reed, would have found that neither the Diversity Clause nor the District Clause provided the basis for such jurisdiction.

Of further concern is that those concurring Justices who did not join in the three-judge plurality opinion were not silent on the issue of Congress's power under the District Clause. Consequently, it is possible that a majority of the Justices would have reached a differing result on the breadth of Congress's power. In addition, it would appear that even the three-judge plurality might have distinguished the instant proposal from the legislation which was at issue in the *Tidewater Transfer Co*.

Thus, a closer analysis of this case should consider the different opinions, how the Justices framed the questions before them, and then the reasoning they used to resolve the issue. To help understand the issues raised by this case and by the instant bill, this analysis should focus on four different issues: (1) whether the District of Columbia is a "state" for purposes of diversity jurisdiction; (2) whether the District of Columbia is a "state" for purposes of voting representation; (3) whether Congress can grant diversity jurisdiction under the District Clause; and (4) whether Congress can provide for a voting Delegate under the District Clause.

Whether the District of Columbia is a "State" for Purposes of Diversity Jurisdiction

As noted, the Court has held since the 1805 case of *Hepburn v. Ellzey*[52] that federal diversity jurisdiction under Article III does not include suits where one of the parties was from the District of Columbia.[53] Presaging the *Adams v. Clinton*[54] case by nearly two centuries, this unanimous decision briefly considered the use of the term "state" throughout the Constitution. The Chief Justice noted that the plain meaning of the term "state" in the Constitution did not include the District of Columbia, and further noted that this was the term used to determine representation in the Senate, the House, and the number of Presidential Electors. As there was little

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[51] U.S. Const., art. III, § 2, cl. 1 provides that "The Judicial Power shall extend to ... Controversies between two or more States...."

[52] 6 U.S. (2 Cranch) 445 (1805).

[53] Id. at 452.

[54] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.*, Alexander v. Mineta, 531 U.S. 940 (2000).

doubt that state did not include the District of Columbia in those instances, the Court found no reason that the term should take on a different meaning for purposes of diversity.

In the *Tidewater Transfer Co.* case, however, the Rutledge concurrence took issue with *Hepburn.* Justice Rutledge noted that the term "state" had been found in some cases to include the District of Columbia. The main thrust of the opinion was that the use of the term state in the Constitution occurred in two different contexts: (1) in provisions relating to the organization and structure of the political departments of the government, and (2) where it was used regarding the civil rights of citizens.[55] The Rutledge concurrence argued that the latter uses of the term should be considered more expansively in the latter case than the former. For instance, the Court noted that the Sixth Amendment, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State ... wherein the crime shall have been committed ...," had been held to apply to the citizens of the District of Columbia.[56]

Next, the Rutledge concurrence sought to establish that of these two categories, access to the federal courts under diversity jurisdiction fell into the latter. The opinion suggested that the exclusion of the District of Columbia from diversity jurisdiction served no historical purpose, and that the inclusion of the District would be consistent with the purposes of the provision. The opinion essentially rested on the premise that such a distinction between the citizens of the District of Columbia and the states made no sense: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[57]

The opinion of the these two Justices, however, was not shared by any of the other seven Justices of the Court.[58] The Jackson plurality opinion, for instance, specifically rejected such an interpretation. That opinion noted that while one word may be capable of different meanings, that such "such inconsistency in a single

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[55] 337 U.S. at 619 (Rutledge, J. concurring).

[56] The *Rutledge* opinion conceded that Court's initial determination that District residents were entitled to a jury trial in criminal cases in *Callan v. Wilson*, 127 U.S. 540 (1888) rested in large measure on the more inclusive language of Article III, § 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." But the Court noted that cases relied upon by *Callan* were based at least in part on the Sixth Amendment. "In Reynolds v. United States, 98 U.S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions...." *Callan*, 127 U.S. at 550.

[57] 337 U.S. at 625.

[58] Although not addressed by the any opinion of the Court, a separate argument has been made that the extension of diversity jurisdiction to the District of Columbia could also have been made under the Privileges and Immunities Clause. *See* James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 Notre Dame L. Rev. 1925 (2004).

instrument is to be implied only where the context clearly requires it."[59] The Jackson plurality found no evidence that the Founding Fathers gave any thought to the issue of the District of Columbia and diversity jurisdiction, and that if they had that they would not have included the District by use of the term "state." Nor did the Court find this oversight particularly surprising, as the District of Columbia was still a theoretical political entity when the Constitution was ratified, and its nature and organization had not yet been established.

