VOTING REPRESENTATION IN CONGRESS FOR CITIZENS OF THE DISTRICT OF COLUMBIA

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Before the United States Senate Committee on Governmental Affairs
May 23, 2002

INTRODUCTION

The issue of voting representation in the federal legislature for citizens of the District of Columbia is now before the Congress. This hearing is a welcome and constructive step because the issue is now being debated in the appropriate forum. However, Congress cannot simply pass legislation granting DC Citizens voting rights in Congress. A constitutional amendment is required. The make-up of the federal legislature is an essential ingredient of "Our Federalism." Every school child should be familiar with the story of the Constitutional Convention and the"Great Compromise," which resulted in each state's proportional representation in the lower house and equal representation in the Senate. Most historians agree that, without this compromise, the work of the Constitutional Convention would have never been completed. The importance of this compromise can also be gleaned from the final clause in Article V of the Constitution (concerning the amendment process), which provides "that no state, without its consent, shall be deprived of its equal suffrage in the Senate." U.S. Const. Art. V. One might even argue that this constitutional language means that the structural make-up of the Senate can never be modified.

Representation in the federal legislature is defined by clear, unambiguous, constitutional requirements. The Constitution provides that "[t]he Senate of the United States shall be composed of two Senators from each State." U.S. Const. Art. I, § 3. It also requires that the House of Representatives be composed of members chosen by the people of the several states, and that each member of Congress be an inhabitant of the state from which he shall be chosen. U.S. Const. Art. I, § 2.

The District of Columbia, or, in constitutional parlance, "the Seat of the Government of the United States," as presently constituted, is not a state. Therefore, it is not entitled to any representation in the House or the Senate. The only way the District, as presently constituted, can achieve full voting representation in the House of Representatives and in the Senate is by constitutional amendment. Another alternative, which would alter the District as presently constituted, is for the District of Columbia (or a portion thereof) to be admitted as a state, with some smaller geographic enclave remaining as the constitutionally required "Seat of the Government of the United States."

Those two options will be briefly discussed below. The controlling constitutional principle must be emphasized. Congress has a critical, but non exclusive, role in the political process necessary to achieve any change in D.C.'s present status of no representation in the federal legislature. However, Congress cannot, by "simple" legislation, provide the present District of Columbia citizens with voting rights in the national legislature. Such legislation would be unconstitutional.

Legal arguments have been made that a variety of constitutional principles require that District citizens receive congressional representation. Those arguments have been uniformly rejected. Moreover, any attempt to rely on Congress' enforcement powers to legislate pursuant to section five of the fourteenth amendment is also misplaced. The present lack of D.C. representation in the federal legislature is a feature of American federalism, is part of the constitutional structure, and does not violate equal protection, due process, or any other constitutional principle.[1]

Congress, in other contexts, often treats the District as if it were a state for other legislative purposes (principally for funding allocation of various federal programs pursuant to Congress' Article I powers). However, Congress does not possess the legislative authority to decree the District as a state for purposes of providing and allocating representatives in the national legislature.[2]

Delegate Eleanor Holmes Norton has authored proposed legislation either granting the District representation in the House and Senate, or exempting DC residents from paying federal income tax. This proposal is flawed for many reasons. First, Delegate Norton has reportedly acknowledged that the "either-or trade-off" is basically a rhetorical device

and that the proposal has no realistic hope of being enacted. Second, the "taxation without representation" slogan is inapposite-- and has been conclusively refuted in many other fora over the last two decades.[3] Lastly, the "either-or trade-off" is based on a faulty premise because Congress, in any event, does not possess the unilateral authority to enact legislation conferring DC voting rights.

PROPOSED CONSTITUTIONAL AMENDMENT PROVIDING DISTRICT CITIZENS WITH VOTING RIGHTS IN CONGRESS

Upon two thirds vote of both houses of Congress, Congress can propose a constitutional amendment to be submitted to the states for ratification. U.S. Const. Art. V. Ratification of a proposed constitutional amendment requires approval of three fourths of the state legislatures, or three fourths of specifically called state constitutional conventions. A proposed constitutional amendment could provide for the District to elect a member of the House only, or could also provide for Senate representation (either with one or two senators).

