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District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Updated April 19, 2010

Congressional Research Service
https://crsreports.congress.gov
RL33830

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

This report provides a summary and analysis of legislative proposals that would provide voting representation in Congress to residents of the District of Columbia. Since the issue of voting representation for District residents was first broached in 1801, Congress has considered five legislative options: (1) seek voting rights in Congress by constitutional amendment, (2) retrocede the District to Maryland (retrocession), (3) allow District residents to vote in Maryland for their representatives to the House and Senate (semi-retrocession), (4) grant the District statehood, and (5) define the District as a congressional district for the purpose of voting representation in the House of Representatives.

On January 6, 2009, the non-voting delegate for the District of Columbia, Eleanor Holmes Norton, introduced H.R. 157, the District of Columbia Voting Rights Act of 2009, a bill that would permanently increase the size of the House from 435 to 437 Members and provide voting representation to the District and the state most likely to gain an additional representative, Utah. Weeks later, on January 23, 2009, Representative Dana Rohrabacher introduced H.R. 665, a bill that would provide voting rights to District citizens by retroceding the District of Columbia to Maryland. Also on January 6, Senator Lieberman introduced S. 160, a related bill of the same title as H.R. 157. The Senate Homeland Security and Governmental Affairs Committee reported S. 160 on February 12, 2009. The House Judiciary Committee reported an amended version of H.R. 157 on February 25, 2009, by a vote of 20-12. A provision amending the city's gun control laws was introduced during Committee markup of the bill, but was withdrawn before a vote. The full Senate passed the bill on February 26, 2009, by a vote of 61-37. The Senate bill includes a controversial provision unrelated to voting rights that would amend the District's gun control laws.

These proposals would grant voting representation by statute, eschewing the constitutional amendment process and statehood option. Any proposal considered by Congress faces three distinct challenges. It must (1) address issues raised by Article 1, Sec. 2 of the Constitution, which limits voting representation to states; (2) provide for the continued existence of the District of Columbia as the "Seat of Government of the United States" (Article 1, Sec. 8); and (3) consider its impact on the 23rd Amendment to the Constitution, which grants three electoral votes to the District of Columbia. For a discussion of constitutional issues of proposed legislation, see CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, by Kenneth R. Thomas.

This report will be updated as events warrant.

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Introduction

The Constitution, ratified in 1789, provided for the creation and governance of a permanent home for the national government. Article I, Section 8, Clause 17, called for the creation of a *federal district* to serve as the permanent seat of the new national government[1] and granted Congress the power

> To exercise exclusive Legislation, in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States.... [2]

Proponents of voting representation contend that the District's unique governmental status resulted in its citizens' equally unique and arguably undemocratic political status. Citizens residing in the District have no vote in their national legislature, although they pay federal taxes and may vote in presidential elections. Opponents often note that the Constitution grants only states voting representation in Congress. They argue that, given the District's unique status and a strict reading of the Constitution, no avenue exists to provide District residents voting rights in the national legislature other than a constitutional amendment or the statehood process, which could be achieve by statute.

Issues central to the District of Columbia voting representation debate arguably revolve around two principles of our republican form of government: (1) the consent of the governed and (2) no taxation in the absence of representation. The debate has also involved questions about how to reconcile two constitutional provisions: one creating the District and giving Congress exclusive legislative power over the District (Article I, Section 8); the other providing that only citizens of *states* shall have voting representation in the House and Senate (Article 1, Section 2 and Section 3).

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through

- constitutional amendment to give District residents voting representation in Congress, but not granting statehood;
- retrocession of the District of Columbia to Maryland;
- semi-retrocession, i.e., allowing qualified District 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, i.e., designating the District a state for the purpose of voting representation.

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[1] Historians often point to the forced adjournment of the Continental Congress while meeting in Philadelphia on June 21, 1783, as the impetus for the creation of a federal district. Congress was forced to adjourn after being menaced for four days by a mob of former soldiers demanding back pay and debt relief. Although the Congress sought assistance and protection from the Governor of Pennsylvania and the state militia, none was forthcoming. When the Congress reconvened in Princeton, New Jersey, much was made of the need for a federal territory whose protection was not dependent on any state. U.S. Congress, Senate, *A Manual on the Origin and Development of Washington*, S. Doc. 178, 75th Cong., 3rd sess., prepared by H. Paul Caemmerer (Washington: GPO, 1939) pp. 2-3.

[2] In 1788, Maryland approved legislation ceding land to Congress for the creation of a federal district. One year later, Virginia passed a similar act. On July 16, 1790, Congress approved the Residence Act, "an act establishing the temporary (Philadelphia) and permanent seat of the Government of the United States" along the Potomac.

In the recent past, Congress has restricted the ability of the District government to advocate for voting representation. Several provisions have been routinely included in District of Columbia appropriation acts prohibiting or restricting the District's ability to advocate for congressional representation.[3]

A Summary History of Legislative Options

During the 10-year period between 1790 to 1800, Virginia and Maryland residents that ceded land that would become the permanent "Seat of the Government of the United States" were subject to the laws for the state—including the right to continue to vote in local, state, and national elections in their respective states—until the national government began operations in December 1800. One year after establishing the District of Columbia as the national capital, District residents began seeking representation in the national legislature. As early as 1801, citizens of what was then called the Territory of Columbia voiced concern about their political disenfranchisement. A pamphlet published by Augustus Woodward, reportedly a protégé of Thomas Jefferson, captured their concern:

> This body of people is as much entitled to the enjoyment of the rights of citizenship as any other part of the people of the United States. There can exist no necessity for their disenfranchisement, no necessity for them to repose on the mere generosity of their countrymen to be protected from tyranny, to mere spontaneous attention for the regulation of their interests. They are entitled to participation in the general councils on the principles of equity and reciprocity.[4]

Congress has on numerous occasions considered legislation granting voting representation in the national legislature to District residents, but these attempts have failed to provide permanent voting representation for District residents.[5] During the 103rd Congress (1993-1994), the District's delegate along with delegates from the territories of the Virgin Islands, Guam, and American Samoa, and the resident commissioner from Puerto Rico were allowed to vote in the Committee of the Whole under amended House rules. Although the change was challenged in court as unconstitutional, it was upheld by the U.S. District Court in *Michel v. Anderson,* and affirmed by the Court of Appeals.[6] Nevertheless, the new House Republican majority repealed the rule early in the 104th Congress. On January 24, 2007, the new Democratic majority of the House passed a rules change (H.Res. 78) allowing resident commissioners and delegates to vote in the Committee of the Whole, during the 110th Congress.

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through a constitutional amendment, retrocession of part of the District back to Maryland, semi-retrocession allowing District residents to be treated like citizens of Maryland for the purpose of voting representation in Congress, statehood and virtual statehood

[3] Congresses have prohibited the D.C. government from using federal or District funds to support lobbying for such representation. The prohibition is discussed in **Appendix B** of this report.

[4] Augustus Brevoort Woodward, *Considerations on the Government of the Territory of Columbia* [Paper No. I of 1801]. Quoted in Theodore Noyes, *Our National Capital and Its Un-Americanized Americans* (Washington, DC: Press of Judd & Detweiler, Inc., 1951) p. 60. Hereafter cited as Woodward, quoted in Noyes.

[5] Congress twice approved legislation allowing the District of Columbia to elect a non-voting Delegate to Congress. From 1871 to 1874, Congress established a territorial form of government for the District with the passage of 16 Stat.419. The new government authorized the election of a non-voting delegate to represent the District in the House. Congress abolished this arrangement in the aftermath of a fiscal crisis. In 1970, Congress enacted P.L. 91-405 (H.R. 18725, 91st Congress) creating the position of Delegate to the House.

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

that allow Congress to define the District as a state for the purpose of voting representation in Congress. Each is discussed below.