The Vinson dissent summarily dismissed the argument that the *Hepburn v. Ellzey* decision be overruled.[60] The Frankfurter dissent argued vehemently that the use of the term "state" in the clause at issue was one of the terms in the Constitution least amenable to ambiguous interpretation. "The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government."[61] This, combined with knowledge of the distrust that the Founding Fathers had towards the federal judiciary, left Justice Frankfurter with little interest in entertaining arguments to the contrary.

Whether the District of Columbia is a "State" for Purposes of Representation

While there has been some academic commentary suggesting that the term "state" could be construed more broadly for purposes of representation than is currently the case,[62] there is little support for this proposition in case law. Starting with Chief Justice Marshall in the *Hepburn* case, and as recently as *Adams v. Clinton* and *Michel v. Anderson*, the Supreme Court and lower courts have generally started with the basic presumption that the use of the term "state" for purposes of representation in the House did not include the District of Columbia. In fact, in *Hepburn*, Chief Justice Marshall had referred to the "plain use" of the term "state"

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[59] Id. at 587.

[60] That it was not the specific intent of the framers to extend diversity jurisdiction to suits between citizens of the District of Columbia and the States seems to be conceded. One well versed in that subject, writing for the Court within a few years of adoption of the Constitution, so held. The question is, then, whether this is one of those sections of the Constitution to which time and experience were intended to give content, or a provision concerned solely with the mechanics of government. I think there can be little doubt but that it was the latter. That we would now write the section differently seems hardly a sufficient justification for an interpretation admittedly inconsonant with the intent of the framers. Ours is not an amendatory function.

Id. at 645 (Vinson, J., dissenting).

[61] Id. at 646 (Frankfurter, J., dissenting).

[62] *See* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

in the clauses regarding representation as the benchmark to interpret other clauses using the phrase.[63]

The opinions of the Justices in *Tidewater Transfer Co.* appear to be no different. As noted above, seven of the nine Justices in that case accepted the reasoning of the *Hepburn* case as regards diversity jurisdiction, and would certainly have been even less likely to accept the argument that the District of Columbia should be considered a state for purposes of the House of Representatives. It also seems likely that the Justices associated with the Rutledge concurrence would have similarly rejected such an interpretation. As noted, that opinion suggested that the error in *Hepburn* was the failure to distinguish between how the term "state" should be interpreted when used in the context of the distribution of power among political structures and how it should be interpreted when it is used in relation to the civil rights of citizens.[64] Although Justice Rutledge found that a restrictive interpretation of the term state was unnecessarily narrow in the context of diversity jurisdiction, there is no indication that the Justice would have disputed the "plain use" of the term "state" in the context of representation for the District in Congress.

Whether Congress Has the Authority Under the District Clause to Extend Diversity Jurisdiction to the District of Columbia

The Jackson plurality opinion considered whether, despite the Court's holding in *Hepburn*, Congress, by utilizing its power under the District Clause, could evade the apparent limitations of Article III on diversity jurisdiction. The plurality noted that the District Clause had not been addressed in Chief Justice Marshall's opinion, and that the Chief Justice had ended his opinion by noting that the matter was a subject for "legislative not for judicial consideration."[65] While admitting that it would be "speculation" to suggest that this quote established that Congress could use its statutory authority rather than proceed by constitutional amendment, the Court next considered whether such power did in fact exist.

As noted previously, the power of Congress over the District includes the power to create local courts not subject to Article III restrictions. The plurality suggested that there would be little objection to establishing a federal court in the District of Columbia to hear diversity jurisdiction. Instead, the concerns arose because the statute in question would operate outside of the geographical confines of the District.

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[63] 6 U.S. at 452 ("When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it").

[64] The two judges noted a distinction to be made between constitutional clauses "affecting civil rights of citizens," such as the right to a jury trial, and "the purely political clauses," such as "the requirements that Members of the House of Representatives be chosen by the people of the several states." Id. at 619-623 (Rutledge, J., concurring). *See* Adams v. Clinton, 90 F. Supp. 2nd at 55.

[65] *Hepburn*, 6 U.S. at 453.