A proposed constitutional amendment to provide the District with representation in the House and Senate "as if it were a State" passed Congress and was submitted to the state legislatures for ratification in 1978. Despite bipartisan support at the federal level-- including the support of Senator Robert Dole, the 1996 Republican standard bearer for President-- the proposed amendment fell well short of ratification.

As a basic issue of fairness and democratic principles, it is hard to argue against D.C. voting rights in the national legislature. President Richard Nixon aptly summarized, "[i]t should offend the democratic sense of this nation that citizens of its Capital ... have no voice in the Congress."[4]

If "equal" voting rights is the goal sought to be achieved, that would seem to militate in favor of a proposal that the District receive proportional representation in the House, and two U.S. senators. Political reality must acknowledge that this formula would appear to guarantee two additional Democratic senators for the foreseeable future. However, the body politic must demonstrate the ability to rise above raw partisan politics. President Bush has often said that political Washington too often focuses on what is good for a particular political party instead of what is good for America. This issue provides all involved with an opportunity to demonstrate that America inside and outside of the Beltway will do what is right for America, and will support the democratic principles that we as Americans rhetorically espouse throughout the world. Upon a two thirds vote of both Houses of Congress, Congress should send the proposed constitutional amendment out to the States for ratification.

Or Congress could choose to sidestep the respective state legislatures altogether. Article V gives Congress the option of the means of ratification-- Congress can choose to send the proposed amendment to the state legislatures *or* to state constitutional conventions expressly convened to consider the sole issue of ratification of the proposed constitutional amendment.[5]

As to the wisdom of the policy of providing District citizens with two Senate votes (above and beyond the oft repeated "equality-one person one vote" principles), there is much to be said for a formula that, at the dawn of the twenty-first century, would provide for increased representation of urban interests in the Senate. Moreover, the District economy is more diversified, and less dependent on the federal government that ever before. Thus, the D.C. Senators are unlikely to be simply "voting lobbyists" for the federal workforce. Lastly, the political demographics of the District are not static. That the District would elect two Democratic senators in perpetuity is not necessarily the case, and certainly not an appropriate reason to oppose this amendment.

Congress possesses the authority to propose a constitutional amendment to provide the District with voting rights for federal elective office. Congress took an analogous path in 1960 when it submitted the 23rd amendment to the states for ratification, and thus provided for the District's participation in presidential elections through the Electoral College.

Four related points of particular interest to me warrant brief mention here. First, one could argue that it is unconstitutional to provide voting rights in the Senate to a non-State entity such as the District of Columbia, even by purported constitutional amendment. As noted above, article V, which sets forth the constitutional amendment process, provides in its last sentence that "no State, without its consent, shall be deprived of it's equal suffrage in the Senate." What exactly does this mean? Does it imply that the constitutional provision concerning the make-up of the Senate is, in effect, unamendable, and that it would take a unanimous vote of the States to ratify a constitutional amendment providing for D.C. voting rights (without creating a new State). How such an amendment would be challenged if it were ratified by three fourths, but not all of the states, raises an interesting question to say the least.[6]

Second, in a similar vein, one might argue that the inherent fabric of the Great Compromise includes the core principle that the citizens were represented in the House, and the States-- as States-- were represented in the Senate. Thus, perhaps the District should get a full House vote, but no Senate vote.

If one amends the Constitution in 2002, this 18th century principle should not be determinative. It is contrary to most of the modern equal voting rights principles that have evolved over the last half-century, notwithstanding some language in *Bush v. Gore.* Moreover, regardless of whether the principle accurately reflects the original nature of the Union, the concept of a State as a distinct entity apart from its citizens was substantially eroded , if not effectively eliminated, with the passage of the 17th amendment in 1913, which provided for the direct election of senators.