Constitutional Amendment

The most often-introduced proposal for voting rights has taken the form of a constitutional amendment. Since the 1888 and 1889 resolutions, more than 150 proposals have been introduced that would have used a constitutional amendment to settle the question of voting representation for citizens of the District. The proposals can be grouped into six general categories:

- measures directing Congress to provide for the election of two Senators and the number of Representatives the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of one Senator and the number of Representatives the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of at least one Representative to the House, and, as may be provided by law, one or more additional Representatives or Senators, or both, up to the number the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of one voting Representative or delegate in Congress;
- measures directing Congress to provide for voting representation in Congress without specifying the number of Representatives or Senators; and
- measures directing Congress to provide for voting representation in Congress for the District apportioned as if it were a state.

Initial Efforts

The idea of a constitutional amendment was first suggested in 1801, by Augustus Brevoort Woodward, in a pamphlet entitled "Considerations on the Government of the Territory of Columbia."[7] Although not a Member of Congress, Mr. Woodward, a landowner in the city of Washington, served as a member of the city council of Washington. His proposal to amend the Constitution would have entitled the District to one Senator and to a number of members in the House of Representative proportionate to the city's population. The proposal, which was never formally introduced, may be found in **Appendix A**.

Woodward's pamphlets, which were published between 1801 and 1803, provided a rationale for his proposal arguing that

> the people of the Territory of Columbia do not cease to be a part of the people of the United States and as such are entitled to the enjoyment of the same rights with the rest of the people of the United States.... It is contrary to the genius of our constitution, it is violating an original principal of republicanism, to deny that all who are governed by laws ought to participation in the formulation of them.[8]

Woodward noted that the Senate represented the interest of sovereign states and that no state was disadvantaged due to its population because the Constitution granted each state an equal number of Senate votes. He acknowledged the distinction between the Territory of Columbia and states and argued that the Territory, whose residents were citizens of the United States, should be

[7] Woodward, quoted in Noyes, *passim*.

[8] Woodward, quoted in Noyes, p. 195.

considered half a state and thus entitled to one vote in the Senate. With respect to the House of Representatives, Woodward simply contended that House Members were representatives of the people, and that the citizens of the Territory of Columbia were therefore entitled to representation in the House equivalent to their population and consistent with the democratic principal of "consent of the governed."

It took another eighty-seven years before the first proposed constitutional amendment providing for voting representation in Congress for the District of Columbia was formally introduced by Senator Henry Blair of New Hampshire. During the 50th Congress, on April 3, 1888, Senator Blair introduced a resolution identical in its intent to that of the Woodward proposal of 1801. The Blair proposal was submitted on behalf of Appleton P. Clark and was accompanied by a letter which was printed in the *Congressional Record*.[9] On April 5, 1888, the Senate Judiciary Committee was discharged from considering the resolution. Senator Blair reintroduced a modified version of the proposed amendment, S.J.Res. 82, on May 15, 1888.

During the 51st Congress, Senator Blair reintroduced both proposals as S.J.Res. 11 and S.J.Res. 18. The Senate Committee on Privileges and Elections responded to both bills adversely. On September 17, 1890, Senator Blair addressed the Senate on the subject of the District of Columbia representation in Congress. His statement referred to many of the arguments in support of voting representation in Congress. It admonished the Senate for what the Senator characterized as the hasty disposition of the amendments he introduced, noting that

> This [the lack of voting representation in Congress for citizens of the District] is no trifling matter, and I verily believe that it constitutes a drop of poison in the heart of the Republic, which, if left without its antidote, will spread virus through that circulation which is the life of our liberties.[10]

In the years between 1902 and 1917, several bills proposed constitutional amendments entitling the District to two Senators and representation in the House in accordance with its population. Although the Senate District Committee held a hearing on S. J. Res. 32, in 1916, the Senate took no further action on the resolution.

On January 27, 1917, Senator Chamberlain introduced S.J.Res. 196 in the 64th Congress. The bill empowered Congress to recognize the citizens of the District as citizens of a state for the purpose of congressional representation. The resolution gave Congress the power to determine the structure and qualifications of the District's delegation, essentially allowing Congress to act as a state legislature in conformance with Article I, Sec. 4, Clause 1 of the Constitution. Congress would have been empowered to provide the District with one or two votes in the Senate and such votes in the House that it would be entitled based on its population. The resolution was noteworthy because it was the first resolution to be introduced that would have permitted, rather than mandated that Congress grant District residents voting representation in Congress. Between 1917 and 1931, at least 15 resolutions of this type were introduced.[11]

Continued Efforts

In March 1967, Representative Emanuel Celler, chair of the House Judiciary Committee, introduced a legislative proposal on behalf of President Lyndon Johnson granting District residents voting representation in Congress. The proposal—H.J.Res. 396—sought to authorize one voting Representative and granted Congress the authority to provide, through legislation,

[9] Senator Henry Blair, Remarks in the Senate, *Congressional Record*, vol. XIX, April 3, 1888, p. 2637.

[10] Senator Henry Blair, Remarks in the Senate, *Congressional Record* , vol. XXI, September 17, 1890, p. 10122.

[11] Noyes, p. 207.

additional representation in the House and Senate, up to the number the District would be entitled were it a state. The House Committee on the Judiciary held hearings on the Johnson proposal, as well as others, in July and August 1967. On October 24, 1967, the Committee reported an amended version of the resolution to allow full voting representation for the District of Columbia: two Senators and the number of Representatives it would be entitled if it were a state. No other action was taken on the resolution during the 90th Congress.

In 1970, the Senate Judiciary Subcommittee on Constitutional Amendments held hearings on two constitutional amendments (S.J.Res. 52 and S.J.Res. 56) granting voting representation in Congress to District residents, but did not vote on the measures. Instead, Congress passed H.R. 18725, which became P.L. 91-405, creating the position of nonvoting Delegate to Congress for the District in the House of Representatives.

States Fail to Ratify Constitutional Amendment

In 1972 and 1976 constitutional amendments (H.J.Res. 253, 92nd Congress and H.J.Res. 280, 94th Congress), introduced by the District's Delegate to Congress, Walter Fauntroy, granting voting representation to citizens of the District were reported to the House Judiciary Committee. Only the 1976 proposal reached the House floor where it was defeated by a vote 229-181. Representative Don Edwards reintroduced the proposed constitutional amendment as H.J.Res. 554 in the 95th Congress on July 25, 1977. It passed the House on March 2, 1978, by a 289-127 margin. On August 22, 1978, the Senate approved the resolution by a vote of 67-32. The proposed amendment, having been passed by at least two-thirds of each house, was sent to the states. The amendment provided that—for the purposes of electing members of the U.S. Senate and House of Representatives and presidential electors, and for ratifying amendments to the U.S. Constitution—the District of Columbia would be considered as if it were a state. Under the Constitution, a proposed amendment requires ratification by three-fourths of the states to take effect. In addition, Congress required state legislatures to act on ratification within seven years of its passage.[12] The D.C. Voting Rights Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Renewed Efforts

On June 3, 1992, during the 102nd Congress, Representative James Moran introduced H.J.Res. 501, a proposed constitutional amendment declaring that the District, which constitutes the seat of government of the United States, be treated as a state for purposes of representation in Congress, election of the President and Vice President, and Article V of the Constitution, which delineates the process for amending the Constitution. The resolution was referred to the House Judiciary Committee, where no action was taken.

Retrocession

Retrocession as a remedy for achieving voting representation for District residents was debated by Congress during the first years following the establishment of the federal capital. Retrocession proposals typically would relinquish all but a portion of the city of Washington to Maryland, providing voting representation for the city residents located outside the designated federal enclave. Retrocession could increase Maryland's congressional delegation by at least one additional seat in the House of Representatives and provide District residents in the newly retroceded area with voting representation in the Senate. According to proponents, retrocession

[12] The seven-year period does not appear in the Constitution, but it has become customary over time.

and the concurrent creation of a federal enclave may address the constitutional provision regarding Congress's authority to exercise exclusive legislative control over the federal district. If past history is a guide, retrocession would probably be contingent upon acceptance by the state of Maryland. Although, parts of the District was retroceded to Virginia in 1846, modern retrocession is a judicially and politically untested proposition. (See discussion of Virginia retrocession later in this report.)