Further, the statute would require that Article III courts be tasked with functions associated with an Article I court.[66]

The Jackson plurality had little trouble assigning the tasks of an Article I court to an Article III court, suggesting that such assignments had been approved in the past, including in the District of Columbia.[67] A more difficult question was the exercise of diversity jurisdiction by federal courts outside of the geographical confines of the District. While noting that the Congress's power over the District was not strictly limited by territory, it admitted that the power could not be used to gain control over subjects over which there had been no separate delegation of power.[68] Thus, the question arose as to whether a separate power beyond the District Clause was needed here.

Essentially, the Court held that the end that the Congress sought (establishing a court to hear diversity cases involving District of Columbia citizens) was permissible under the District Clause, and that the choice of means that the Congress employed (authorizing such hearings in federal courts outside of the District) was not explicitly forbidden. As a result, the Court held that it should defer to the opinions of Congress when Congress was deciding how to perform a function that is within its power.[69]

It should be noted that even the plurality opinion felt it necessary to place this extension in a larger context, emphasizing the relative insignificance of allowing diversity cases to be heard in federal courts outside of the District. The Court noted that the issue did not affect "the mechanics of administering justice" or involve the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms," nor did the legislation "substantially disturb the balance between the Union and its component states." Rather, the issue involved only whether a plaintiff who sued a party from another state could require that the case be decided in a convenient forum.[70]

The Rutledge concurrence, on the other hand, explicitly rejected the reasoning of the plurality, finding that the Congress clearly did not have the authority to authorize even this relatively modest authority to District of Columbia citizens.[71] In fact, the concurring opinion rejected the entire approach of the plurality as unworkable, arguing that it would allow any limitations on Article III courts to be

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[66] 337 U.S. at 509.

[67] *See* O'Donoghue v. United States, 289 U.S. 516 (1933) (holding that Article III District of Columbia courts can exercise judicial power conferred by Congress pursuant to Art. I).

[68] 337 U.S. at 602.

[69] Id. at 602-03.

[70] Id. at 585.

[71] Id. at 604-606 (Rutledge, J., concurring) ("strongly" dissenting from the suggestion that Congress could use Article I powers to expand the limitations of Article III jurisdiction).

disregarded if Congress purported to be acting under the authorization of some other constitutional power.[72]

The Vinson dissent and the Frankfurter dissent also rejected the reasoning of the plurality as regards Congress power to grant diversity to the District, citing both Article III limitations on federal court and separation of powers. The Vinson dissent argued that the question as to whether Congress could use its legislative authority to evade the limitations of Article III had already been reached in cases regarding whether the Congress could require federal courts to hear cases where there was no case or controversy.[73] The Frankfurter dissent made similar points, and also noted the reluctance by which the states had even agreed to the establishment of diversity jurisdiction.[74] Thus, considering both the dissents and the concurrence, six Justices rejected the plurality's expansive interpretation of the District Clause.

Whether Congress Has the Authority Under the District Clause to Extend House Representation to the District of Columbia

The positions of the various Justices on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to also inform the question as to whether such Justices would have supported the granting of House representation to District citizens. As noted, six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause. It is unlikely that the Justices in question would have rejected diversity jurisdiction for District of Columbia residents, but would then approve voting representation for those same residents. The recurring theme of both the *Hepburn* and *Tidewater Transfer Co.* decisions was that the limitation of House representation to the states was the least controversial aspect of the Constitution, and that the plain meaning of the term "state" in regards to the organization of the federal political structures was essentially unquestioned.

Consequently, only the three Justices of the plurality in *Tidewater Transfer Co.* might arguably have supported the doctrine that the Congress's power over the District of Columbia would allow extension of House representation to its citizens. However, even this conclusion is suspect. As noted, the plurality opinion took pains to note the limited impact of its holding — parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a law suit. As noted, the plurality specifically limited the scope of its decision to legislation that neither involved an "extension or a denial of any fundamental right" nor substantially

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[72] "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not." Id. at 605 (Rutledge, J. concurring).

[73] Id. at 628-31 (Vinson, J., dissenting). *See, e.g.*, Keller v. Potomac Electric Co., 261 U.S. 428 (1923).

[74] Id. at 646-55 (Frankfurter, J., dissenting).

disturbed "the balance between the Union and its component states."[75] Arguably, granting the Delegate a vote in the House involves an extension of a fundamental right. Further, the possibility that a non-state political entity could cast a deciding vote on an issue of national significance could well be seen as a substantial disturbance to the existing federalism structure. Thus, even the Justices in the Jackson plurality might distinguish the instant proposal from their holding in *Tidewater Transfer Co*.

