

**Post-Hearing Questions for the Record
Submitted to Jonathan Turley
From Senator Tom Coburn**

**“Equal Representation in Congress:
Providing Voting Rights to the District of Columbia”
May 15, 2007**

1. According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation’s transmission to the President?

Answer from Professor Turley:

This is another example of the obvious flaws in the constitutional arguments made by advocates on the other side of this debate. Regardless of the fact that Congress has plenary authority of the treatment of residents *inside* the District, it does not have the authority to constructively amend other provisions of the Constitution such as a Composition Clause. Article I, Section 7 mandates that legislation passed by Congress must be submitted to the President for signature or veto. Congress cannot transfer this authority to another body without violating Article I.

The effort to avoid discussion of the history and text of the Composition Clause and Qualification Clause reflects this obvious flaw. Whatever authority Congress has over residents within the District Clause, it cannot use that authority to affect the right of citizens (or states) outside of

the District or to contradict another provision of the Constitution. This point was made in *Palmore v. United States*, 411 U.S. 389, 397-398 (1973):

Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States.*

Sponsors seem to be laboring under the misconception that plenary authority within the District means that they can give residents any new status or benefit. The incomprehensible result is that the District Clause (which advocates insist was something of an afterthought) would devour fundamental structural provisions like the Composition Clause.

2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has “like authority” over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the “forts, magazines, arsenals, dockyards, and other needful buildings” and the District?

Answer from Professor Turley:

Advocates often cite the District Clause without including the later words from the same section in which Congress is expressly allowed “to exercise like Authority [as over the District] over all Places purchased . . . for

the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings.” It is obvious that the Framers viewed the authority over the federal enclave and federal territories to be similar: a view later repeatedly noted by the Supreme Court. The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:

This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' *The power of Congress over federal enclaves that comes within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia.* The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.

Paul v. United States, 371 U.S. 245, 263-64 (1963). The plain and obvious meaning of this language is that Congress would be given administrative and operational control over such areas – not the power to fashion those areas into new forms of voting members in Congress. Indeed, if Congress could use this authority to award seats to a federal enclave, it could presumably do

the same thing for other federal enclaves and territories. After all, the way that the District received its own government in the 1960s was when Lyndon Johnson treated the District as a type of federal agency. Under that precedent and the current interpretative theory, Congress could award voting seats to the Department of Defense to cover tax-paying citizens in military reservations.

3. **Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House Representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia Retrocession era?**

Answer from Professor Turley:

There is a long and entirely consistent historical record running from the Constitutional Convention to the Ratification Conventions to the early Congresses to the Retrocession period on this question. The statements and actions during the late eighteenth and early nineteenth centuries reflect an understanding of the plain meaning of both the District and Composition Clauses. I have already cited the statements and amendments recorded in the Constitutional and Ratification Conventions. The most interesting are the amendments offered by Alexander Hamilton and Samuel Osgood. On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that “the Inhabitants of the said District shall be entitled to the like essential

Rights as the other inhabitants of the United States in general.” Hamilton wanted the District to be given the same proportional representation in Congress and recognize that, unless changed, the federal enclave would not be entitled to such representation:

That When the Number of Persons in the District of Territory to be laid out for the Seat of Government of the United States, shall, according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [blank] such District shall cease to be parcel to the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body. Among the other amendments offered to change the District Clause, Samuel Osgood in Massachusetts sought to amend the provision to allow the residents to be “represented in the lower House.” These efforts failed. Once again, no one has suggested that the status of the District was a focus of the debates. However, the statements and amendments offered during this period show a consistent recognition of the obvious meaning of the clause.

Likewise, in Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be “represented in the lower House.”

After ratification, the District and Composition Clauses continued to generate interest. One interesting example was the effort to add a non-voting member from the territory of Ohio. Connecticut Rep. Zephaniah Swift objected to the admission of anyone who is not a representative of a state. Although non-voting members would ultimately be allowed, the members on both sides agreed that the Constitution restricted voting members to

representatives of actual states. This debate, occurring only a few years after the ratification (and with both drafters and ratifiers) serving in Congress reinforces the clear understanding of the meaning and purpose of the language.

Early controversies also focused on the use of Congress' plenary authority under the District Clause to create national policies or affect states.

The consistent view was that the plenary authority over the District was confined to its internal operations and would not extend beyond its borders to affect the states. For example, in 1814, the use of this authority was successfully challenged when used to create a second national bank. Senator John Calhoun and Rep. Robert Wright joined together to use the District Clause as a way of avoiding constitutional questions. It was defeated in part by arguments that the District Clause could not be used to circumvent national legislation or impose policies on the rest of the nation. In 1813, the proposed National Vaccine Institution was defeated after sponsors sought to use the District Clause to establish it under Congress' plenary authority. Again, it was viewed as an effort to use the District Clause to impose policies outside of its borders. Likewise, in 1823, an effort to create a fraternal association for the relief of families of dead naval officers was rejected.