Opponents of retrocession note that the adoption of such a measure could force Congress to consider the repeal of the 23rd Amendment to the Constitution, which grants District residents representation in the electoral college equivalent to the number of Senators and Representatives in Congress it would be entitled to if it were a state. If the amendment were not repealed, the net effect would be to grant a disproportionately large role in presidential elections to a relative small population residing in the federal enclave.

Early Debates

On February 8, 1803, Representative John Bacon of Massachusetts introduced a motion seeking "to retrocede that part of the Territory of Columbia that was ceded by the states of Maryland and Virginia." The motion made retrocession contingent on the state legislatures agreeing to the retrocession.[13] During the debate on the motion supporters of retrocession asserted that

- exclusive jurisdiction over the District was not necessary or useful to the national government;
- exclusive control of the District deprived the citizens of the District of their political rights;
- too much of Congress's time would be consumed in legislating for the District, and that governing the District was too expensive;
- Congress lacked the competency to legislate for the District because it lacked sensitivity to local concerns; and
- the District was not a representative form of government as structured, and thus denies citizens of the nation's capital the right of suffrage.

On the other hand, opponents of Bacon's retrocession proposal argued that

- the national government needed a place unencumbered by state laws;
- District residents had not complained or petitioned the Congress on the question of retrocession; and that Congress could not retrocede the land without the consent of the citizens;
- the District might be granted representation in Congress when it achieved sufficient population;
- the expense of administering the District would decrease over time;
- retroceding the land removed the national government of any obligation to remain in place; and
- the cession of land and Congress's acceptance constituted a contract that could only be dissolved by all parties involved including the states of Maryland and Virginia, Congress, and the people of the District.

[13] *Annals of Congress*, 7th Cong., 2nd sess., December 6, 1803 to March 3, 1803 and Appendix. (Washington, 1803) p. 486-491 and 494-510.

The Bacon motion was defeated by a vote of 66 to 26.

A year later, on March 17, 1804, Representative John Dawson introduced a similar provision that would have retroceded all of the Virginia portion of the Territory of Columbia to Virginia, and all but the city of Washington to Maryland. The House postponed a vote on the resolution until December 1804. On December 31, 1804, Representative Andrew Gregg called up the motion seeking retrocession of the District of Columbia to Virginia and Maryland. The House elected to postpone consideration of the resolution until January 7, 1805. During three days, from January 7 to 10, the House debated the merits of retroceding the District of Columbia to Virginia and Maryland, excluding the city of Washington. During the debate, concerns about the disenfranchisement of District residents and the democratic principle of no taxation without representation clashed with efforts to create an independent and freestanding federal territory as the seat of the national government. The House again rejected a resolution allowing for the retroceding of Maryland and Virginia lands.

Virginia Retrocession

In 1840 and 1841, the citizens of Alexandria sought congressional action that would retrocede the area to Virginia. Five years later, on July 9, 1846, the District territory that lay west of the Potomac River was retroceded to Virginia by an act of Congress. The retroceded area represented about two-fifths of the area originally designated as the District.

Largely because Virginia agreed to the retrocession, there was no immediate constitutional challenge to the change. During the debate on retrocession, issues of the constitutionality of the Virginia Retrocession Act were raised. Opponents argued that the retrocession required the approval of a constitutional amendment. In 1869, Representative Halbert E. Paine submitted a resolution that was referred to the Committee on Elections and that challenged the seating of Virginia's 7th Congressional District's representative, Representative Lewis McKenzie. Representative Paine asserted that the retrocession of Alexandria was unconstitutional and requested a review by the Committee on the Judiciary. No action was taken.[14]

Constitutional Challenge to Virginia Retrocession

The constitutional question concerning retrocession to Virginia was not reviewed by the Supreme Court until 1875. In 1875, the Supreme Court in *Phillips v. Payne*,[15] rendered a decision that allowed the retrocession to stand, but did not rule on the constitutionality of the Virginia retrocession. The Court noted that since the parties to the retrocession (the federal government and the state of Virginia) were satisfied with its outcome, no third party posed sufficient standing to bring suit. In essence, retrocession was an accepted fact, a *fait accompli.* On December 17, 1896, the Senate adopted a resolution introduced by Senator James McMillan directing the Department of Justice to determine what portion of Virginia was originally ceded to the United States for the creation of the District of Columbia, under what legislative authority was the Virginia portion of the District retroceded, whether the constitutionality of such action had been judicially determined, and to render an opinion on what steps must be taken for the District to regain the area retroceded to Virginia.[16]

[14] U.S. Congress, Journal of the House of Representative, 41st Cong., 2nd sess. (Washington December 13, 1969) pp. 57-58.

[15] 92 U.S. 130 (1875).

[16] Sen. James McMillan, "*Original District of Columbia Territory*," remarks in the Senate, Congressional Record , vol.

The Attorney General of the United States, although offering no opinion on the constitutionality of the retrocession, noted that Congress could only gain control of the retroceded area if territory was again ceded by Virginia and accepted by Congress.[17] On February 5, 1902, a joint resolution introduced in the House and Senate (S.Res. 50) again raised the question of the constitutionality of the retrocession of land to Virginia and directed the Attorney General of the United States to seek legal action to determine the constitutionality of the retrocession and to restore to the United States that portion of Virginia that was retroceded should the retrocession be judged unconstitutional.[18] On April 11, 1902, Senator George F. Hoar, Chairman of the Senate Judiciary Committee, submitted a report to the Senate (S.Rept. 1078) which concluded that the question of retrocession was a political one, and not one for judicial consideration. The Committee report recommended that the resolution be adversely reported and indefinitely postponed.[19]

Maryland Retrocession

From 1838 to the Civil War, a number of bills and resolutions were introduced to retrocede part or all of the Maryland side of the District. Some of these linked retrocession to the abolition of slavery in the Nation's capital. All failed to win passage. In both 1838 and 1856, Georgetown unsuccessfully sought retrocession to the state of Maryland. On July 3, 1838, the Senate also considered and tabled a motion that prevented consideration of a petition by the citizens of Georgetown to retrocede that part of Washington County west of Rock Creek to Maryland.[20]

In 1848, Senator Stephen Douglas of Illinois submitted a resolution directing the District of Columbia Committee to inquire into the propriety of retroceding the District of Columbia to Maryland. The motion was agreed to by unanimous consent. Again, it was only a motion to study the question of retrocession. On January 22, 1849, Representative Thomas Flournoy introduced a motion that called for the suspension of the rules to enable him to introduce a bill that would retrocede to Maryland all of the District not occupied by public buildings or public grounds. The motion failed. On July 16, 1856, a bill (S. 382) was introduced by Senator Albert G. Brown directing the Committee on the District of Columbia to determine the sentiments of the citizens of the city of Georgetown on the question of retrocession to Maryland. The following year, on January 24, 1857, the Senate postponed further consideration of the measure after a brief debate concerning the language of the bill and its impact on consideration of any measure receding Georgetown to Maryland.

Modern Era

Since the 88th Congress, a number of bills have been introduced that would retrocede all or part of the District to Maryland; none were successful. Most involved the creation of a federal enclave, the National Capital Service Area, comprising federal buildings and grounds under control of the federal government. In 1963, Representative Kyl, introduced H.R. 5564 in the 88th Congress, which was referred to the House District of Columbia Committee, but was not reported by the

XXIX, December 17, 1896, p. 232.

[17] Amos B. Casselman, The Virginia Portion of the District of Columbia, Records of the Columbia Historical Society, vol. 12. (Washington, read before the Society, December 6, 1909) pp. 133-135.

[18] Sen. James McMillan. "Introduction of Resolution (SR 50) Regarding Constitutionality of Virginia Retrocession," remarks in the Senate, Congressional Record, vol. XXXV, February 5, 1902, p. 1319.