These three Justices might also have had other concerns that would weigh against such an extension of their holding. The act before the Justices in that case did not affect just the District of Columbia, but also extended diversity jurisdiction to the territories of the United States, including the then-territories of Hawaii and Alaska.[76] Although the question of diversity jurisdiction over residents of the territories was not directly before the Court, subsequent lower court decisions[77] have found that the reasoning of the *Tidewater Transfer Co.* case supported the extension of diversity jurisdiction to the territories, albeit under the "Territory Clause."[78]

Thus, a concern that the plurality Justices might have had about the instant proposal would be whether its approval would also validate an extension of House representation to other political entities, such as the territories. While the extension of diversity jurisdiction to residents of territories has been relatively uncontroversial, a decision to grant a voting Delegate to the territories might not. Under the Territory Clause, the Congress has plenary power over the territories of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Commonwealth of the Northern Marianas Islands. Thus, extending the reasoning of the *Tidewater Transfer Co.* case to voting representation might arguably allow each of these territories to seek representation in the House.[79]

Although an analysis of the constitutionality of such an extension goes beyond the scope of this report, providing House representation to the territories would clearly represent a significant change to the national political structure. Of particular note would be the relatively small number of voters in some of these territories. For instance, granting House representation to American Samoa, with a population of

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[75] Id. at 585.

[76] Id. at 584-585.

[77] *See, e.g.*, Detrea v. Lions Building Corporation, 234 F.2d 596 (1956).

[78] U.S. Const. Art. IV, § 3, cl. 2 provides

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[79] *But see Tidewater Transfer Co.*, 337 U.S. at 639 (Vinson, J., dissenting) (noting differences between Congressional regulation of local courts under the District Clause and the Territorial Clause.)

about 58,000,[80] most of whom are not citizens of the United States,[81] would appear to depart significantly from the existing makeup of the House.

Similarly, a holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution which deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize the District of Columbia to have Senators, Presidential Electors,[82] and perhaps even the power to ratify Amendments to the Constitution.[83]

The Significance of Limiting Delegate Voting to the Committee of the Whole

As the above discussion is directed at the full House, the question can be raised as to whether it should also apply to the Committee of the Whole. The Committee of the Whole is not provided for in the Constitution, and the nature of the Committee of the Whole appears to have changed over time. Established in 1789, the Committee of the Whole appears to be derived from English Parliamentary practices. It was originally intended as a procedural device to exclude the Speaker of the House of Commons, an ally of the King, from observing the proceedings of the House.[84] Since that time, the Committee has evolved into a forum where debate and discussion can occur under procedures more flexible than those otherwise utilized by the House.

At present, the Committee of the Whole is simply the Full House in another form.[85] Every legislator is a member of the Committee, with full authority to debate and vote on all issues.[86] By resolving into the Committee of the Whole, the House invokes a variety of procedural devices which speed up floor action. Instead of the normal quorum of one-half of the legislators in the House, which is generally more than 200 legislators, the Committee of the Whole only requires a quorum of 100 members. In addition, amendments to bills are debated under a five-minute rule rather than the one hour rule. Finally, it is in order to close debate on sections of bills by unanimous consent or a majority of members present.[87]

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[80] *See* CIA World Fact book, [https://www.cia.gov/cia/publications/factbook/index.html].

[81] *See* Arnold Leibowitz, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989) at 41.

[82] This authority, it should be noted, has already been granted, but it was done by Constitutional Amendment. *See* U.S. CONST. Amend. XXIII.

[83] U.S. CONST. Art. V.

[84] Alexander, De Alva Stanwood, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 257 (1916).

[85] W. Oleszak, Congressional Procedures and the Policy Process 128 (1984).

[86] Id.

[87] Id. at 129.

Assuming that the Delegate for the District of Columbia could not cast a vote in the full House, a separate question arises as to whether, as provided for by the House Rules amended by H.Res. 78, the Delegate (along with the territorial delegates) could cast a vote in the Committee of the Whole, subject to a revote when such a vote is determinative. Under Article I of the Constitution, all legislative authority for the United States is to be vested in the Senate and the House of Representatives,[88] and under §2 of that Article, the House of Representatives shall be composed of "Members" chosen in conformity with the qualifications and requirements of the Constitution. As the Delegate for the District of Columbia is not a Member for purposes of Article § 2,[89] the question arises as to the basis on which delegate could vote in the Committee of the Whole.

