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SENATE REPUBLICAN POLICY COMMITTEE

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D.C. Voting Rights: H.R. 1433 Presents More Problems Than It Resolves

Executive Summary

- Throughout the years, numerous proposals have been offered to grant congressional representation to residents of the District of Columbia.

- H.R. 1433 is a bill to treat D.C. as a congressional district for the purposes of representation in the House. However, it does not provide representation in the Senate.
  - The House may vote on the measure later this week or next week.

- H.R. 1433 attempts to bypass the Constitution. It presents practical problems, as well.

- Awarding D.C. voting representation in the House brings into question two Constitutional provisions:
  - Article 1, Section 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States…"

  - Article 1, Section 8, known as the District Clause, which gives Congress the power to "exercise 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…" Since the District Clause seems to outline that D.C. is not a State, it is logical to think that it cannot qualify under Article 1, Section 2 for representation in the House.

- H.R. 1433 also creates an additional seat for Utah, but instead of requiring the state to redistrict to accommodate an additional district, it provides that the seat be at-large.

- With the more than likely possibility of constitutional challenges and lengthy court battles, both to the D.C. seat as well as to the Utah at-large one, D.C. residents would undoubtedly remain in limbo for many years to come regarding their rights to federal representation.

Introduction

Since the existence of the formal establishment of Washington D.C. as the capital of our nation, the residents of the District of Columbia (hereinafter "D.C.") have never been afforded voting representation in the Congress. Throughout the years, numerous proposals have been offered that would have granted D.C. voting rights. Such proposals include:

- Constitutional amendment to give District residents voting representation in Congress, but not granting statehood;
- Retrocession of the District of Columbia into Maryland;
- Semi-retrocession (allowing qualified D.C. residents to vote in Maryland in federal elections for the Maryland congressional delegation to the House and Senate;
- Statehood for the District of Columbia; and
- Other statutory means such as virtual-statehood (classifying D.C. a state for the purpose of voting representation).[1]

H.R. 1433 is a bill to treat D.C. as a congressional district for the purposes of representation in the House. The House Judiciary approved H.R. 1433 on March 15, 2007 by a vote of 21-13, and the House Oversight and Government Reform Committee approved the same bill on March 13, 2007 by a vote of 24-5. The House may vote on the measure later *this* week, or next week.

H.R. 1433 contains three major provisions:

1. Establishes that D.C. shall be considered a Congressional District for purposes of representation in the House of Representatives. It clarifies that D.C. remains entitled to three Presidential electors as required by the 23rd Amendment;
2. Provides that, beginning in the 110th and for each succeeding Congress, the size of Congress shall be increased by two Members. One seat would be designated for D.C. and the other seat would go to Utah, the state next in line under the 2000 Census apportionment formula to receive a seat if the size of the House were increased. The Utah seat shall be an "at-large" seat and will exist through the 112th Congress, the period prior to the 2012 reapportionment; and
3. Ensures that should any section of H.R. 1433 be struck down, then all of the sections would be vacated. Thus, no section of the bill should be effective without the entire bill being ruled effective; alternatively, no section of the bill should be subject to injunction without the entire bill being subject to the same injunction.

H.R. 1433 attempts to bypass the Constitution. It presents practical problems, as well. Any bill that attempts to do what requires a Constitutional Amendment would lead to lawsuits and delays for the residents of D.C.

[1] This paper limits its discussion to the current proposal, but, for details on past proposals, see CRS, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, RL 33830, January 30, 2007.

Problems with Treating District of Columbia as Congressional District

Constitutional Problem: D.C. is Not a 'State'

Clearly, H.R. 1433 sidesteps the Constitution in that it attempts to treat D.C. similarly to a state by granting representation in the House without actually going through the formal process of actual statehood or a Constitutional Amendment. As such, awarding D.C. voting representation in the House raises two primary Constitutional concerns. The first concern is the bill's apparent contradiction to Article 1, 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 in the States Legislatures."[2] The other constitutional concern is found in Article 1, Section 8, known as the District Clause, which gives Congress the power to "exercise 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…" Since the District Clause seems to outline that D.C. is not a state, it is logical to think that it cannot qualify under Article 1, Section 2.