Opponents objected to the use of the District Clause to create an institution with national purposes.

The retrocession movement began almost immediately after the District was formed. This early debate (occurring only a few years after ratification) reflect the same meaning of the District Clause. I have detailed those statements in my prior written testimony. However, during this period, it was proposed that the District should return to Maryland to afford its residents full voting rights. It was roundly rejected by District residents who accepted their status in exchange for being residents of the Capitol City. As I noted earlier, in one recorded vote taken within Georgetown, the Board of Common Council voted overwhelmingly (549 to 139) to accept these limitations in favor of staying with the federal district.

After the retrocession period, the debate over the status of the District uniformly acknowledged the need for a constitutional amendment unless retrocession occurred. This was the impetus of the constitutional amendment in 1978, which failed. Members in support of that amendment accepted the defeat and did not try to achieve the same result by legislative means.

4. **Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to ‘states’, why would the Federal Enclave Clause be able to shape**

the meaning of the House Composition Clause under rules of statutory construction?

Answer from Professor Turley:

This is perhaps the single most important fact that is routinely ignored in this debate. Whatever the District Clause means, it cannot be interpreted to violate the express and plain meaning of the Composition Clause. In all of the effort to spin the historical record of the District Clause, sponsors have avoided any mention of the clear language and history of the Composition Clause.

In what was billed as the first public defense of the Constitution by one of its framers, in an October 6, 1787 speech, James Wilson cited the Composition Clause as the guarantee that Congress would be tethered closely to the states and that only states could elect members: “The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the foederal constitution must likewise be extinct.” As I noted earlier, this principle was defended in Third Congress when there was an effort to add a representative from a

federal territory.

Given the expressed concerns over the composition of Congress during the constitutional debates and the fixation on the rights of states, it is perfectly ludicrous to suggest that the Framers would have left open the possibility that Congress could use its plenary authority over federal enclaves and territories to create to forms of voting members. The protection of state authority was a paramount concern and even the Senate was the product of the voting of state legislatures. It would make little sense for the Framers to work out the delicate balancing of state interests in the composition of Congress only to reserve the right of Congress to add non-state voting members at its discretion.

Equally evident in today's debate is the reluctance of advocates to recognize the conflict with the Qualifications Clause. By claiming the right to create new forms of voting members, Congress would negate the purpose of the Qualifications Clause since it could dictate the qualifications for anyone representing a federal enclave or territory. As Alexander Hamilton noted "[t]he qualifications of the persons who may choose or be chosen . . . are *defined and fixed* in the Constitution, and are *unalterable* by the legislature." As noted in my written testimony, the Supreme Court has been adamant in

preventing manipulation of the rolls of Congress through the creation of new qualifications or disqualifications.

5. In John Elwood's (representing the US Department of Justice Office of Legal Counsel) Senate Judiciary Committee hearing written testimony, he cites to *Banner v. U.S.*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows: 'In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress is the District's Government, see U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312.'

Please comment on what precedential value this case should have on the constitutionality of S. 1257.

Answer from Professor Turley:

Banner is only one of the latest in a long line of cases that affirm the plain meaning of the District Clause. Only a few years after ratification, the Supreme Court itself stressed this point in *Hepburn v. Ellzey*, rejecting the notion that "Columbia is a distinct political society; and is therefore 'a state' . . . the members of the American confederacy only are the states contemplated in the constitution." This view was reaffirmed by the D.C. Circuit just recently in *Parker v. District of Columbia* where both the majority and dissenting opinions stress that the word "states" refers to actual state entities.

6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?

Answer from Professor Turley:

As noted above (and in my written testimony), there is no textual or interpretive limitation to the new authority claimed by some in Congress to create new forms of members. The District Clause is immediately followed by a clause referencing other federal territories. Section 17 states that Congress is expressly allowed “to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings.” Just as the District has tax-paying, military serving citizens, so do many other federal enclaves and territories. Congress could award voting representatives to military families living on military reservations or residents in Puerto Rico. With tens of millions of people living in such areas, dozens of new members could be created under proportional claims.

Likewise, the advocates have yet to offer a plausible basis for barring the same use of authority to create two new senators for the District. The most that they can offer are assurances that they do not intend to claim such authority – an assurance lacking in any legally binding effect. If Congress can use the District Clause to reform the composition of the House, it can use

the same authority to reform the composition of the Senate. The problem with discarding principle for political convenience is that one cannot predict what changes politics will demand in the future. Advocates have already stated that they believe that the District should receive such representation in the Senate and, as I note in my written testimony, advocates have already suggested using the same authority to demand multiple seats for Puerto Rico. If Congress yields to this temptation, it will allow the future manipulation of its rolls by any majority in Congress. It is precisely the type of fluidity and uncertainty that the Framers sought to avoid in our government.