The Constitution does not provide for representatives of the District of Columbia or the territories such as the delegate for the District of Columbia or the resident commissioners or delegates for the territories; nor does it appear that these delegates and resident commissioners are required to meet the qualifications or electoral requirements required of Members of Congress.[90] Consequently, the Constitution does not appear to provide the basis for a delegate to exercise the power of Members under the Constitution.[91] However, the Constitution does not specify whether or not all legislative activities which a Member might engage in are restricted to those Members, thus leaving open the possibility that a delegate may engage in some legislative activities which are not limited to Members.

Historically, delegates have engaged in a number of legislative activities which, although preliminary to final passage of legislation and thus arguably advisory, appear to involve the exercise of some modicum of legislative authority. These activities have included introducing legislation,[92] serving on standing congressional committees, voting on these committees,[93] and debating on the floor of the house. The line between what legislative activities are limited to Members of Congress and those which are not, however, is not well developed.[94]

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[88] U.S. Const. Art. I, § 1.

[89] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

[90] For example, the number of persons who may be represented by each Member must be approximately equal with the number represented by other Members. Wesberry v. Sanders, 376 U.S. 1 (1962). The number of persons represented by the District of Columbia delegate is not established in relationship to this number; rather, the delegate represents the entire population of the District of Columbia.

[91] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

[92] See, e.g., H.R. 4718, 102nd Cong., 2nd Sess. (a bill submitted by Delegate Eleanor Holmes Norton to provide for admission of the State of New Columbia into the Union). Cosponsors are apparently not required. See id.

[93] Rule XII, Rules of the House of Representatives.

[94] Although a delegate may currently introduce legislation on the House floor, and may engage in floor debate which could ultimately influence how courts interpret a piece of legislation, there appears to have been no clear constitutional basis distinguishing these particular powers from others not granted. For instance, "preliminary" votes in the House,

(continued...)

As noted previously, the question of whether a vote in the Committee of the Whole, subject to a revote, is advisory in nature was addressed by the United States Court of Appeals in *Michel v. Anderson*.[95] In *Michel*, the court noted the long-standing traditions of allowing territorial delegates to vote in standing committees.[96] However, despite a variety of arguments that the procedures of Committee of the Whole made it constitutionally distinct, the court also found that the operational similarities between the Committee and the whole House were significant enough to raise constitutional issues.[97] Nonetheless, because the revote provision rendered the vote largely "symbolic," the court held that "we do not think this minor addition to the office of delegates has constitutional significance."[98]

Standing

The question has arisen as to who might have the ability to challenge a statute which provides a representative of the District of Columbia a vote in the Committee of the Whole or in the full House. Article III of the Constitution requires that the federal courts may only consider lawsuits which involve actual "cases or controversies."[99] This limitation is enforced through the doctrine of standing, which provides that, in order to bring a suit in federal court, a plaintiff must have a personal stake in the outcome of the controversy.[100]

The Supreme Court has indicated that there is a four-part test to determine whether a party has standing: (1) there must be an injury in fact (2) to an interest arguably within the zone of interests protected by the statute or constitutional guarantee at issue (3) resulting from the putatively illegal conduct and (4) which could be redressed by a favorable decision of the court.[101] Thus, an evaluation of whether a particular plaintiff would have standing would require an evaluation of these four factors.

There would appear to be at least three groups of plaintiffs who might be in a position to bring a suit based on the above factors. First, voters in a state (or perhaps the state itself) could argue that the vote of their Representative in the House was

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[94] (...continued)
such as on the adoption of Rules or voting to advice conferees, have historically been denied delegates, although these votes are not directly related to the passage of final legislation.

[95] 14 F.3d 623 (D.C. Cir. 1994).

[96] Id. at 631.

[97] Id. at 632.

[98] Id.

[99] U.S. Const., Art. III, § 2.

[100] *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (voters have standing to challenge state apportionment scheme).

[101] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474 (1982).

diluted by the provision of a vote to non-states. Second, Representatives themselves could argue that their vote had been diluted or nullified by vote from a representative of the District. Finally, were a representative from the District to cast a deciding vote regarding legislation that became law, persons affected by such legislation might be able to bring suit.

The United States Court of Appeals for the District of Columbia has directly addressed the issue of whether voters from a state would have the authority to challenge the provision of District of Columbia voting representation in the House. In the case of *Michel v. Anderson*,[102] the Court of Appeals reviewed a district court opinion which had considered whether state voters would have standing to challenge a House Rule from the 103rd Congress that provided a vote by the District of Columbia and territorial delegate in the Committee of the Whole of the House.[103] In considering this issue, the district court used the four-part test set forth above to determine the existence of a "case or controversy."

