ADDITIONAL VIEWS OF SENATORS TOM COBURN AND TED STEVENS

The lack of Congressional representation for American citizens living in the District of Columbia is a grave injustice. However, the oath we swear upon taking office is to uphold and defend the Constitution, not justice. Happily, the two rarely diverge. However, our Framers wisely foresaw the possibility of such divergence and provided a remedy. When all constitutional options are exhausted in pursuit of justice, the one remaining remedy is the constitutional amendment process.

We believe that there are constitutional options to remedy the injustice faced by District residents, but S.1257 is not one of them. If the American people, in their wisdom, deem that the plainly constitutional options of admitting new States into the union, or of States voluntarily redrawing their borders are not desirable, then the Constitutional amendment process is the exclusive remaining remedy.

Supporters of S.1257 claim it is constitutional, but can only support their claim with a broad interpretation of the text, supplemented by a handful of Supreme Court opinions. In his letter to William Johnson of June 12, 1823, Thomas Jefferson provided us guidance with the following: "Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure."

The simple rules of statutory interpretation, rather than Jefferson's "metaphysical subtleties," leave us no choice but to conclude that the bill is unconstitutional. These rules include first examining the plain meaning of the text of the Constitution before relying on an interpretation of another, and interpreting the parts that are unclear by those parts that are clear.

We hope to demonstrate in these minority views that both an historical and a textual analysis of the Constitution will not support the approach taken by S. 1257. Further, we hope to demonstrate that the approach taken by supporters of the bill can produce at best only a tenuous constitutional foundation, and at worst a reason for Congress to embark upon, in the words of Professor Jonathan Turley, "the most premeditated unconstitutional act by Congress in decades."[1] Either conclusion should prevent Congress, bound by our oath of office, from passing this bill.

Historical Analysis

In looking at history, it is clear that representation in government is at the heart of the American identity and that voting is one of the nation's most sacred rights. It is puzzling, then, why the Framers of the Constitution didn't choose to be more explicit regarding whether voting rights were intended for the residents of the District of Columbia. Yet,

[1] Turley, Jonathan, statement for the record for the Committee on the Judiciary, U.S. House of Representatives, "Legislative Hearing on H.R. 1433, the 'District of Columbia House Voting Rights Act of 2007," March 14, 2007, pg. 4.

though the Constitution isn't as clear as some might want it to be, the Framers were not silent on the issue and have left us with sufficient evidence to conclude that this bill is unconstitutional.

Claim: The Federal District Was Not Designed to be Different Than a State

Supporters of the bill argue that the Framers, with the ideals of the Revolutionary War fresh on their minds, obviously intended to provide residents of the District full voting rights like other citizens. Its omission, they claim, was simply an oversight of the Constitutional Convention. But, a closer look at the circumstances surrounding the creation of the federal district plainly refutes this claim.

The idea of an independent federal district is said to have arisen in 1783 after an incident involving the Continental Congress in Philadelphia, and a mob of disgruntled soldiers.[2] The soldiers claimed they had gone unpaid and, under threat of violence, forced Congress to meet and address their grievance. Congress sought protection from the Pennsylvania state militia, but was denied. Left without any protection, Congress convened under duress and addressed the matter. Realizing that the situation could happen again, the Framers recognized that the seat of government should not be dependent on the good graces and protection of any one State.

Though the notion of protecting the federal government from the States is in many ways outdated and in modern times reversed, the Framers were concerned about preserving the government's independence. To ensure its independence, they not only carved out land for the District that was not located in any State, but designed it to be governed equally by all States through Congress. Additionally, the Framers wanted to protect the States from any unnecessary burdens. For example, housing the District within any single state would have, on the one hand, put a large financial burden on that state to maintain the capital, while on the other hand would have unfairly given that state the benefits of capital improvements paid for by the other States. The decision was eventually made to cede land from Maryland and Virginia to form a small district of ten square miles to ensure that the land belonged to no state.[3]

James Madison reinforced this point on January 23, 1788, in writing Federalist no. 43 on the topic of a federal district:

> 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 interrupted with impunity; but a dependence

[2] Footnote 1, Congressional Research Service Report for Congress RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, April 23, 2007, pg. CRS-1.
[3] Congress passed the Residence Act on July 16, 1790, during the First Congress, second session. Text of the act can be found here: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=253

> 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. 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. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature.

