Testimony of

Kenneth R. Thomas

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Statement of Kenneth R. Thomas
Legislative Attorney, American Law Division
Congressional Research Service
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On "Ending Taxation Without Representation: The Constitutionality of S. 1257."

Mr. Chairman and members of the Committee: My name is Ken Thomas. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress. I'd like to thank you for inviting me to testify today regarding the Committee's consideration of S. 1257, the "District of Columbia House Voting Rights Act of 2007." Today, I would like to discuss the constitutional questions surrounding this bill.

S. 1257 provides the following: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." The bill also provides that regardless of existing federal law regarding apportionment, "the District of Columbia may not receive more than one member under any reapportionment of members." In addition, the bill contains a non-severability clause, so that if a provision of the Act is held unconstitutional, the remaining provisions of S. 1257 would be treated as invalid.

First, I would like to start with some background on the political status of the District of Columbia. Residents of the District of Columbia have never had more than limited representation in Congress. For this reason, for more than 100 years, various Members of Congress have sought to amend the Constitution so that the District would be treated as a state for purposes of voting representation. The most significant such effort occurred in 1978, when H.J. Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The text of that proposed constitutional amendment, like S. 1257, provided that, for certain purposes, the District would be treated as a state. I should note, however, that H.J. Res 554 was a much more far-reaching proposal than S. 1257, as it would have granted the District the right to representation in the House and in the Senate, the right to appoint Presidential Electors,1 and the right to participate in the ratification of Constitutional Amendments. The Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Since the expiration of this proposed Amendment, other proposals have been made to give the District of Columbia representation in the full House. In general, these proposals avoided the more procedurally difficult route of amending the Constitution, being implemented instead by

statute. Thus, for instance, bills have been introduced and considered that would have: (1) granted statehood to the non-federal portion of the District; (2) retroceded the non-federal portion of the District to the State of Maryland; and (3) allowed District residents to vote in Maryland for their representatives to the Senate and House. Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.

Unlike the proposals cited above, S. 1257 closely tracks the language used in the constitutional amendment that was sent to the states, but then seeks to implement that language by statute. Thus, the question arises as to whether direct House representation for the District of Columbia, as contemplated by S. 1257, can be achieved by statute, or whether it is necessary for Congress to pass and the states to ratify a constitutional amendment. I would like to spend a few moments today exploring this issue.

First, it is important to emphasize that there are two separate questions to be asked here. The first is whether that portion of the Constitution that grants House membership, the "House Representation Clause," provides for or allows the District of Columbia to have House Members. If the answer is no, then the next question is whether there is some separate constitutional provision that allows the Congress to override the limitations of the House Representation Clause. The provision most often cited for this latter proposition is the clause granting Congress authority over the District of Columbia, or the "District Clause." Let me address these two issues separately.

Article I, § 2, clause 1 of the Constitution, the "House Representation Clause," provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The meaning of this clause appears relatively clear. For instance, an early consideration of this clause occurred in 1805, when Chief Justice John Marshall authored a unanimous opinion in the case of Hepburn v. Ellzey.2 In the Hepburn case, the Court was asked to consider the limits of federal diversity jurisdiction, authorized under Article III of the Constitution, which provides that a citizen of one state may bring a federal suit against the citizen of another state. In order to identify these limits, the Court considered whether the District of Columbia should be treated as a state for purposes of Article III of the Constitution.3

In the Hepburn case, Justice Marshall defined a "state" as a member of the Union, i.e., those political entities that preexisted the federal government or had been granted statehood. The District of Columbia, on the other hand, is a creation of the Constitution, and of Congress. In Hepburn, Justice Marshall held that diversity jurisdiction could not be conferred on the District for the same reason that the District of Columbia did not have House Members or Senators. And that was because the plain meaning of term "state," at least for purposes of these provisions, did not include the District of Columbia.

More recently, the Supreme Court summarily affirmed a three-judge panel of the United States District Court of the District of Columbia which had held that the District of Columbia should

not be considered a state for purposes of having a vote in the House of Representatives. In Adams v. Clinton,4 a three-judge panel examined the issue of whether failure to provide congressional representation for the District of Columbia violated the Equal Protection Clause. The court in Adams examined the Constitution's language, history, and relevant judicial precedents to determine whether the Constitution allowed for areas that were not states to have representatives in the House. In doing so, it extensively discussed whether the Constitution, as it stands today, allows such representation.