In *Michel*, the district court evaluated the injury to state voters as being related to the injury to the voting power of their Representatives. Thus, the first question was whether the injury the court was asked to consider was too generalized or speculative to establish a true case or controversy. For example, a claim that the alleged unconstitutional action merely diminishes a legislator's effectiveness, but does not actually diminish his legal authority, is generally considered too amorphous an injury to confer standing.[104] By contrast, the court had found previously that the loss of a vote or deprivation of a particular opportunity to vote to be a sufficiently particularized injury to warrant judicial scrutiny.[105]

In *Michel*, the district court found that the specific injury alleged was sufficient to confer standing. For instance, the court noted that the Apportionment Clause of the Constitution provides that Members of the House should be apportioned among the states according to the number of inhabitants in the states.[106] By allowing representation from a non-state, the voting power of each Representative would be less than that authorized under the Apportionment Clause. The court found that the alleged dilution of the representational voting power set forth in the Constitution satisfied the requirement of injury-in-fact.[107]

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[102] 14 F.3d 623 (1994).

[103] 817 F. Supp. 126 (1993).

[104] *See* Harrington v. Bush, 180 U.S. App. D.C. 45, 553 F.2d 190, 205-206 (D.C. Cir. 1977) (Representative did not have standing because claim that illegal activities of CIA diminished his effectiveness as legislator was not concrete injury).

[105] Moore v. United States House of Representatives, 733 F.2d 946, 952-53 (D.C. Cir. 1984); Coleman v. Miller, 307 U.S. 433, 438 (1939); Dellums v. Bush, 752 F. Supp. 1141, 1147 (D.D.C. 1990).

[106] U.S. Const. art. I, § 2, cl. 3. "Representatives ... shall be apportioned among the several States which may be included within this Union, according to their respective Numbers...."

[107] *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1170 (D.C. Cir. 1983) (standing found based on alleged dilution of Republican representation on congressional committees); Coleman (continued...)

The district court also noted that the harm fell within the zone of interest protected by Article I of the Constitution, and the court was able to trace the injury to the actions of the House majority in passing the rule. Finally, the court held that the alleged injury was capable of redress as the plaintiffs only sought a ruling that the vote of the territorial delegates in the Committee of the Whole was unconstitutional. As the plaintiffs met the requirements of all four prongs of the test for standing, the court concluded that the state-voter plaintiffs could proceed.

The Court of Appeals for the District of Columbia, in reviewing this decision, noted that the fact that an injury is widespread is not a bar to a suit, as long as each person can be said to have suffered a distinct and concrete harm.[108] The court also noted the many times that the Supreme Court has held that voters who were placed in a voting district that had significantly fewer voters than another district ("one-man, one-vote") had standing because the significance of their vote was diluted.[109] Although in the *Michel* case, the vote dilution which occurred was of the Representative's vote, not the voters, the court did not find this distinction was of significance for purpose of establishing injury. Thus, the court concluded that sufficient particularized injury had been alleged to establish standing.[110]

A separate question arises as to whether Members of the House themselves can bring a suit challenging the allocation of voting representation to the District of Columbia.[111] In addition to the state voters who brought suit in the case of *Michel v. Anderson*, the plaintiffs in that case included Members of the House. The court found that, like the state voters, the Members themselves had suffered particularized injury. However, a further question, which had not been considered by the Supreme Court at that time, was whether there were separation of powers and prudential concerns which would preclude a court from allowing Members to maintain a suit in such a case.[112] As the Supreme Court has since considered this issue in *Raines v.*

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[107] (...continued)
v. Miller, 307 U.S. 433, 438 (1939) (standing found when action by state executive branch overrode the votes of state senators).

[108] *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 449-50, (1989) ("The fact that other citizens or groups of citizens might make the same complaint … does not lessen appellants' asserted injury….").

[109] *See* Wesberry v. Sanders, 376 U.S. 1, 5-6, (1964); Franklin v. Massachusetts, 505 U.S. 788 (1992).

[110] *But see* Skaggs v. Carle, 324 U.S. App. D.C. 87 (1997) (state voters may not challenge requirement that income tax increases be approved by 3/5ths of the House, since requirement can be changed by a vote of the majority of the House).