Third, providing the District with only one Senate vote -- reflecting another sort of compromise-- would abrogate the constitutional role of the Vice President to break ties. U.S. Const. Art. I, § 3, cl. 4. Although the Vice-President has been called on to break tie senate votes infrequently throughout history, the Vice-President's role as Senate tie breaker is constitutionally significant nonetheless, and should not be eliminated as an unintended consequence of an apparently unrelated constitutional amendment that would provide for an odd number of senators. The issue should at least be recognized.

Fourth, a Senator from the District of Columbia should recognize the unique aspects of the federal courts of the District of Columbia Circuit, and should be aware that the "normal" Senatorial prerogatives on judicial appointments may not apply. This is because of the presence of some unique jurisdictional grants conferred upon the district courts and the U.S..Court of Appeals for the District of Columbia Circuit. These legislative grants include subject matter jurisdiction over various federal administrative and executive branch agencies. As such, these courts are more national in scope than other federal courts.[7] While different presidents have taken different approaches as to the deference afforded to home state Senator input in the federal judicial selection process, the issue with respect to the role of a Senator from District of Columbia in the federal judicial selection process may warrant sui generis treatment.

STATEHOOD

The arguments for and against D.C. Statehood have been exhaustively debated on numerous occasions and will not be recounted here. It is suffice to say that Statehood raises additional practical and legal complexities that can be avoided with a D.C. Voting Rights amendment discussed above.

One must be realistic about any proposed Statehood alternative. Because of the geographic presence of the federal government as well as its pervasive presence in other matters as well, New Columbia would always have an extensive symbiotic relationship with federal government, even after statehood. To illustrate but one example, virtually all of the foreign embassies would be located in the State of New Columbia. At the very least, this would result in a continuing roaming federal police presence throughout the state. Thus, any quest for true equal footing could lead the federal government to consider whether it should relocate its 10 miles square elsewhere in a more convenient location (e.g. outside of Denver).

Congress has the authority to admit a new state into the Union by act of Congress. U.S. Const. Art. IV, § 3, cl. 1. The great weight of authority indicates that Presidential approval is also required. On a few occasions, Statehood has been defeated because of a presidential veto. All of the "defeated" proposed states eventually were admitted.[8]

D.C. Statehood would result in the new state being entitled to proportional representation in the House, and two seats in the United States Senate. However, any Statehood bill for New Columbia would also have to provide for a geographic area remaining that would constitute a greatly reduced "Seat of the Government of the United States," which is constitutionally required. The Constitution requires that the federal Seat of Government of the United States "not exceed 10 miles square [100 square miles]," but there is no constitutionally required minimum size.[9] This greatly reduced Seat of Government of the United States with a minuscule population would be entitled to three electoral votes in presidential elections as mandated by the 23rd amendment.[10]

To avoid this absurdity, the 23rd amendment would have to be repealed. Therefore, as a practical matter, D.C. Statehood also requires resort to the constitutional amendment process. However, the states should be compelled to consider for ratification a constitutional amendment in order to eliminate an intentional congressionally created absurdity. Such a scenario is contrary to the purpose of the constitutional amendment process. As Alexander Hamilton observed in *Federalist No. 85,* a proposed amendment to the Constitution that would alter our basic charter of government should face "mature consideration" as to whether the amendment "be thought useful." To avoid this problem, Congress should choose the politically responsible route-- any proposed statehood legislation should be made contingent upon repeal of the 23rd

amendment.