Proponents of H.R. 1433 postulate that the Framers never intentionally disregarded D.C. residents' rights to representation in Congress and that it most likely was an oversight. However, this is clearly not the case. The Framers were fully aware that they were leaving the District of Columbia without representation. Otherwise, why would they need to offer amendments trying to overcome the problem of disenfranchisement of the citizens of D.C.? For example, Alexander Hamilton offered an amendment that would allow D.C. representation once it grew to a reasonable size.[3] However, Hamilton's amendment and other similar ones were not adopted. As Professor Jonathan Turley noted in his recent testimony before the House Judiciary Committee:

> If the Framers believed that the District was a quasi-state under a fluid definition, the District would have presumably had a representative and two Senators from the start. Article I, Section 3 specified that "each state shall have at Least one Representative." Yet, there is no reference to the District in any of the provisions.[4]

Beyond the actual text of the Constitution, case law that analyzes the word "state" seems to point to the conclusion that D.C. is not a state. The Supreme Court has long held that 'State' as used in the Constitution refers to one of the States of the Union.[5] "[A] citizen of the district of Columbia is not a citizen of a *state* within the meaning of the constitution."[6] In addition to *Hepburn*, numerous other cases have said that D.C. is not a state:

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[2] U.S. Const. Art. 1, Sec. 2.
[3] 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett and Jacob E. Cooke eds., 1962).
[4] Jonathan Turley, Testimony in front of House Judiciary Committee Hearing, "*Legislative Hearing on H.R. 1433, The District of Columbia House Voting Rights Act of 2007*," March 15, 2007.
[5] *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007) located at http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf at page 66 referring to *Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 452-53 (1805).
[6] *Hepburn and Dundas v. Ellzey,* 6 U.S. 445 (1805) (emphasis in original).

- *Adams v. Clinton*: "We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives."[7]
- *LaShawn v. Barry*: "The District of Columbia is not a state. It is the seat of our national government…."[8]
- *Lee v. Flintkote Co.*: "[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."[9]
- *O'Donoghue v. United States*: "[A] citizen of the district of Columbia is not a citizen of a *state* within the meaning of the constitution."[10]

A key case that proponents of H.R. 1433 rely on is *National Mutual Insurance Co. v. Tidewater*.[11] However, their reliance is misplaced. In *National Mutual Insurance*, the court upheld a federal law extending diversity jurisdiction of the federal courts to hear cases in which D.C. residents were parties. According to CRS, "The plurality opinion [in *National Mutual Insurance*] took pains to note the limited impact of [its] holding… [T]he plurality specifically limited the scope of its decision to cases which did not involve any extension of any fundamental right."[12] One can argue that, unlike what *National Mutual Insurance* provided, H.R. 1433 does provide a fundamental right.

If proponents of the bill continue to argue with past case law and insist on relying on a flawed analysis of *National Mutual Insurance*, then one can easily point to a case decided as recently as March 9, 2007. The United States Court of Appeals for the District of Columbia reaffirmed in both majority and dissenting opinion that the word "states" refers to actual state entities.[13] In fact, the brief for the **District of Columbia** in *Parker v. District of Columbia* argued that the court was justified in dismissing the action because D.C. is not a state under the Second Amendment.[14] In addition, the dissent specifically notes that D.C. is *not* a state for the purposes of voting in Congress: "in its origin and operation, moreover, the District is plainly not a "State" of the Union."[15] This case is significant in that the D.C. Circuit is the most likely forum for a future challenge of H.R. 1433.[16]

Practical Problem: Bill Falls Short of Affording Full Representation

Proponents of H.R. 1433 fall short of awarding the residents of D.C. full representation. If, as the proponents insist, D.C. should be treated as a state for purposes of this bill, then why is there not also a section in the bill that allows for two Senators? As Professor Turley has written, "That's [like]

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[7] 90 F.Supp.2d 35, 50 (2000).
[8] 87 F. 3d 1389, 1394 (D.C. Cir. 1996).
[9] 593 F.2d 1275, 1278 (D.C. Cir. 1979).
[10] 289 U.S. 516, 541 (1993).
[11] 337 U.S. 583 (1949).
[12] CRS, "*The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, January 24, 2007.
[13] *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007) located at http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf.
[14] Jonathan Turley, Testimony in front of House Judiciary Committee Hearing, "*Legislative Hearing on H.R. 1433, The District of Columbia House Voting Rights Act of 2007*," March 15, 2007.
[15] *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007) located at http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf, at 72.
[16] Jonathan Turley, Testimony in front of House Judiciary Committee Hearing, "*Legislative Hearing on H.R. 1433, The District of Columbia House Voting Rights Act of 2007*," March 15, 2007.