[111] For a general discussion of the ability of Members of Congress to bring lawsuits, see CRS Report RL30280, *Congressional Standing to Sue: An Overview*, by Jay R. Shampansky.

[112] The court ultimately declined to allow House members to proceed under the doctrine of "remedial discretion." Michel v. Anderson, 14 F.3d at 627-28 (D.C. Cir. 1994). This was a doctrine which the court had developed over the years to consider when a federal court may, in its discretion, withhold judicial relief regarding challenges by Members of Congress to (continued...)

Byrd,[113] this latter case would appear to be the most relevant to consider regarding the question of whether Members have standing to bring suit.

The question of congressional standing appears to involve issues that go beyond the strict constitutional requirements of "case and controversy." In general, standing is a mixture of constitutional requirements and prudential considerations,[114] and the cases do not always clearly distinguish between the constitutional and prudential aspects.[115] It should be noted that Congress can eliminate some of the prudential barriers to standing, but not the constitutional requirements.[116] However, it should also be noted that S. 1257 does not currently contain an explicit right for House Members or other plaintiffs to challenge the law.

In *Raines v. Byrd*, six Members of Congress who had voted against the Line Item Veto Act[117] brought suit against the Secretary of the Treasury and the Director of the Office of Management and Budget, alleging that the act unconstitutionally increased the President's power by authorizing him to "cancel" certain spending and tax benefit measures after he signed them into law, without complying with the requirements of bicameral passage and presentment to the President.[118]

The Court found that an Article III court should have a "restricted role" in resolving disputes between the political branches,[119] and held that plaintiffs lacked standing because their complaint did not establish that they had suffered an injury that was personal, particularized, and concrete.[120] The majority was of the view that

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[112] (...continued)
legislative actions. For an analysis of the extent that this doctrine is still viable after the Supreme Court decision in *Raines v. Byrd*, see CRS Report RL30280, *Congressional Standing to Sue: An Overview*, by Jay R. Shampansky, at 5-9, *supra* note 111.

[113] 521 U.S. 811 (1997).

[114] *See* Department of Commerce v. House of Representatives, 525 U.S. 316, 328-29 (1999).

[115] *Valley Forge Christian College*, 454 U.S. at 471 (1982).

[116] *Raines*, 521 U.S. at 820 n.3. The prudential components of the standing doctrine require that (1) a plaintiff assert his own legal rights and interests rather than those of third parties, (2) a plaintiff's complaint be encompassed by the "zone of interests" protected or regulated by the constitutional or statutory guarantee at issue, and (3) courts decline to adjudicate "'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 474.

[117] P.L. 104-130, 110 Stat. 1200 (1996).

[118] 521 U.S. at 815.

[119] Id. at 828. See also *id*. at 819-20.

[120] Id. at 818-20. Although the holding was based on the Court's finding that plaintiffs did not satisfy the first standing requirement (personal injury), the Court questioned whether the plaintiffs could meet the second standing requirement (that the injury be "fairly traceable" to unlawful conduct by the defendants) "since the alleged cause of ... [plaintiffs'] injury is not ... [the executive branch defendants'] exercise of legislative power but the actions of
(continued...)

a congressional plaintiff may have standing in a suit against the executive if it is alleged that the plaintiff has suffered either a personal injury (e.g., loss of a Member's seat) or an institutional one[121] that is not "abstract and widely dispersed" but amounts to vote nullification.[122] In the view of the Court, the *Raines* plaintiffs alleged[123] an institutional injury which damaged all Members (a reduction of legislative and political power generally), rather than a personal injury to a private right, which would be more particularized and concrete.[124]

The Court in *Raines* was willing to find an institutional injury to be sufficient if that injury amounted to nullification of a particular vote[125] and if the plaintiffs' votes "would have been sufficient to pass or defeat a specific bill."[126] Additionally, the *Raines* Court indicated that it would not find a nullification of a vote if some means of legislative redress was available to the plaintiffs.[127]

Based on the *Raines* case, it could be argued that if a representative of the District of Columbia cast a deciding vote, then a court might find this to constitute

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[120] (...continued)
their own colleagues in Congress in passing the act." Id. at 830 n.11.

[121] *See* Chenoweth v. Clinton, 997 F. Supp. 36, 38-39 (D.D.C. 1998) (personal injury more likely to result in grant of standing, but institutional injury is sufficient under *Raines*), *aff'd*, 181 F.3d 112 (D.C.Cir. 1999). *See also* Planned Parenthood v. Ehlmann, 137 F.3d 573, 577-78 (8th Cir. 1998) (standing of state legislators).