[19] U.S. Congress, Senate. "*Retrocession of a Portion of the District of Columbia to Virginia*," Congressional Record, vol. XXXV. p. 3973.

[20] U.S. Congress, *Congressional Globe, Sketches of Debates and Proceedings*, 25th Cong., 2nd sess, (Washington: 1838) pp. 297, 493.

Committee. The measure would have retroceded 96% of the District to Maryland and created a federal enclave.

On August 4, 1965, Representative Joel Broyhill of Virginia introduced a measure (H.R. 10264 in the 89th Congress) creating a federal enclave and retroceding a portion of the District to Maryland. Also, in 1965, the House District of Columbia Committee reported H.R. 10115, a bill combining the creation of a federal enclave, the retrocession of part of the District to Maryland, and home rule provisions. The bill was reported by the House District of Columbia Committee (H.Rept. 89-957) on September 3, 1965. It would have allowed the creation of a federal enclave, and retrocession of the remaining part of the city not included in the federal enclave, contingent on the state of Maryland's acceptance. If the Maryland legislature failed to pass legislation accepting the retroceded area within one year, the District Board of Election would be empowered to conduct a referendum aimed at gauging support for the creation of a charter board or commission to determine the form of government for the outer city. The bill provided for congressional approval of any measure approved by the citizens of the affected area.

On October 2, 1973, H.R. 10693, introduced by Representative Edith Green, included provisions retroceding the portion of the District ceded to the United States by Maryland. The bill would have retained congressional control over the federal enclave. If the retrocession provisions of the bill had been approved, Maryland would have been entitled to two additional United States Representatives for the area retroceded until the next congressional reapportionment. The bill also provided nine years of federal payments after retrocession to Maryland to defray expenses of supporting a newly established local government for the retroceded area. It was referred to the House District of Columbia Committee on October 2, 1973, but no further action was taken.

Since the 101st Congress, eight bills have been introduced to retrocede some part of the District to Maryland.[21] The bills would have maintained exclusive legislative authority and control by Congress over the National Capital Service Area (federal enclave) in the District of Columbia. Like their earlier counterparts no hearings or votes were held on these bills.

Retrocession as a strategy for achieving voting representation in Congress for District residents arguably should address both political and constitutional issues and obstacles. The process would require not only the approval of Congress and the President, but also the approval of the State of Maryland and, perhaps, the voters of the retroceded area. Although the Supreme Court reviewed the question of retrocession in *Phillips v. Payne,*[22] in 1875, it did not rule on its constitutionality.

Semi-Retrocession: District Residents Voting in Maryland

Short of retroceding all or a portion of the District to Maryland, a second option would allow District residents to be treated as citizens of Maryland for the purpose of voting in federal elections. Such an arrangement would allow District residents to vote as residents of Maryland in elections for the House of Representatives, and to have their vote counted in the election of the two Senators from Maryland. This semi-retrocession arrangement would allow District residents to be considered inhabitants of Maryland for the purpose of determining eligibility to serve as a member of the House of Representatives or the Senate, but would not change their status regarding Congress's exclusive legislative authority over the affairs of the District.

[21] Rep. Regula has introduced a retrocession bill in every Congress since the 101st Congress. These include H.R. 4195 (101st Congress); H.R. 1204 (102nd Congress); H.R. 1205 (103rd Congress); H.R. 1028 (104th Congress); H.R. 831 (105th Congress); H.R. 558 (106th Congress); H.R. 810 (107th Congress); and H.R. 381 (108th Congress).

[22] 92 U.S. 130 (1875).

The idea of semi-retrocession is reminiscent of the arrangement that existed between 1790 to 1800, the ten-year period between the creation and occupation of the District as the national capital. During this period residents of District residing on the respective Maryland and Virginia sides of the territory were allowed to vote in national elections as citizens of their respective states and in fact voted in the 1800 presidential election.

Initial Efforts

Several bills have been introduced since 1970 to allow District residents to vote in Maryland's congressional and presidential elections without retroceding the area to Maryland. During the 93rd Congress, on January 30, 1973, Representative Charles Wiggins introduced H.J.Res. 263, a proposed constitutional amendment would have considered the District a part of Maryland for the purpose of congressional apportionment and representation. Under this bill, District residents would have been subject to all the requirements of the laws of Maryland relating to the conduct of elections and voter qualification. The bill was referred to the House Committee on the Judiciary where no further action was taken.

On March 6, 1990, Representative Stanford Parris introduced H.R. 4193, the National Capital Civil Rights Restoration Act of 1990. The bill would have given District residents the right to cast ballots in congressional elections as if they were residents of Maryland. It also would have maintained the District's governmental structure, and was offered "as a workable way to change the [status quo] which represents taxation without representation" and as an alternative to a statehood measure, H.R. 51, introduced by Delegate Walter E. Fauntroy of the District of Columbia.[23] District officials and some members of the House, most notably Representatives Constance Morella and Steny Hoyer, who represented the two Maryland congressional districts adjacent to the District of Columbia, opposed the bill. Opponents of H.R. 4193 argued that it was not a practical means of addressing the District's lack of voting representation in Congress and that it could further cloud the District's status. Both bills were referred to the House District of Columbia Committee, but received no further action.

In defending the proposal, Representative Parris noted his opposition to statehood for the District and offered this explanation of his proposal in a letter published in the *Washington Post* on March 18, 1990.

> This approach would allow the government of the District to remain autonomous from the Maryland state government. D.C. residents would continue to vote for a mayor and a city council, and would not participate in Maryland elections for state positions such as delegate, state senator and governor. The reason for this is the constitutional mandate that the nation's capital remain under the exclusive legislative jurisdiction of Congress.
>
> There is an important distinction between this action and the Voting Rights Constitutional Amendment proposed in 1978. That action, rejected by the states, called for the election of members of Congress from the District. It did not, as my proposal does, elect those members as part of the Maryland delegation. There is also a distinction between this and proposals simply to turn the District over to Maryland [retrocession]. With my proposal, there is no need to delineate the federal enclave, and there would not be a requirement to obtain the approval of the Maryland legislature.
>
> I do not propose this because the push for statehood might pass; on the contrary, I am certain that given the political and practical problems facing the District, the

[23] H.R. 51 had 61 cosponsors in the House. A companion bill was introduced in the Senate, S. 2647 by Sen. Kennedy with five cosponsors. H.R. 4193 had three cosponsors in the House, but no companion bill in the Senate.

> unconstitutionality of statehood, and the positions taken by members of Congress during the most recent statehood debate, that statehood would not pass.
>
> Rather, I take this action because the current injustice should be corrected, and this proposal is the only one that takes into account the constitutional limitations on statehood and the compelling case to restore voting rights in national elections to District residents.[24]

Representative Parris contended that the proposal did not require the approval of the Maryland legislature or a referendum vote by District citizens. The proposal did raise questions of constitutional law, apportionment, and House procedure. It would have provided Maryland one additional seat in the House of Representatives, increased the size of the House temporarily until the 2000 reapportionment and allowed the District's Delegate to Congress to serve as a member of the House of Representatives from Maryland until the date of the first general election occurring after the effective date of the act.