While this would answer the question of independence for the nation's capital, it raised another question of what to do with the residents of Maryland and Virginia living in the land to be ceded to create the new federal district. These citizens had full voting rights as citizens of Maryland and Virginia, but those rights would be relinquished under the new plan.

Claim: The Founders Forgot to Address Congressional Representation for District Residents

Supporters of S. 1257 today claim that the Framers inadvertently forgot to address congressional representation for these citizens because there were other pressing issues to consider at the time. Further still, the Constitution was a relatively new document and all of its implications were not yet well understood, particularly the issue of representation for citizens living in the newly formed federal district. Therefore, they believe that the Framers did not feel a pressing need to consider the question, but that if they had they certainly never *intended* to exclude residents from voting.

The historical record, however, refutes this claim. In fact, there is solid evidence that the Framers had given this issue more than just a passing glance. Following the passage of the Residence Act in 1790, which designated the future site of Washington, D.C., residents of those areas retained their right to vote for representatives in Congress, but they were simply not allowed to vote *as district residents*. The Framers approached the issue by deferring to the State-based structure of the Union and allowed each former resident of Maryland and Virginia to vote in their home state. This was no small technicality; they believed it was the only acceptable means to allow these residents to vote in a manner consistent with the Constitution.

Madison hints at this in a further reading of Federalist no. 43, by assuming that the state governments in Maryland and Virginia would make adequate provision for their residents living in those lands, including the matter of representation.

> And as [the land to create a federal district] 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.

This voting system changed with the passage of the Organic Act in 1801, which provided for governance of the federal district. Because the bill did not specifically address voting rights for district residents, it effectively nullified the previous arrangement. That voting rights weren't immediately restored to district residents after the passage of the Organic Act through other legislation is significant. It demonstrates that such rights were not automatically granted to district residents by the Constitution and that Congress would not or could not act legislatively in this area.

Although some may point to this example and claim that if district residents were *taken away* by legislation (Organic Act) then voting rights can be *given* through legislation today. The flaw in this argument is that it fails to see the decidedly state-centered way in which the Framers handled the matter in contrast to the means being considered by S. 1257. The prior arrangement only allowed district residents to vote when they were still considered residents of their former home states. Above all else, what this example clearly shows is that these issues *were* in the minds of the Framers when they drafted the Constitution and were not, as some claim, an afterthought.

Claim: No One Anticipated the District Becoming a Large City With Many Citizens

Another dubious claim made by supporters of S. 1257 is that hardly anyone, including the Framers themselves, anticipated the federal district becoming a large city home to large numbers of citizens seeking the right to vote. After all, there were barely 8,000 citizens living in the District at the time of its inception. They believe that if the Framers knew that larger numbers of people would be impacted by the creation of the District, then voting rights would have been granted. This point is easily refuted by looking at the original plan for the city, as commissioned by the federal government itself. As early as 1791, nine years before the federal government began its operations in Washington, D.C., Pierre-Charles L'Enfant completed a commission by President George Washington to design the city, and his design was anything but small. L'Enfant's design envisioned the federal district to be a large, thriving city with as many as 800,000 residents[4] – a size that

[4] Library of Congress sources, http://memory.loc.gov/ammem/today/jul16.html

is not matched today.[5] Even a cursory glance at L'Enfant's earliest plans show that the intended design for the federal district is largely similar to today's design.[6]

Furthermore, the following journal entry was written by Henry Wansey in 1794, only three years after L'Enfant's plans for the district were finalized. This first-hand account clearly shows that the expectation existed even then that the city of Washington would become a great city.

> [A friend] has often been to the new federal city of Washington; has no doubt it must be very considerable in a few years, if the government is not overturned, for nothing less can prevent it. Mercantile men will principally settle in the South-East corner on the East River. . . . The government will make it a principal object to improve this place, and all its regulations respecting its future grandeur are already planned, suitable to a great and growing empire. . . . Many houses are already built, and a very handsome hotel, which cost in the erection more than thirty thousand dollars . . . It is now apportioned into one thousand two hundred and thirty-six lots, for building, (which are for sale). Each lot contains ground for building three or four houses.[7]

It stretches the bounds of one's imagination, in light of this evidence, to assume that the Framers and the Congress simply *forgot* to consider the voting rights of citizens in a city as large as the District would become. Even if they had, it was not long before citizens of the District began seeking such rights, reminding them of their "mistake." In 1801, following the passage of the Organic Act, a group of District residents petitioned Congress for the right to vote. Tellingly, though, voting rights were *not* given to residents of the District, despite the fact that the Congress of that time was made up of many Framers of the Constitution. That residents were denied representation then does not necessarily mean they should be so denied today. However, this record does provide strong evidence that the Framers intended, whatever their reasons, that the District's residents would not have the same automatic rights to Congressional representation as residents of the several States.