pretending [that] allowing Rosa Parks to move to the middle of the bus would have been a civil rights victory."[17]

Problems with Awarding Utah an Additional Seat in the House

Constitutional Problem: One Person, One Vote

H.R. 1433 also creates an additional seat for Utah, but instead of requiring the state to redistrict to accommodate an additional congressional district, it provides that the seat be at-large.[18] Essentially, this would provide every Utahn two Members of Congress, compared to one for every other American in the other 49 states. The creation of an at-large seat in Utah might be open to question under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[19] According to the court:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'[20]

Practical Problem: One Representative is Like a Senator

Beyond the Constitutional issues that H.R. 1433 presents, there are numerous practical ones as well. By giving the voters in Utah two representatives, H.R. 1433 appears to create an unfair political advantage. Each voter in Utah would have greater representation (2 Members) compared to every voter in every other state (1 Member). This inequality would cause the voters of Utah to have a disproportionately larger voting power compared to voters in all of the other states.

Consider the practical implications on the Utah delegation if H.R. 1433 were to be enacted. Currently, Utah has three representatives, each representing approximately one-third of their state's residents, but the fourth would represent them all – essentially transforming that Member into a Senator in the House of Representatives. His or her actions and votes would either double the power of one of the Utah colleague's – or would erase it. Meanwhile, how would the House treat this Member for purposes of allotments for constituent services, communications, and travel? Would the Member be allotted three times the number of district offices? Would he or she receive three times the staffing allowance, both in Washington and in the district? This problem of a "super" Member of the delegation is greater than any that would result from the customary at-large seat temporarily created after a census because any others would be at-large for two years or less whereas H.R. 1433, as a quick fix to get the bill passed, provides that the at-large seat continue for up to five years until 2012.

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[17] Jonathan Turley, "Too Clever by Half: the Unconstitutional D.C. Voting Rights Bill," *Roll Call*, January 25, 2007.
[18] 2 USC 2a(c)(2) provides seating according to an at-large election.
[19] 376 U.S. 1 (1964).
[20] 376 U.S. 1, 7-8.

Practical Problem: Inequality for Constituent Services

Consider also the comparative impact on Americans. Members of Congress provide many valuable constituent services, including casework in which they represent their constituents' needs to government agencies, such as the Social Security Administration, Veterans Affairs, and Internal Revenue Service. In addition, they provide a host of other services, including these: answering queries about operations of the federal government; meeting and assisting constituents when they visit the nation's capital on business or as tourists; and making recommendations to the service academies. Legislatively, they respond to constituents preferences with their votes in committee and on the House floor. And, of course, they sponsor bills and seek grants and appropriations on behalf of their constituents. Suddenly, Utahns would receive double the services that are provided residents of the other 49 states. Would this cause bad will, civil protests, and law suits? Regardless, Utahns likely would enjoy this special privilege accorded to them and none others. However, it would not be guaranteed to them over the long term because reapportionments following the 2010 Census might take it away and afford it to the residents of another state.

Practical Problem: Uncertainty of the Next Census

In addition to the D.C. seat, the bill awards a new seat to Utah because, according to the 2000 Census, the state of Utah would be the next in line to get an additional representative in Congress. The typical Republican make-up of the state of Utah makes it politically palatable to partner it with D.C. That is, the balance of adding an assuredly solid Democrat vote from D.C. with likely Republican votes from Utah undoubtedly was meant to soften Republican resistance to this bill. However, such deliberations are short-sighted due to the uncertainty of what the 2012 census will reveal. It is certainly plausible that some other state will have grown larger since the 2000 census was conducted. This would mandate that the additional seat be removed from Utah and added to another part of the country with no guarantee of party affiliation.