Recent Efforts

This approach had not been reintroduced in succeeding Congresses until the 108th Congress when Representative Dana Rohrabacher introduced the District of Columbia Voting Rights Restoration Act of 2004, H.R. 3709. The bill was referred to the House Administration Committee, the House Judiciary Committee, and House Committee on Government Reform, which held a hearing on June 23, 2004. When introducing his bill, Representative Rohrabacher, noted the purpose of this bill was to restore voting rights to District residents that Congress severed with the passage of the Organic Act of 1801. Representative Rohrabacher introduced a similar measures, H.R. 190 and H.R. 492, during the 109th and 110th Congresses. A similar measure was introduced in the 110th Congress (H.R. 665), and referred to House Administration Committee, the Oversight and Government Reform Committee, and the House Judiciary Committee. It would have made the following changes:

- treat District residents as Maryland voters for the purpose of federal elections, thus allowing District voters to participate in the election of Maryland's delegation to the House and Senate;
- allow District residents to run for congressional and senatorial seats in Maryland; increased the size of the House by two additional members until reapportionment following the 2010 decennial census;
- classify the District as a unit of local government for the purpose of federal elections and subject to Maryland election laws;
- give one House seat to Maryland and require most, if not all, of the city to be designated a single congressional district, as population permits;
- direct the clerk of the House to notify the governor of the other state, mostly likely Utah, that it is entitled to a seat based on the apportionment report submitted to the Congress by the President in 2001;
- repeal the 23rd Amendment, which allows the District to cast three electoral votes in presidential elections; and
- allow citizens in the District to vote as Maryland residents in elections for President and Vice President.

[24] Rep. Stanford Parris. "Voting Rights, Yes, A New Status, No." *The Washington Post* March 18, 1980. p. b8.

The bill raised several policy questions relating to state sovereignty and the imposition of federal mandates:

- Can Congress, without the consent of the state, require the state of Maryland to administer or supervise federal elections in the District?
- Does transferring administrative authority and associated costs for federal elections in the District to the state of Maryland constitute an unfunded mandate?
- Who should bear the additional cost of conducting federal elections in the District?
- Is the proposal constitutional?
- Does the measure require an affirmative vote of the citizens of Maryland or the Maryland legislature?

Semi-retrocession arguably rests on uncertain ground. The constitutionality of the concept has not been tested in the courts. Semi-retrocession raises questions relating to state sovereignty and the power of Congress to define state residency for the purpose of voting representation in the national legislature. Further, since this option would not make the District a state, it might violate Article 1, Section 2 of the Constitution and the 14th Amendment to the Constitution. Article 1, Section 2 requires Representatives to be chosen from the states. The 14th Amendment is the basis for the "one-person, one-vote" rule for defining and apportioning congressional districts in the states.

Statehood

In the past, statehood has been granted by a simple majority vote in the House and the Senate and the approval of the President. However, according to some scholars, the District's unique status raises constitutional questions about the use of this statutory method to achieve statehood. Article IV, Section 3, of the Constitution identifies certain requirements for admission to the Union as a state. The Article states that

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or Parts of the States, without the consent of the legislatures of the States concerned as well as of the Congress.

Some opponents of statehood contend that this article implies that the consent of Maryland would be necessary to create a new state out of its former territory. They note that Maryland ceded the land for the creation of a national capital. This could raise a constitutional question concerning whether Maryland could object to the creation of another state out of territory ceded to the Untied States for the creation of the national seat of government, the District of Columbia. In addition, it could be argued that the granting of statehood for the District would violate Article I, Section 8, Clause 17, which gives Congress exclusive legislative control of the District. Because of these constitutional issues, most statehood proposals for the District have sought to achieve statehood through the constitutional amendment process.

Granting statehood to the District of Columbia would settle the question of congressional representation for District residents. A ratified constitutional amendment granting statehood to the District would entitle the District to full voting representation in Congress. As citizens of a state, District residents would elect two Senators and at least one Representative, depending on population.

Modern History

In 1983, when it became evident that H.J.Res. 554—a proposed constitutional amendment granting voting rights to District residents—would fail to win the 38 state votes needed for ratification, District leaders embraced the concept of statehood for the District of Columbia. The statehood effort, however, can be traced back to1921.[25] Statehood legislation in Congress has centered around making the non-federal land in the District the nation's 51st state. Several supporters of voting representation in Congress for District residents believe that statehood is the only way for citizens of the District to achieve full congressional representation.

Since 1983, there has been a continuing effort to bring statehood to the District—an effort that was most intense from 1987 through 1993. Since the 98th Congress, 13 statehood bills have been introduced.[26] On two occasions, House bills were reported out of the committee of jurisdiction, resulting in one floor vote. D.C. Delegate Walter E. Fauntroy introduced H.R. 51, 100th Congress, in 1987 to create a state that would have encompassed only the non-federal land in the District of Columbia. While the bill was reported out of the House District of Columbia Committee, no vote was taken on the House floor. On a second statehood bill, H.R. 51, introduced by Delegate Eleanor Holmes Norton in the 103rd Congress, in 1993, the measure was reported from the Committee on the District of Columbia, and a vote was taken on the House floor on November 21, 1993, with a tally of 277-153 against passage.

Other Statutory Means

On July 14, 1998, during the 105th Congress, Delegate Eleanor Holmes Norton introduced H.R. 4208, a bill providing full voting representation in Congress for the District of Columbia. The bill was referred to the Committee on Judiciary, Subcommittee on the Constitution, where no action was taken. The bill was noteworthy in that it did not prescribe methods by which voting representation was to be obtained such as a constitutional amendment. Nor did the Norton bill include language typically found in other measures that defined or declared the District a state for the purpose of voting representation in Congress. The measure suggested that Congress might provide voting representation by statute, a constitutionally untested proposition.

During the 109th Congress, Representative Davis introduced legislation (H.R. 2043) that would have provided voting representation to the citizens of the District of Columbia by eschewing methods used in the past such as a constitutional amendment, retrocession, semi-retrocession and statehood. The bill would have provided District citizens with voting rights in Congress by designating the District as a congressional district.

[25] In November and December 1921, and January 1922, during the 67th Congress, the Senate held hearings on S.J.Res. 133, which would have granted statehood to the District.

[26] In the 98th Congress, Del. Fauntroy introduced H.R. 3861 on September 12, 1983, and Sen. Kennedy introduced S. 2672 on May 15, 1984. In the 99th Congress, Del. Fauntroy introduced H.R. 325 on January 3, 1985; Sen. Kennedy introduced S. 293 on January 24, 1985. In the 100th Congress, Del. Fauntroy introduced H.R. 51 on January 6, 1987; Sen. Kennedy introduced S. 863 on March 26, 1987. In the 101st Congress, Del. Fauntroy introduced H.R. 51 on January 3, 1989; Sen. Kennedy introduced S. 2647 on May 17, 1990. In the 102nd Congress, Del. Norton introduced H.R. 2482 on May 29, 1991; Sen. Kennedy introduced S. 2023 on November 22, 1991. In the 103rd Congress, Del. Norton introduced H.R. 51 on January 5, 1993; Sen. Kennedy introduced S. 898 on May 5, 1993. In the 104th Congress, Del. Norton introduced H.R. 51 on January 4, 1995.

Virtual Statehood

Much of the latest thinking on securing voting rights for citizen's of the District centers on the premise that Congress has the power to define the District as a state for the purpose of granting voting representation. Proponents of virtual statehood note that the District is routinely identified as a state for the purpose of intergovernmental grant transfers, that Congress's authority to define the District as a state under other provisions of the Constitution has withstood Court challenges,[27] and that Congress has passed legislation allowing citizens of the United States residing outside the country to vote in congressional elections in their last state of residence.[28] They also note that the Constitution gives Congress exclusive legislative control over the affairs of the District and thus the power to define the District as a state. Opponents argue that the District lacks the essential elements of statehood, principally an autonomous state legislature, charged with setting the time, place and manner for holding congressional elections.

During the 109th Congress Delegate Eleanor Holmes Norton and Senator Joseph Lieberman introduced identical bills in the House and Senate (H.R. 398/S. 195: No Taxation Without Representation Act of 2005) that would have treated the District as a state for the purpose of congressional representation. In addition, the bills would have

- given the District one Representative with full voting rights until the next reapportionment;
- granted full voting representation to District citizens, allowing them the right to elect two Senators, and as many Representatives as the District would be entitled to based on its population following reapportionment;
- permanently increased the size of the House from 435 to 436 for the purpose of future reapportionment.

The proposals raised several questions, chief among them, whether Congress has the legal authority to give voting representation to District residents. The bills differed significantly from the other measures introduced in during the 109th Congress. H.R. 398 would have provided citizens of the District with voting representation in both the House and the Senate, unlike the other measures which would provide representation only in the House.