Claim: The Framers Did Not Intentionally Exclude Residents From Voting for Congressional Representation

Supporters of S. 1257 believe, despite the fact that District residents were never given congressional representation, that these rights were not withheld *on purpose*. This claim

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[5] Statistics provided by the U.S. Census Bureau, and can be found online at: http://quickfacts.census.gov/qfd/states/11000.html

[6] A picture of L'Enfant's design for the City of Washington can be seen on the website of the Library of Congress, and can be found here: http://www.loc.gov/exhibits/us.capitol/twtynine.jpg

[7] This excerpt was taken from the "Journal of an Excursion to the United States of North America in the Summer of 1794," by Henry Wansey. It was reprinted in pg. 10. Text of the book can also be found at: http://memory.loc.gov/cgi-bin/ampage?collId=lhbcb&fileName=03201//lhbcb03201.db&recNum=9&itemLink=r?ammem/lhbcbbib:@field(NUMBER+@od1(lhbcb+03201))&linkText=0

is contradicted by examining the opinion of a prominent Framer soon after the Constitution's ratification. Supreme Court Chief Justice John Marshall, former commander in the Revolutionary War, said the following in 1820 indicating strongly that voting rights were far from an afterthought:

> "[The District has] relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation."[8]

Clearly, Chief Justice Marshall, like us today, was uncomfortable with the distinct divergence in this case between justice and the Constitution, but barring a Constitutional amendment, he considered himself bound to the Constitution, whatever its perceived flaws. Prior to his appointment on the Supreme Court, William Rehnquist confirmed Marshall's opinion that the District did not have a legislative option for obtaining a vote, despite his own personal opinion that district residents should be given representation in Congress. Serving then as an assistant Attorney General in the U.S. Department of Justice in 1970, Rehnquist said: "The need for an amendment [providing representation for the District] at this late date in our history is too self-evident for further elaboration; continued denial of voting representation from the District of Columbia can no longer be justified."[9]

Claim: Congress Has Always Had the Constitutional Power to Address This Matter Through Legislation

The historical record of those who have previously attempted to address voting rights for the District itself testifies that nothing less than a change in the Constitution would be necessary. Since 1888, no fewer than 150 constitutional amendments have been attempted to resolve the matter.[10] Had a legislative option been available under the Constitution, surely a serious attempt would have been made prior to today to pass such a bill in Congress rather than go through the arduous task of passing a constitutional amendment – yet the supporters behind each of these efforts knew that it was an amendment, not a bill, that should be attempted.

Of those in Congress that did try to address the matter, the issue primarily revolved around allowing the election of a non-voting delegate to Congress.[11] No attempt has

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[8] *Adams v. Clinton*, 90 F. Supp. 2d 35, 55 (D.D.C.), *aff'd*, 531 U.S. 940 (2000) citing to Chief Justice Marshall's opinion in *Loughborough v. Blake* 18 U.S. (5 Wheat.) 317 (1820). Interestingly enough, the supporters of S. 1257 repeatedly cite to *Loughborough* as a case that supports their position since the Supreme Court ultimately did uphold federal taxation of District residents in the case.

[9] See the website of DC Vote at: http://www.dcvote.org/pdfs/congress/dcvrarepublicanquotespdf.pdf

[10] Footnote 1, Congressional Research Service Report for Congress RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, April 23, 2007, pg. CRS-3.

[11] The following points were outlined by Richard P. Bress in responses to questions for the records in *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary*,

been made prior to S. 1257 to try and provide House representation through the legislative process. It is significant that until the consideration of S. 1257 by the 110th Congress that all previous Congresses, without exception, understood that the Constitution prevented them from passing such a bill. [12]

The 150 constitutional amendment attempts have taken various forms and each one has failed to pass, with the exception of what became the 23rd Amendment. The 23rd Amendment provides District residents with the right to vote in Presidential elections. Other amendment attempts would have provided the District with one member of the House of Representatives and two Senators, while still others would have allowed for some combination of voting for the President as well as for representation in the House of Representatives and the Senate.