The court noted that, while the phrase "people of the several States" could be read as meaning all the people of the "United States," the use of the phrase later in the clause and throughout the Article5 makes clear that the right to representation in Congress is limited to states. This conclusion has been consistently reached by a variety of other courts,6 and is supported by most commentators.7

The court in Adams noted that construing the term "state" to include the "District of Columbia" for purposes of House and Senate representation would lead to many incongruities in other parts of the Constitution. For instance, Article I requires that voters in House elections "have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature."8 The District, unlike the states, did not have a legislature until home rule was passed in 1973, so this rule would have been ineffectual for most of the District's history.9 This same point can be made regarding the clause providing that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof...."10 Similar issues arise where the Constitution refers to the executive branch of a state.11

The court went on to examine the debates of the Founding Fathers to determine the understanding of the issue at the time of ratification. The court concluded that such evidence as exists seems to indicate an understanding that the District would not have a vote in the Congress. 12 Later, when Congress was taking jurisdiction over land ceded by Maryland and Virginia to form the District, the issue arose again, and concerns were apparently raised precisely because District residents would lose their ability to vote.13 Finally, the court noted that other courts that had considered the question had concluded in dicta or in their holdings that residents of the District do not have the right to vote for Members of Congress.14

Thus, the question of whether the House Representation Clause includes the District of Columbia does not seem to be open to significant dispute. Not only have the federal courts consistently found that the term "state" in that clause does not include the District of Columbia, but most scholarly commentators have agreed. Assuming for the moment that this position is correct, we can then move to the question of whether the Congress has authority somewhere else in the Constitution to override this restriction.

In this regard, the argument has been made that the plenary authority that the Congress has over the District of Columbia under Article I, section 8, clause 17 - the District Clause - represents an independent source of legislative authority under which Congress can grant the District a voting Representative.15 And the case which has been most often cited for this proposition is the 1948 case of National Mutual Insurance Co. v. Tidewater Transfer Co.16

The Tidewater Transfer Co. case appears to provide a highly relevant comparison to the instant proposal. As with the instant proposal, the congressional statute in question was intended to extend a right to District of Columbia residents that was only provided to citizens of "states." As I noted previously, the Supreme Court held in Hepburn v. Ellzey17 that federal diversity jurisdiction did not include suits where one of the parties was from the District of Columbia.18 Despite this ruling, Congress enacted a statute extending federal diversity jurisdiction to cases where a party was from the District.19 The Court in Tidewater Transfer Co. upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.20

On closer examination, however, the Tidewater Transfer Co. case may not support the constitutionality of the instant proposal. Of primary concern is that this was a decision where no one opinion commanded a majority of the Justices. Justice Jackson's opinion (the Jackson plurality), joined by Justices Black and Burton, held that District of Columbia residents could seek diversity jurisdiction based on Congress's exercising power under the District Clause. Justice Rutledge's opinion (the Rutledge concurrence) joined by Justice Murphy, argued that the provision of Article III that provides for federal diversity jurisdiction21 permits such lawsuits, even absent congressional authorization. Justice Vinson's opinion (the Vinson dissent), joined by Justice Douglas, and Justice Frankfurter's opinion (the Frankfurter dissent), joined by Justice Reed, would have found that neither the Diversity Clause nor the District Clause provided the basis for such jurisdiction.

The Jackson plurality opinion considered whether, despite the Court's holding in Hepburn, Congress, by utilizing its power under the District Clause, could avoid the apparent limitations of Article III on diversity jurisdiction. The plurality first noted that it had been previously established that Congress had the power to create courts in the District of Columbia, and that such local courts could hear local cases that did not fall under Article III federal court jurisdiction. Thus, the plurality suggested that there would be little objection to establishing a federal court in the District of Columbia to hear diversity cases. Instead, the concerns arose because the statute in question would operate in federal courts located outside of the geographical confines of the District.