Congressional District

On March 13, 2007, the House Oversight and Government Reform Committee ordered reported H.R. 1433, the District of Columbia House Voting Rights Act of 2007. The measure superseded H.R. 328, which was introduced earlier in the 110th Congress. The bill included a controversial provision that was not included in H.R. 328, namely, the temporary creation of an at-large congressional district for the state most likely to gain an additional representative. That state, Utah, approved a fourth congressional district in December 2006. H.R. 1433 would have:

- designated the District of Columbia as a congressional district for the purpose of granting the city voting representation in the House of Representative; and
- permanently increased the number of members of the House of Representative from 435 to 437. One of the two additional seats would have been occupied by a Representative of the District of Columbia; the other would be elected at large from the state of Utah based on 2000 decennial census of the population and

[27] See *Stoutenburg v. Hennick*, 129 U.S. 141 (1889) (Art. 1, Sec. 8, Clause 3—Commerce Clause); *Callan v. Wilson*, 127 U.S. 540, 548 (1988) (Sixth Amendment—District residents are entitled to trial by jury).

[28] The Uniform and Overseas Citizens Absentee Voting Act, 100 Stat. 924.

> apportionment calculations which placed Utah in the 436 position. This is one seat short of the 435 seats maximum size of the House. (For information on the impact of the 2000 Population Census on the apportionment process, see CRS Report RS20768, *House Apportionment 2000: States Gaining, Losing, and on the Margin*, by Royce Crocker, and CRS Report RS22579, *District of Columbia Representation: Effect on House Apportionment*, by Royce Crocker.)[29]

The House Government Reform and Oversight Committee, which approved the bill by a vote of 24-5, considered several amendments, but adopted only one. The amendment, which was sponsored by Representative Westmoreland and approved by voice vote, would prohibit the District from being considered as a state for the purpose of representation in the Senate. Other amendments that were offered or ruled non-germane by the chair included measures that would have ceded the District back to Maryland, required the ratification of a constitutional amendment giving Congress the power to grant the District voting rights in the House, and nullified the bill if there was not partisan balance in the added representation.

On March 15, 2007, the bill was marked up and ordered reported by a vote of 21-13 by the House Judiciary Committee, which held a hearing on the constitutionality of the bill a day earlier. The committee considered and rejected a number of amendments to the measure, including the following:

- a provision calling for expedited judicial review in the likely event of a court challenge to the bill's constitutionality,
- a provision allowing Utah's state legislature to decide if the state's additional representative would be elected at-large or by congressional district, and
- a provision allowing for congressional representation of all military bases with populations of 10,000 or more.

When considered during the 110th Congress, H.R. 1433 was one of the most recent in a long series of efforts aimed at giving District residents voting representation in Congress, a series that extends back to 1801. During the 109th Congress, when a similar measure (H.R. 5388) was being considered by the House Subcommittee on the Constitution, the creation of an at-large congressional district for Utah was cited as a hurdle to the bill being reported out of the subcommittee. These concerns were raised anew during the House Judiciary Committee hearing on March 14, 2007, and during the markup of the bill the following day. The proposed creation of an at-large congressional district for Utah is not without precedent. According to the *Historical Atlas of United States Congressional Districts* the use of at-large congressional districts lasted from the 33rd Congress (1853-1855) to the 89th Congress (1965-1967). Such districts were used for one of several reasons. The state legislature

- could not convene in time to redistrict,
- could not agree upon a new redistricting plan,
- decided not to redistrict, or

[29] On March 20, 2007, the Bush Administration issued a State of Administration Policy announcing its opposition to H.R. 1433. The Administration's statement outlined its constitutional objections to the bill noting that (1) the bill violated Article 1, Section 2 of the Constitution, which limits representation in the House to representatives of states; (2) the District Clause is qualified by other provisions of the Constitution, including the Article I requirement that representatives of the House are to be elected by the people of the several states; and (3) it believed that voting representation for the District could only be achieved by constitutional amendment.

- decided to use this method as a part of its new redistricting plan.[30]

The idea of an at-large District raised questions about the measure's constitutionality. In response, on December 4, 2006, the Utah legislature approved by a vote of 23 to 4 in the Senate and 51 to 9 in the House, a redistricting map creating a 4th congressional district for the state. The move was seen by supporters of voting rights for the District as removing a significant impediment to the bill's consideration by the full House of Representatives during the 109th Congress. However, a floor vote on the measure was not possible before the 109th Congress adjourned following the 2006 congressional elections.

On March 22, 2007, the House began consideration of H.R. 1433. A House vote on the bill was postponed after Representative Smith of Texas offered a motion to recommit the bill to the House Oversight and Government Reform Committee for consideration of an amendment that would have repealed substantial portions of the city's gun control law, the Firearms Control Regulation Act of 1975.[31]

Action in the 111th Congress

H.R. 157

On January 6, 2009, Delegate Norton introduced H.R. 157, the District of Columbia Voting Rights Act of 2009, a measure identical to a bill, H.R. 1905, that passed the House on April 19, 2007, but failed to win final congressional approval during the 110th Congress. H.R. 157, as introduced, would:

- permanently increase the number of Members in the House of Representatives from 435 to 437 starting with the 111th Congress (provision was changed to 112th Congress during Committee consideration of the bill);
- designate the District of Columbia a congressional district for purposes of voting representation in the House;
- limit the District to no more than one representative in the House, (this provision was eliminated during Committee consideration of the bill); and
- require that one of the two additional seats be occupied by a Representative of the District of Columbia; the other would be temporarily elected at large from the state of Utah based on the 2000 decennial census and would remain in place until the 2012 apportionment process.

In addition, the act includes a *nonseverability* provision that would void the entire act if any part of the act is declared invalid, unenforceable or unconstitutional.

H.R. 157, as introduced, did not include several provisions included in a Senate companion bill, S. 160, introduced by Senator Joseph Lieberman.[32] Most notably, the bill did not include language that would:

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[30] Kenneth C. Martis. *Congressional Districts* in The Historical Atlas of United States Congressional Districts: 1789-1993 (New York, NY, The Free Press, 1982) p. 5.

[31] D.C. Code § 7-2501.01

[32] Sen. Lieberman introduced an identical bill (S. 1257) during the 110th Congress. On September 18, 2007, the Senate began the process of bringing the bill to the Senate floor for a vote. A cloture motion limiting debate was introduced but failed to win the 60 votes necessary to prevent a filibuster of the bill. The failed cloture vote forced supporters to indefinitely delay further Senate consideration of S. 1257.

- prohibit the District from being considered a state for the purpose of Senate representation;
- require the two new representatives (one from the District and one from Utah) to be seated on the same date;
- require the new representative from the State of Utah to be elected based on a redistricting plan enacted by the state;
- require that the newly created congressional district in Utah remain in effect until the first reapportionment occurring after the 2010 decennial census;
- repeal provisions of the District of Columbia Delegate Act of 1970, P.L. 91-405, relating to the election, privileges, and qualifications of the Delegate to the House of Representatives from the District of Columbia;
- abolish the office of the District of Columbia Statehood Representative; and
- allow for expedited judicial review by the United States District Court for the District of Columbia and the United States Supreme Court if the constitutionality of any provision of the act is challenged.

By a vote of 20-12, the House Judiciary Committee marked up and approved an amended version of H.R. 157 on February 25, 2009. The amended version of the bill would:

- provide for expedited judicial review of the legislation;
- increase the number of House seats by two beginning in the 112th Congress instead of the 111th Congress;
- clarify that the District would remain entitled to three presidential electors to the Electoral College as mandated by the XXIII Amendment to the Constitution; and
- allow the District to have additional representatives apportioned if its population increases, with such additional representation based on 437 House seats.

The Committee rejected several amendments sponsored by Republican members, including amendments that would have:

- retroceded all land in the District, except federal buildings, back to Maryland; and
- required the establishment of a fourth congressional district in Utah instead of allowing for the creation of an at-large district.