While the merits of those proposals are not the subject of this discussion, they were seen to have failed by many because of their implications for Statehood for the federal district. No serious attempt has ever been made to pass a Constitutional amendment providing simply for representation in the House of Representatives. Until this is attempted, there is no historical evidence to demonstrate how such an amendment might fare. That the amendment process is *difficult*, though, does not grant Congress the luxury of circumventing the Constitutional process for the sake of political expediency.

Conclusion: The Historical Record Demonstrates that S. 1257 is Unconstitutional

The historical record is far from silent on the matter of congressional voting rights for residents of the federal district. In our view, the weight of evidence supports the notion that the original intent of the Framers, as well as the interpretation of 109 consecutive Congresses, was to preclude the residents of the District from being represented in the House of Representatives. Though the Framers believed at the time that such an arrangement did not run counter to our republican form of government, we have now come to believe differently.

It is our view that though the reasons for creating a federal enclave without explicitly-provided voting rights for its residents may have seemed reasonable at the time, the reasons no longer hold the same appeal. And though it may be past time to alter the House of Representatives and allow a vote for the District in the House, Congress is

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110th Cong. *29 (2007). Mr. Bress identified the previous attempts by Congress to address the matter of congressional voting rights for the District of Columbia and categorized them in one of two ways: 1) legislation to examine the notion of voting rights for residents, and 2) allowing for a non-voting delegate. Such attempts were made: Dec. 30, 1819, Rep. Kent (MD); March 20, 1819, Sen. Johnson (KY); Feb. 13, 1824, Rep. Ross (OH); April 26, 1830, Rep. Powers; Dec. 21, 1831, Rep. Carson (NC); March 9, 1836; March 28, 1838, Sen. Norvell (MI); January 28, 1845. No such attempts were made to legislatively expand the House of Representatives and provide for full voting representation for residents of the federal district.

[12] This point is made in full recognition of the fact that legislation was introduced in recent Congresses to address the matter of congressional representation through either 1) retrocession, 2) semi-retrocession, or 3) granting full membership to the House of Representatives. None of this legislation passed the Congress or was presented to the President for signature. Such legislation included in the 109th Congress: H.R. 190, H.R. 398, H.R. 5388, S. 195; in the 108th Congress: H.R. 1285, H.R. 3709, S. 617; and in the 107th: S. 3054.

constrained to act only in a Constitutional manner. We do not believe this to be the case with the approach taken by S. 1257.

Constitutional Analysis

Textual Analysis

As stated earlier, any effort to analyze the meaning of a specific constitutional provision must begin with the text itself. Supporters of the bill assert that the best place to begin this discussion is with the Federal Enclave Clause, at Article I, Section 8, Clause 17. However, since the bill's main effect is to change the composition of the House of Representatives, the proper place to begin is with the House Composition Clause found at Article I, Section 2:

> "Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

It is clear that the term "state" is used numerous times in this provision, as it is throughout the Constitution. It is also clear from the records of the Framers during the Constitutional Convention that they chose their words carefully when drafting the text. Nowhere does the context suggest that the term "state" could be interpreted to mean anything other than what it straightforwardly implies. Since the federal district is not a state, the plain reading of the text clearly precludes the District of Columbia from being considered a state for the purposes of choosing members for the House of Representatives.

A basic rule of statutory interpretation is that when a reader is interpreting a statute, or in this case the Constitution, the statute should be read with the plainest reading in context; if no ambiguity appears, the search into the meaning of the word is complete. As the U.S. Supreme Court stated, "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "*Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 , 254 (1992). In the absence of any ambiguity in the term "state" in Article I, Section 2, Congress should not look to other places, such as the history of the District or in the Federal Enclave Clause, to attempt to justify the constitutionality of S. 1257.

Some supporters of this legislation argue that because the Founders placed such a premium on direct voting for representation as well as on government powers being derived from the consent of the governed, the Founders could not have possibly meant to exclude district residents from congressional representation simply because the District is not a state. However, they have no evidence in the text of the Constitution to suggest the Framers intended to treat the District like a state under Article I, Section 2. In fact, the evidence points in the opposite direction. A Representative of the District would not even meet the qualifications set out in Article I, Section 2, the Qualifications Clause:

> "No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant *of that state* in which he shall be chosen." (Emphasis added)

Supporters of S. 1257 misguidedly draw support for their position from certain U.S. Supreme Court and other federal court cases that extend to the District, as an entity or its citizens, other rights found in the Constitution. Nevertheless, supporters of the bill cannot refute the fact that the text of Article I, Section 2, leaves no open door to treat the District as a state for House representation short of actual statehood or Constitutional amendment.