While conceding that the power of Congress under the District Clause has limitations, the plurality concluded that federal diversity cases involving District of Columbia citizens could occur in federal courts outside of the District. The plurality held that, because Congress had the authority to establish a court to hear diversity cases within the District of Columbia, the Court could also allow Congress to authorize such cases to be heard in federal courts outside the District. Essentially, the Court held that, because the end of providing District residents access to federal courts under diversity jurisdiction was constitutional, the Court would defer to Congress to decide the means of executing this power.22

It should be noted that even the plurality opinion felt it necessary to place this extension in a larger context. The plurality emphasized the relative insignificance of allowing diversity cases to be heard in federal courts outside the District instead of limiting them to the geographical confines of the District. Justice Jackson noted that the issue did not affect "the mechanics of

administering justice," involve the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms"; nor did the legislation "substantially disturb the balance between the Union and its component states." Rather, the issue involved whether a plaintiff who sued a party from another state could require that the case be decided in a convenient forum.23

Despite the limited nature of this holding, the Rutledge concurrence explicitly rejected the reasoning of the plurality, finding that the Congress clearly did not have the authority to authorize even this relatively modest authority to District of Columbia citizens.24 In fact, the concurring opinion rejected the entire approach of the plurality as unworkable, arguing that it would allow any limitations on Article III courts to be disregarded if Congress purported to be acting under the authorization of some other constitutional power.25 And, as I noted previously, the four Justices in dissent also rejected this expansive interpretation of the District Clause.

The positions of the various Justices in the Tidewater Transfer Co. case on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to inform the question of whether the Justices would have supported the granting of House representation to District citizens. As six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause, it is likely that these six Justices would also have rejected the suggestion that Congress has the power to award voting representation in Congress to District residents. The recurring theme of both the Hepburn and Tidewater Transfer Co. decisions was that the limitation of House representation to the states was the least controversial aspect of the Constitution, and that the plain meaning of the term "state" with regard to the organization of the federal political structures was essentially unquestioned.

Consequently, it appears that only the three Justices of the plurality in Tidewater Transfer Co. might have supported the doctrine that the Congress's power over the District of Columbia would allow extension of House representation to its citizens. However, even the three-judge plurality might have distinguished the instant proposal from the legislation that was at issue in Tidewater Transfer Co. As discussed previously, the plurality opinion took pains to note the limited impact of its holding -- that parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a lawsuit. And, as noted, the plurality specifically limited the scope of its decision to legislation that neither involved an "extension or a denial of any fundamental right" nor substantially disturbed "the balance between the Union and its component states."26

This distinction is important, because it brings us to the nature of the power being granted by S. 1257. For instance, consider what might occur if the House voted on an issue of national import, such as raising the minimum wage, and the representatives from the states were evenly divided on the question. As the proponents of the legislation had not gained the majority support of state representation, the provision would normally fail. However, if a representative of the District of Columbia were then to cast the deciding vote, this would have several effects. First, it would appear to overrule the decision of the states of the Union to not raise the minimum wage. Second, it would appear to have a significant legislative effect outside of the District of Columbia. Arguably, this could be seen by the Supreme Court as a substantial disturbance to the existing federalism structure. Thus, even the Justices in the Jackson plurality might distinguish the instant proposal from their holding in Tidewater Transfer Co.

A further concern with the instant proposal is that the act before the Justices in Tidewater Transfer Co. did not affect just the District of Columbia, but also extended diversity jurisdiction to the territories of the United States, including the then-territories of Hawaii and Alaska.27 Although the question of diversity jurisdiction over residents of the territories was not directly before the Court, subsequent lower court decisions28 have found that the reasoning of the Tidewater Transfer Co. case supported the extension of diversity jurisdiction to the territories, albeit under the Territory Clause.29

Thus, a concern arises as to whether it would be difficult to legally distinguish the instant proposal from an extension of House representation to other subordinate political entities, such as the territories. While the extension of diversity jurisdiction to residents of territories has been relatively uncontroversial, a decision to grant a voting Delegate to the territories might not be. Under the Territory Clause, Congress has plenary power over the territories of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Commonwealth of the Northern Marianas Islands. If the Supreme Court extended the reasoning of the Tidewater Transfer Co. case to voting representation, it might be difficult for the Court to later distinguish a similar effort to allow each of these territories representation in the House.30

Similarly, a holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution that deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize the District of Columbia to have Senators, Presidential Electors, and perhaps even the power to ratify Amendments to the Constitution.31 Again, it seems unlikely that even the three-judge plurality in Tidewater Transfer Co. would support such an extension of the District Clause.