In addition, an amendment that would have reformed the District gun-control law by repealing the ban on semiautomatic weapons was withdrawn before a committee vote was taken.

S. 160

The Senate bill, S. 160, which was introduced on January 6, 2009, was reported by the Senate Committee on Homeland Security and Governmental Affairs on February 12, 2009 and approved by the full Senate on February 26, 2009. As passed, the bill includes a number of the same provisions contained in H.R. 157, as reported, including the following provisions.

- An increase in the number of House seats from 435 to 437 would be effective upon commencement of the 112th Congress.
- Expedited judicial review to determine the constitutionality of any provision of the bill would be allowed. Unlike the House bill, the Senate bill would allow any

Member of the House or Senate to file legal briefs in support of or in opposition to the position of a party in the case.

The bill includes several other provisions not included in H.R. 157, as reported by the House Judiciary Committee, including provisions that would:

- require the creation of fourth congressional district, based on a redistricting plan filed by the state of Utah, instead of the creation of an at-large district for the state;
- repeal provisions of the District of Columbia Delegate Act of 1970, P.L. 91-405, relating to the election, privileges, and qualifications of the Delegate to the House of Representatives from the District of Columbia;
- limit the District to no more than one representative in the House; and
- abolish the office of the District of Columbia Statehood Representative.

In addition, the bill includes amendments unrelated to voting rights for the District. One would require the Federal Communications Commission (FCC) to encourage diversity in media ownership and ensure broadcast station licenses are used in the public interest. The second, and more controversial provision would repeal provisions of the District's gun control law.

Gun Control Provisions[33]

Senate Amendment 575, the "Second Amendment Enforcement Act," was introduced by Senator John Ensign and adopted by a vote of 62-36.[34] It makes a series of amendments to the District of Columbia's Firearms Control Regulation Act of 1975, which the D.C. Council had the authority to enact pursuant to the District of Columbia Self-Government and Government Reorganization Act (the Home Rule Act). Overall, this Senate amendment would effectively repeal the District's scheme that requires the registration of all firearms and restricts the possession and storage of firearms and ammunition. Specifically, the language in the amendment essentially provides that the D.C. Council would not be empowered to promulgate laws relating to firearm regulation either by virtue of the authority granted in the D.C. Code[35] or any other provision granting similar police power. Further, it would appear to prohibit the District from barring firearm possession by individuals who are not prohibited from possessing firearms under federal law, and it would also appear to prevent the District from prohibiting or regulating the possession of firearms not already prohibited or regulated under federal law. However, the amendment would not interfere with the Council's authority to regulate or prohibit the carrying of open or concealed firearms, except in cases where the firearm is in a person's dwelling, place of business, or other land possessed by the person.

A major portion of the amendment would repeal the District's existing requirement that all firearms be registered, but it would allow the possession of sawed-off shotguns, machine guns, and short-barreled rifles to still be prohibited. Other provisions of the amendment would repeal

[33] This section is authored by Vivian Chu, Attorney, American Law Division, Congressional Research Service. For a detailed discussion of congressional actions and gun control legislation in the District of Columbia, see CRS Report R40474, *D.C. Gun Laws and Proposed Amendments: An Analysis of Title II of S. 160 and the District's Gun Laws*, by Vivian S. Chu.

[34] The provisions of this amendment draw upon H.R. 6842, which was passed during the 110th Congress by the House of Representatives, who voted 266-152.

[35] D.C. Code § 1-303.43 (2008) "The Council ... is authorized and empowered to make ... all such usual and reasonable police regulations ... as the Council may deem necessary for the regulation of firearms."

the District's semiautomatic handgun ban by amending the definition of "machine gun" to conform with the federal definition.[36] The Senate amendment would also "Restore the Right of Self-Defense in the Home" and repeal provisions of the D.C. Code that make it a policy that firearms be unloaded and either disassembled or secured by trigger lock, and further prohibits and provides criminal penalties if a person keeps a loaded firearm on any premise knowing a minor is likely to gain access.[37] The amendment would also remove criminal penalties for carrying a firearm without a license either outside or within one's dwelling, place of business, or on other land possessed by that person whether loaded or unloaded. Lastly, the amendment proposes a change to existing federal law to allow federally licensed firearms dealers, whose place of business is in Maryland or Virginia, to sell and deliver handguns to residents of the District of Columbia.[38]

Senate Amendment 575 also includes provisions to repeal the District's Firearms Registration Emergency Amendment Act of 2008, which is effective through April 6, 2009, and the Firearms Registration Amendment Act of 2008, the permanent version of the emergency legislation.[39] The amendment also includes a Severability Clause, which effectively provides that the gun amendments would not be affected should any other part of the bill be held unconstitutional.

Analysis

Over the two hundred year history of the Republic, citizens of the District of Columbia have sought political and judicial redress in their efforts to secure voting representation in Congress. In 2000, the Supreme Court affirmed a decision by a three-judge panel of the United States District Court of the District of Columbia in the case of *Adams v. Clinton,*[40] which rejected a petition from District residents seeking judicial redress in their effort to secure voting representation in the national legislature. The Court ruled that District residents did not have a constitutional right to voting representation in Congress, but Congress has the power to grant voting rights to District residents through the political process including options outlined in this report.

Any of the options outlined in this report must be able to withstand political and constitutional challenges. Some, such as a constitutional amendment or retrocession are more problematic than others. Others such as statehood, which can be achieved by statute, may trigger other constitutional issues. All must overcome what some observers consider conflicting provisions of the Constitution. Namely, Art. 1, Sec. 2, of the Constitution which states that the House of Representative shall be composed of members chosen every two years by the people of the

[36] National Firearms Act 1934, 26 U.S.C.§ 5845(b). The District's current emergency legislation, the "Firearms Registration Emergency Amendment Act of 2008" has, in its provisions, this same amendment to the definition of "machine gun."

[37] This storage of firearms policy and requirements is the District's current law as stated in its existing emergency legislation, whereas before the D.C. Code provided that all firearms must be unloaded and either disassembled or bound by trigger lock even in one's home.

[38] Under 18 U.S.C. § 922(b)(3), it is illegal for a licensed dealer to sell or deliver any firearm to any person the licensee knows or has reasonable cause to believe does not reside in the State in which the licensee's place of business is located; however, this prohibition does not apply to the sale or delivery of any rifle or shotgun if the transfer is done in person and the transaction fully complies with the legal conditions of sale in both such States.

[39] Pursuant to the Home Rule Act, the Firearms Registration Amendment Act of 2008 has been transmitted to Congress for its review before it can become permanent law.

[40] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000)(cites to later proceedings omitted).

several states and Art. 1, Sec. 8, Clause 17 which conveys exclusive legislative authority in all cases whatsoever over the affairs of the District of Columbia.

It can be argued that, given the District's unique status as the seat of the national government and a strict reading of the Constitution, the only fail-safe avenues that exist to provide District residents voting rights in the national legislature are a constitutional amendment or statehood, which could be achieved by statute. The former—a constitutional amendment—offers a degree of finality and permanence in settling the question of District voting representation in the national legislature, but the process of winning approval of such an amendment is by no means easy. To be successful, proponents of a constitutional amendment in support of District voting rights must win the support of

- two-thirds majority in both Houses of Congress. The amendment must then be ratified by three-fourths of the states (38 states) in a state convention or by a vote of the 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 be ratified by three-fourths of the states (38 states) in a state convention or by a vote of the state legislatures.

The amendment process could take years and prove unsuccessful, as was the case with the D.C. Voting Rights Amendment of 1978, which was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Retrocession, the ceding of part of the District back to Maryland, has not been fully tested in the courts. Retrocession as a strategy for achieving voting representation in Congress for District residents arguably should address both political and constitutional issues and obstacles. Given the Virginia experience, the process would require not only the approval of Congress and the President, but also the approval of the State of Maryland and, perhaps, the voters of the retroceded area. Although the Supreme Court reviewed the question of retrocession in *Phillips v. Payne,*[41] in 1876, it did not rule on its constitutionality. Moreover, retrocession would require some portion of the District to remain a federal enclave in conformance with Article 1, Sec. 8, Clause 17 of the Constitution, which requires Congress to exercise exclusive legislative control over the "Seat of the Government of the United States."