In fact, the provision of the Constitution that supporters rely on most, the Federal Enclave Clause, directly contradicts any notion that the federal district should be considered a state for purposes of House representation.

The Federal Enclave Clause in Article I, Section 8, Clause 17 states Congress' rights regarding the federal district:

> "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, dockyards, and other needful buildings." (Emphasis added).

The Federal Enclave Clause itself shows that the District is different than "states" in the Constitution. By using both the term "District" and "states" in the same sentence, the language shows most clearly that the Framers had two distinct concepts in mind regarding what was a state and what was the District. To construe this provision to define the word "state" in such a way as to include the federal district is to render the words meaningless.

Finally, supporters of S. 1257 wrongly believe that Congress' complete power over the District gives Congress the power to alter even the makeup of the House of Representatives. In so doing, they create the perverse problem by which one provision of the Constitution is used to cancel out the meaning of another provision. In other words, supporters have interpreted Congress' constitutional powers over the District to be so broad that they can use them even to overcome that provision which explains the makeup of the House of Representatives.

The text of the Federal Enclave Clause states that Congress has "exclusive" power "in all cases whatsoever, *over such District*…" Nothing in the phrase "over such District" or the related context allows an interpretation in which Congress could change the makeup of Congress. Quite the opposite as the text grants to Congress a custodial and operational

power of control over the District. Thus, the plain reading of this provision demonstrates that Congress' power within the District itself is nearly unlimited, but that power does not extend beyong the District's borders. In fact, if the power given to Congress in this provision is as broad as supporters of S. 1257 claim it is, there would be no limits to how Congress could use this power. Nothing could stop Congress from adding additional seats to the House for the District as well as representatives in the Senate.

The full context of the Federal Enclave Clause shows that the power granted to Congress over the District is the exact same power as that granted to Congress to erect "forts, magazines, etc." Thus, the supporters of S. 1257 are forced to argue that the power of Congress to purchase land for the military is the *exact same* broad, sweeping and "plenary" power to grant membership in the House of Representatives. Therefore, in light of this context, these provisions merely grant Congress control over operational matters related to the governance, both administrative and political, of the District just as it is for forts, needful buildings and arsenals. One would need to stretch the rules of interpretation beyond reason to interpret this provision in such a way as to grant Congress power to alter other more plainly drafted sections of the Constitution such as those that determine membership in the House of Representatives and the qualifications of its members.

The 23rd amendment

Passage of the 23rd Amendment to the Constitution is illustrative of why S. 1257 falls short of the Constitution. Before its passage in 1960, and subsequent ratification, District residents could not vote in Presidential elections by virtue of the fact that the District is not a state. Congress remedied this situation not through legislation, but rather by amending the Constitution.

The 23rd Amendment reads:

> 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.
> Section 2. The Congress shall have power to enforce this article by appropriate legislation. (Emphasis added)

The language clearly establishes that D.C. is not a state and that its electors are only for Presidential elections. The House Report accompanying the passage of the Amendment

in 1960 clearly states that the Amendment would not change the status or powers of the District:

> ''[This] . . . 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 form of government.* …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.''[13] (Emphasis added.)

The House Report recognizes two important points. First, the District is not a state and the 23rd Amendment does nothing to make it a state. Second, the House Report affirms the understanding that Congress' power in the District Clause is one of operational control.

The example of the 23rd Amendment illustrates clearly that when Congress wanted to give residents of the federal district the right to vote for the President, they didn't see fit to do so through legislation. They knew then what is still true today - that such rights can only be conferred on citizens through a change in the Constitution through the amendment process.

Legal analysis

Supporters of S. 1257 also stake their claim for the bill's constitutionality on a selection of U.S. Supreme Court and federal court cases in which Congress has treated the federal district's residents the same as residents of states. Examples include imposing federal taxation on D.C. residents, allowing diversity jurisdiction to apply to D.C. residents, giving D.C. residents rights to trial by jury and subjecting D.C. to the interstate commerce regulations. Federal courts have allowed Congress to treat D.C. as if it were a state in each instance in order to uphold the Congressional action. Proponents believe that based on this line of cases, future courts will hold that granting House representation to D.C. is also a legitimate act of Congress' power under the Federal Enclaves Clause. However, there is no direct legal precedent for S. 1257, thus it will be a case of first impression for federal courts to review.