In conclusion, it is difficult to identify either constitutional text or existing case law which would support the extension by Congress of the power to vote in the full House to the District of Columbia Delegate. Further, that case law that does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia is not a sufficient basis to grant congressional representation.

However, it is clear that there is a constitutionally sufficient route to granting the District of Columbia voting representation in the House, and that is by amending the Constitution. I should also note that such an amendment could be modeled on the S. 1257 rather than on the broader amendment sent to the states in 1978. For instance, rather than providing for representation in both the House and the Senate, Presidential electors, and the right to vote on constitutional amendments, as did the previous proposed amendment, a constitutional amendment could be limited to providing the District of Columbia a vote in the House of Representatives. Further, in the same manner as S. 1257, a constitutional amendment could be presented in such a way as to preserve the current political balance of Congress. For instance, Utah could be granted a vote in the House, contingent on the passage of a constitutional amendment granting the District of Columbia a similar vote. In other words, unlike the broad amendment sent to the states in 1978, such a constitutional amendment could more closely track the narrower provisions of S. 1257.

Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Committee may have, and I look forward to working with all Members and the staff of the Committee on this issue in the future.

1 This authority, it should be noted, has already been granted, but it was done by Constitutional Amendment. See U.S. CONST. Amend. XXIII.

2 6 U.S. (2 Cranch) 445 (1805).

3 Although, strictly speaking, the opinion was addressing statutory language in the Judiciary Act of 1789, the language was so was so similar to the language of the Constitution that it was an interpretation of the latter that was essential to the Court's reasoning. See National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 586 (1948).

4 90 F. Supp. 2d 35 (D.D.C.2000), affirmed sub nom. Alexander v. Mineta, 531 U.S. 940 (2000).

5 See, e.g., U.S. Const. Art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); id. at Art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); id. ("each State shall have at Least one Representative"); id. at art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); id. at art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives).

6 See Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

7 See, e.g., Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands, U. HAW. L. REV. 445, 512 (1992). Even some proponents of D.C. voting rights generally assume the District of Columbia is not currently a state for purposes of Article I, § 2, cl. 1. 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 Government Reform) available at [http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf]. But see Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, National Representation for the District of Columbia: A Legislative Solution, 139 U. Pa. L. Rev. 1659, 1661 (1991).

8 U.S. CONST. art. I, § 2, cl. 1.

9 See District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198 (1973).

10 U.S. CONST. art. I, § 4, cl. 1.

11 "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. Art. I, § 2, cl. 4.

12 For instance, at the New York ratifying convention, Thomas Tredwell argued that "[t]he plan of the federal city, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote...." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), reprinted in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

13 See, e.g., 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights").

14 Hepburn v. Ellzey , 6 U.S. (2 Cranch) 445, 452 (1805) (District of Columbia is not a state for purposes of diversity jurisdiction); Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (stating in dicta that "residents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in dicta that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government.")

15 See Viet Dinh and Adam H. Charnes, supra note 7, at 12-13; 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. 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate at 7 12 (February 3, 2003)(analysis prepared for Walter Smith, Executive Director of DC Appleseed Center for Law and Justice) available at [http://www.dcvote.org/pdfs/Lathammemo02032003.pdf].

16 337 U.S. 582 (1948).

17 6 U.S. (2 Cranch) 445 (1805).

18 Id. at 452.

19 Act of April 20, 1940, c. 117, 54 Stat. 143.

20 See Tidewater Transfer Co., 337 U.S. at 600 (plurality opinion of Jackson, J.).

21 U.S. Const., Art. III, § 2, cl. 1 provides that "The Judicial Power shall extend to... Controversies between two or more States...."

22 Id. at 602-03.

23 Id. at 585.

24 Id. at 604-606 (Rutledge, J., concurring)("strongly" dissenting from the suggestion that Congress could use Article I powers to expand the limitations of Article III jurisdiction).

25 "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not." Id. at 605 (Rutledge, J, concurring).

26 Id.. at 585.

27 Id. at 584-585.

28 See, e.g., Detrea v. Lions Building Corporation, 234 F.2d 596 (1956).

29 U.S. Const. Art. IV, § 3, cl. 2 provides: The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

30 But see Tidewater Transfer Co., 337 U.S. at 639 (Vinson, J., dissenting)(noting differences between Congressional regulation of local courts under the District Clause and the Territorial Clause.)

31 U.S. CONST. Art. V.