D.C. statehood would also impact on the federal courts in the District of Columbia. The present federal courts in the District of Columbia could not simply be redesignated as the federal courts of the State of New Columbia. The State of New Columbia does not require its own Circuit Court of Appeals. No federal circuit court of appeals consists of only one state. Moreover, as noted above, the federal nature of the D.C. Circuit is different from other circuits. The State of New Columbia should be moved into the Fourth Circuit, additional judgeships for the Fourth Circuit should be authorized, and the remaining D.C. Circuit would have to undergo a fundamental reevaluation-- perhaps merging into the already existing Federal Circuit with a corresponding modification of its jurisdictional grant. Also, venue in many cases brought in the federal courts of the District of Columbia is based on acts occurring in Congress, the White House, and various federal agencies as being within the present geographic boundaries of the District of Columbia. If those entities are placed geographically outside of the State of New Columbia and remain in the truncated Seat of Government of the United States, then that geographic fact alone would fundamentally alter the jurisdiction of the local federal courts in New Columbia. In short, DC Statehood would require a substantial restructuring of the local federal courts.

CONCLUSION

The U.S. Conference of Mayors recently came out in support of D.C. voting rights. This is a positive indication that the political process quest for D.C. voting rights has moved to the grass roots level– state by state. If the denial of DC voting rights in the national legislature is so antithetical to the democratic ideals which Americans cherish, a proposed constitutional amendment for DC voting rights should be able to win passage in three fourths of the states. To the extent we Americans wear democratic ideals more openly on our sleeves in the post 9/11 world, that should work in favor of passage. Accordingly, we should not be afraid to "have to" resort to the "inconvenient" and even "difficult" constitutional amendment process. As Abraham Lincoln said, "[a] majority held in restraint by constitutional checks and limitations... is the only true sovereign of a free people."

Nor should we devote substantial time considering the provocative but legislatively unobtainable option of either providing voting rights or a federal tax exemption. As a freedom loving people, Americans-- Democrats, Republicans, and Independents alike-- should cherish and embrace the solemn challenge and opportunity to amend the constitution. This is good not only in some grand "civics lesson" sense, but is good for citizens of DC, the citizens of our nation, and is a shining example to the world.

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[1] In addition, since the current lack of voting status emanates from the constitutional structure itself, there appears to be no state action involved.

[2] Many of these unsuccessful constitutional and legal arguments are analyzed in detail in Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000)(three judge court).

[3] *See, e.g.,* Stephen Markman, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 42 (1988)(noting that District residents are not the victims of a far off imperial power, imposing taxes selectively as a means of economic exploitation).

[4] *But see* Markman, supra note 3 at 37 (noting that Founders consciously rejected a pure majoritarian democracy).

[5] It should be noted that these conventions, convened for one express purpose, are NOT the omnibus constitutional convention required to be called on application of two-thirds of the state legislatures, a type of convention that some fear would become a "runaway convention" that might rewrite the entire Constitution. *See generally* JAMES L. SUNDERQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 244-45 (1986).

[6] *See* Markman, supra note 3, at 30-32.

[7] Not surprisingly, a disproportionate number of present Supreme Court Justices have been elevated from the D.C. Circuit bench (Justices Ginsburg, Thomas, Scalia).

[8] The power of Congress to admit new states is not an article I legislative power that would obviously require presidential approval. On the

other hand, a statehood bill requires concurrence of both houses of Congress, and thus may require Presidential approval under Article 1 § 7, cl. 3. In 1992, the Congressional Research Service concluded that "after the President signs the congressional resolution approving admission, the statehood process is complete." CRS REPORT TO CONGRESS, STATEHOOD PROCESS OF THE 50 STATES, at 3 (Oct. 15, 1992). Moreover, Presidents Andrew Johnson and William Taft vetoed acts providing for admission of various proposed states. *See* Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis,* 13 Case. W. Res. L.J. Int'l L. 315, 318 n.21 (1981). *But compare* Resolution for the Admission of Missouri, March 2, 1821, *reprinted in* 1 DOCUMENTS IN AMERICAN HISTORY 227 (Henry Steel Commanger 10th ed.
1988) (stating that Missouri shall be admitted, and that role of President is that he "shall announce the fact [of admission]," arguably implying no discretion in Presidential role).

[9] U.S. Const. Art. I, §. 8, cl. 17.

[10] Issues relating to the 23rd amendment are discussed in Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation,* 60 GEO. WASH. L. REV. 475 (1992).