Semi-retrocession bills would result in a unique arrangement between citizens of the District of Columbia and Maryland. Such bills would allow District residents to vote in Maryland congressional elections based in part on the theory of residual citizenship, that is the idea that District residents retained residual rights as citizens of Maryland, including voting rights after the land creating District was ceded to the federal government. The theory was rejected by the Supreme Court. In *Albaugh v. Tawes,*[42] the Supreme Court rejected the contention that District residents retained residual rights as citizens of Maryland, specifically, the right to vote in Maryland. The case involved a Republican candidate who lost the nomination election for the United States Senate. The candidate, William Albaugh, filed suit seeking a judgment declaring the District a part of Maryland and ordering Maryland state officials (the Governor and the Secretary of State) to declare the primary and any future elections voided because District residents did not vote. The Court held that District residents had no right to vote in Maryland elections.

Statehood is a much simpler process, but it is no less politically sensitive. Article IV of the Constitution gives Congress the power to admit new states into the Union. The Article does not

[41] 92 U.S. 130 (1875).

[42] 379 U.S. 27 (1964).

prescribe the method, and the process has varied over time. Congress could by statute, convey statehood to some portion of the District. It must be noted that if Congress conveyed statehood on what is now the District, a portion of the District would have to remain a federal enclave since Article I, Sec. 8, Clause 17, of the Constitution requires a portion of the District, not exceeding ten square miles, to be maintained as the "Seat of Government of the United States." The statehood option should include Congress introducing a constitutional amendment repealing the 23rd Amendment granting District residents three votes in the Electoral College. Observers argue that if the amendment is not repealed it could result in conveying significant political power in presidential elections to the few District residents remaining in the federal enclave.

Bills that would convey voting rights to the District Delegate to Congress by defining the District as a state or congressional district (virtual-statehood and other means) may conflict with Article I, Sec. 2, of the Constitution which conveys voting rights to representatives of the several states. Despite the constraints of Article 1, Sec. 2, advocates of voting rights for District residents contend that the District Clause (Art. 1, Sec. 8) gives Congress the power to define the District as a state. 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. In general however, courts such as the three-judge panel in *Adams v. Clinton*[43] have not looked favorably upon the argument that the District of Columbia should be considered a state for purposes of representation in the Congress. Some commentators have suggested that Congress, acting under its authority over the District, has the power to confer such representation.[44] Other commentators, however, have disputed this argument.[45] In addition, District voting rights proponents can point to the Uniform and Overseas Citizens Absentees Voting Act, as an example of Congress's authority to provide voting rights to citizens who are not residents of a state. A full analysis of these legal arguments can be found at CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, by Kenneth R. Thomas.

[43] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[44] *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 Oversight and Government Reform) available at D.C. Vote Website at http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf

[45] *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. 61 (testimony of Professor Jonathon Turley).

Appendix A. Woodward Proposal

Resolved that the following be recommended to the Legislatures of the several states as an Article in addition to, and amendment of the constitution of the United States.

> ARTICLE
>
> The Territory of Columbia shall be entitled to one Senator in the Senate of the United States; and to a number of members in the House of Representatives proportionate to its population. Before it shall have attained a population sufficient to entitle it to one representative it shall be entitled to a member, who shall have the right to deliberate and receive pay, but not to vote. It shall also be entitled to one elector for a President and Vice President of the United States, until it shall have attained a sufficient population to entitle it to one representative, and then it shall be entitled to an additional elector for every representative.[46]

[46] Woodward, Proposed Constitutional Amendment of 1801, quoted in Noyes, p. 204.

Appendix B. Anti-Lobbying Provisions in D.C. Appropriations Acts

Congress has restricted the ability of the Government of the District of Columbia to lobby for voting representation. For several years, the general provisions of annual appropriation acts for the District have prohibited D.C. Government from using federal or District funds to lobby for voting representation, including statehood. Recently, P.L. 109-115—the Departments of Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, the Office of President, and Independent Agencies Appropriations Act of 2006—prohibited the use of District and federal funds to support lobbying activities aimed at securing statehood or voting representation for citizens of the District. In addition, the act specifically prohibited the District of Columbia Corporation Counsel or any other officer or entity of the District government from providing assistance for any petition drive or civil action seeking to require Congress provide for voting representation in Congress for the District of Columbia. The act also prohibited the use of District and federal funds to finance the salaries, expenses, or other costs associated with the offices of Statehood Representative for District of Columbia and Statehood Senator.[47]

In 2005, the District passed legislation that some analysts consider a circumvention of Congress's prohibition on the use of District funds to advocate for voting representation in Congress for citizens of the District of Columbia. On July 6, 2005, the Council of the District of Columbia unanimously approved the "Fiscal Year 2006 Budget Support Emergency Act of 2005" (A16-0168). The act included as subtitle F of Title I, the "Support for Voting Rights Educational-Informational Activities Emergency Act of 2005," which appropriated $1 million in local funds to the Executive Office of the Mayor to support "educational and informational activities to apprise the general pubic of the lack of voting rights in the United Sates Congress for District residents."[48] Language of the act aimed at drawing a distinction between "educational and informational activities" and advocacy activities in support voting rights for District residents. In fact, Section 1026(b) of the act prohibits funds from being used to support lobbying activities in support of voting rights for District residents. On April 5, 2006, the Mayor identified three entities who received a share of the $1 million to be used to conduct voter education activities. They

[47] P.L. 109-115 included three specific provisions prohibiting or restricting the District's ability to lobby for voting representation in Congress. They are as follows: "Sec. 104. (a) Except as provided in subsection (b), no part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature. (b) The District of Columbia may use local funds provided in this title to carry out lobbying activities on any matter other than—(1) the promotion or support of any boycott; or (2) statehood for the District of Columbia or voting representation in Congress for the District of Columbia. (c) Nothing in this section may be construed to prohibit any elected official from advocating with respect to any of the issues referred to in subsection (b)."

"Sec. 110. None of the Federal funds provided in this act may be used by the District of Columbia to provide for salaries, expenses, or other costs associated with the offices of United States Senator or United States Representative under section 4(d) of the District of Columbia Statehood Constitutional Convention Initiatives of 1979 (D.C. Law 3—171; D.C. Official Code, section 1—123)."

"Sec. 115. (a) None of the funds contained in this act may be used by the District of Columbia Corporation Counsel or any other officer or entity of the District government to provide assistance for any petition drive or civil action which seeks to require Congress to provide for voting representation in Congress for the District of Columbia. (b) Nothing in this section bars the District of Columbia Corporation Counsel from reviewing or commenting on briefs in private lawsuits, or from consulting with officials of the District government regarding such lawsuits."

[48] Section 1026, Subtitle F, Title I of A16-0168. Text available at http://www.dccouncil.washington.dc.us/images/00001/20050726174031.pdf.

included DC Vote ($500,000), The League of Women Voters of the District of Columbia ($200,00) and Our Nation's Capital ($300,000).

Most recently, Congress considered provisions intended to relax restrictions on the use of District funds to lobby or support efforts to achieve voting representation for the District. During the 110th Congress, House and Senate versions of the Financial Services and General Government Appropriations Act for FY2009 (H.R. 7323 and S. 3260) included provisions that would have eliminated the prohibitions on the use of District funds in support of lobbying activities, the office of Statehood Representative, and voting rights for the District of Columbia.

Author Information

Joseph V. Jaroscak
Analyst in Economic Development Policy

Acknowledgments

This report was originally written by former CRS analyst Eugene Boyd. Congressional clients seeking more information and analysis on the material covered in this report should contact the current author.

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