[122] The Court in *Coleman v. Miller*, 307 U.S. 433 (1939), held that Kansas state legislators had standing to bring suit against state officials to recognize that the legislature had not ratified a proposed amendment to the United States Constitution. The plaintiffs in that case included twenty senators whose votes against the measure would have been sufficient to defeat it but whose votes were essentially nullified by the tie-breaking vote of the state's lieutenant governor, the presiding officer of the senate, in favor of ratification. The *Raines* Court distinguished the injury alleged by the plaintiffs in that case ("the abstract dilution of institutional legislative power") from the injury asserted in *Coleman* (vote nullification), and found it unnecessary to decide whether *Coleman* might also be distinguished on other grounds. Because of the considerable difference between the vote nullification in *Coleman* and the alleged dilution of legislative power in *Raines*, it was not necessary for the *Raines* Court to determine "the precise parameters" of vote nullification that must be alleged for Members to have standing under the *Coleman* exception to *Raines*. *Campbell v. Clinton*, 52 F. Supp. 2d 34, 42 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 121 S.Ct. 50 (2000).

[123] Plaintiffs alleged that the act injured them "in their official capacities" by (1) altering the effect of all votes they might cast on bills containing items that could be cancelled by the President; (2) divesting them of their constitutional role with regard to the repeal of legislation; and (3) shifting the balance of power between the executive and legislative branches. 521 U.S. at 816.

[124] Id. at 821. The case might have been different if the House of Representatives had authorized the suit. Id. at 829.

[125] 521 U.S. at 826.

[126] 521 U.S. at 822-23.

[127] 521 U.S. at 824.

vote "nullification," and thus would represent a sufficient institutional injury so as to allow a suit. For instance, if a legislator was part of group of Members whose votes would have been sufficient to defeat the passage of a bill (because a majority had not voted for its passage), allowing such bill to go into effect would appear to be a nullification of those Members' votes. Further, an attempt by that group of legislators to overturn the vote by the District representative would also be subject to the risk that the District could cast a deciding vote on this proposal.

Absent such an example of specific injury, however, it is less clear that an individual or group of House Representatives could bring a challenge to a vote by a District of Columbia representative if the vote had not yet had a specific effect on the vote of such plaintiffs. In particular, the fact that the Congress could repeal the rule or law granting such a vote would indicate that a court might require that legislators seek redress from the Congress.

Finally, it would seem likely that, in the event that a representative from the District of Columbia were to cast the deciding vote on a piece of legislation, individuals directly affected by such legislation could bring a case. In this situation, a plaintiff could arguably demonstrate an injury in fact and a substantial likelihood that judicial relief could redress the claimed injury. The specific injury requirement would be met by noting the application of the statute to a particular plaintiff, and redress would be accomplished by a finding of unconstitutionality and the issuance of an injunction.[128]

Conclusion

In sum, it is difficult to identify either constitutional text or existing case law which would directly support the allocation by Congress of the power to vote in the full House on the District of Columbia Delegate. Further, that case law which does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.

In particular, at least six of the Justices who participated in what appears to be the most relevant Supreme Court case, *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, authored opinions rejecting the proposition that Congress's power under the District Clause was sufficient to effectuate structural changes to the political structures of the federal government. Further, the remaining three Justices, who found that the Congress could grant diversity jurisdiction to District of Columbia citizens despite the lack of such jurisdiction under Article III, specifically limited their opinion to instances where there was no extension of any

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[128] INS v. Chadha, 462 U.S. 919, 935-36 (1983) (alien had standing to challenge the constitutionality of 8 U.S.C. § 1254(c)(2), under which the House of Representatives, by resolution, sought to invalidate the decision by the Attorney General to allow respondent to remain in the United States); United States v. Smith, 286 U.S. 6, 33 (1932) (judicial review was available where the Senate attempted to revoke the nomination of the plaintiff after he had been confirmed to the Board of the Federal Power Commission).

fundamental right nor substantial disturbance of the existing federalism structure. To the extent that providing District residents with House representation could be so characterized, then one could argue that all nine Justices would have found the instant proposal to be unconstitutional.

Although not beyond question, it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the District of Columbia as contemplated by H.R. 1905. On the other hand, because the provisions of H.Res. 78 allowing Delegates a vote in the Committee of the Whole would be largely symbolic, these amendments to the House Rules are likely to pass constitutional muster.