In fact, the case law may point in the opposite direction, as in *Adams v. Clinton*.[14] In 2000, the federal District Court of the District of Columbia ruled that D.C. residents suffered no Constitutional harm when the District of Columbia was excluded from the apportionment of Congressional districts for House representation. Lois Adams and other District citizens brought their case against President Clinton and the Secretary of Commerce because the Administration did not include D.C. when they transmitted their

[13] Report of the U.S. House of Representatives, 86th Congress, 2d Session, May 31, 1960, p.3.
[14] *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.), *aff'd*, 531 U.S. 940 (2000).

post-census apportionment results to the House Clerk. The District Court, sitting as a special three-judge trial panel, rejected Adams' claim 2-1 holding that the District could not be treated as a state for purpose of House apportionment and that denial of House representation was not a violation of the Equal Protection or Republican form of Government Guarantee clauses.[15] The U.S. Supreme Court affirmed the holding without an opinion, demonstrating that the Constitution does not provide representation in Congress for residents of the District.

The *Adams* opinion reveals that the understanding of those at the time that District residents would lose their right to vote once Virginia and Maryland ceded their lands. This would be for no other reason than that they no longer lived in a state. One Congressman, Rep. Bird, remarked that the blame for D.C. residents losing their voting rights was not "to the men who made the act of cession, not to those who accepted it," but "to the men who framed the Constitutional provision, who peculiarly set apart this as a District" under the federal government.[16]

In fact, one of the early proponents of D.C. voting rights advocated the same position. The *Adams* opinion recounts that Augustus Woodward, a prominent lawyer in the District and protégé' of Thomas Jefferson, wrote in 1801 decrying the violation of "an original principle of republicanism" by passage of the Organic Act. He later said that passage of a Constitutional amendment was "the exclusive and only remedy."[17]

The *Adams* opinion likewise debunked the notion that Congress actively stripped District residents of their right to vote when it passed the Organic Act, officially creating the District. The *Adams* opinion dismissed such theory finding that:

> "Thus, it was *not* the Organic Act or any other cession-related legislation that excluded District residents from the franchise, *something we agree could not have been done by legislation alone*."[18] (Emphasis added, citing a previous Supreme Court case holding that an individual's Constitutionally protected right to vote could not be denied by a vote of the state legislature.)

Instead the *Adams* opinion concludes that the loss of voting rights for District residents came because their residency status had changed from a resident of a "state" to resident of the District. The citizens were now residents a non-state, and therefore prevented from representation in Congress.

> "Rather, exclusion was the consequence of the completion of the cession transaction—which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress

[15] Id at p. 66-69, and 71-72.
[16] *Id* at p. 52..
[17] *Id* at p. 53..
[18] *Id* at p. 62. .

> exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution."[19]

Thus, the *Adams* opinion points back to the plain meaning of Article I, Section 2, as the determinative Constitutional provision for considering D.C. voting rights in Congress. until D.C. residents achieve status of residents of a state or until the Constitution is amended, the residents are barred from Congressional representation by the very language of the Constitution itself.

Conclusion

Because the Constitution clearly designed the House of Representatives to be composed of representatives of States, we believe that S. 1257 is not constitutional. Unfortunately, this leaves us with no other option but to oppose the bill and file these dissenting views. There is no question, though, that the objectives of S. 1257 are noble and worthy of Congressional attention, if not prompt action. However, Congress must resist the temptation to achieve a worthy policy objective by illegitimate means. This is especially true in this case due to the ready availability of better, and more clearly constitutional means, namely amending the Constitution.

In closing, we relay this commentary provided to this Committee by Professor Jonathan Turley when testifying regarding this issue:

> "In his famous commentaries on the Constitution, Justice Story warned against the use of the interpretation to avoid unpopular limitations in our constitutional system:
>
> > 'The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which these powers were conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the constitution. . . . On the other hand, a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment.'"[20]

[19] *Id.* .

[20] Testimony of Professor Jonathan Turley before the U.S. Senate Judiciary Committee hearing on "Ending Taxation without Representation: The Constitutionality of S. 1257" May 16, 2007, p. 13-14 citing Joseph Story, Commentaries on the Constitution of the United States §§ 419-26, at 298-302 (2d ed. 1851).