Additional Problem with H.R. 1433

Bill Does Not Contain an Expedited Judicial Review Provision

Because of the numerous constitutional challenges likely to arise with H.R. 1433, the bill clearly needs a provision requiring expedited judicial review of the constitutionality of its provisions. Such an amendment was offered by Representative Smith during the Judiciary Committee markup on March 15, 2007, but it was defeated, 15-19, along straight party lines.[21] Representative Smith's amendment stated that, "It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States *to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal*."[22] The amendment's language was similar to the expedited judicial review provisions in the McCain-Feingold campaign finance law that was employed to facilitate the Supreme Court's expeditious review of that legislation. [23]

[21] Congressional Quarterly, "Panel Approves District of Columbia Representation Bill," March 15, 2007.
[22] http://www.cq.com/displayamendment.do?docid=2471325&productId=1.
[23] Public Law 107-155.

If the existence of either of the offices of the new D.C. or new Utah Member were subject to a temporary or permanent injunction, none of the provisions of the bill could take effect. According to Representative Sensenbrenner, a federal court would most likely hand down an injunction preventing the new members from serving in Congress until any lawsuits were decided. It is possible that this bill could be enjoined for years on appeal, without any declaration or holding of unenforceability. A prolonged judicial resolution of this issue would only exacerbate the constitutional chaos regarding its validity. Consider the possibility of two new Members of Congress being elected, voting on legislation, then being disqualified by the Supreme Court. If their votes would have changed the result of a bill being passed, would that law then be invalid? Thus, if the Senate were to entertain this bill (despite its other glaring faults), it certainly should consider expedited judicial review to be an essential component.

Constitutional Amendment is the More Prudent Course of Action for Supporters

1978 Constitutional Amendment

In 1978, a Constitutional Amendment granting voting representation to D.C. was approved by both the House and the Senate, but failed to win the ratification of the requisite number of states.[24] When the House Judiciary Committee, under the leadership of Democratic Chairman Peter Rodino, reported out H.J.Res. 554, the accompanying report stated the following: "If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; *statutory action alone will not suffice*."[25] H.R. 1433 uses language similar, but more limited, to that found in H.J.Res. 554; however, it tries to accomplish the intended result by statute, rather than the proper route of a Constitutional Amendment. The 95th Congress realized the need for a Constitutional Amendment and so should the 110th.

A Constitutional Amendment would afford finality and permanence regarding the always-pressing issue of D.C. voting rights. A successful constitutional amendment must gain the support of:

- two-thirds majority of both Houses of Congress. The amendment must then be ratified by three-fourths of the states ─ 38 ─ in a state convention or by a vote of state legislatures; or
- two-thirds of the state legislatures may call for a Constitutional Convention for the consideration of one or more amendments to the Constitution. If approved, the amendments must then be ratified by three-fourths of the states in a state convention or by a vote of the state legislatures.[26]

23rd Amendment

The 23rd Amendment, proposed by Congress on June 17, 1960, and ratified by the states on March 29, 1961, permitted the District of Columbia to choose Electors for President and Vice

[24] CRS, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, RL 33830, January 30, 2007.
[25] H. Rep. No. 95-886 (95th Cong., 2d Sess.) at 4.
[26] CRS, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, RL 33830, January 30, 2007.

President. If D.C. already had been a state, then this additional 23rd Amendment would have been superfluous; however, because D.C. was not a state, the Congress recognized that it must pass a Constitutional Amendment. The amendment expressly distinguishes D.C. from the meaning of a state by providing:

> 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 (emphasis added).[27]

The 23rd Amendment could have granted both electoral rights as well as voting representation rights to D.C.; however, the Amendment clearly notes that D.C. is not to be treated like a state for purposes of electing Senators and Representatives in Congress.

Conclusion

With the more than likely possibility of constitutional challenges and lengthy court battles, both to the D.C. seat as well as to the Utah at-large one, D.C. residents would undoubtedly remain in limbo for many years to come regarding their rights to federal representation. "Proponents and opponents of the voting rights measure agreed Thursday that the bill, if enacted, would likely see court review."[28] Ironically, circumventing the Constitution in an attempt to give D.C. residents quicker access to representation would most likely end up causing residents an even longer wait. For supporters, the prudent way to preserve the bedrock of our country ─ the Constitution ─ is to propose a Constitutional Amendment granting D.C. voting representation in Congress. Then, and only then, would the residents of D.C. be given an *absolute* assurance that their rights would continue indefinitely, not subject to judicial or congressional interpretation and manipulation.

[27] Constitutional Amendment XXIII at http://www.law.cornell.edu/constitution/constitution.amendmentxxiii.html.
[28] Congressional Quarterly, "Panel Approves District of Columbia Representation Bill," March 15, 2007.