Point-Counterpoint: House Representation for the District of Columbia

A Capital Offense Against the Constitution

*By Matthew J. Franck**

The U.S. House of Representatives has grown in membership in its more than two centuries of history, from the sixty-five seats allocated in the original Constitution (Art. I, sec. 2, cl. 3) to a more than fivefold increase (356 seats) a century later, following the 1890 census, to its present size of 435 seats—unchanged since the forty-seventh and forty-eighth states were admitted in 1912. In all its history, there have been only two mechanisms by which the membership of the House has been augmented: by the admission of new states, whose people thereby take on the character of a political unit amenable to representation in the House; or by the addition of new seats to be distributed proportionally among the existing states of the Union to reflect population growth. Both of these steps are of course accomplished by act of Congress.

For apparently the first time in history, Congress has recently considered expanding the membership of the House by neither of these methods. Instead it has contemplated legislation by which "the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives," in the language of both H.R. 1905 (passed on April 19, 2007) and S. 1257 (which failed on a cloture vote on September 18, 2007). Each of these bills would expand the House by two seats, with one going to the District of Columbia and the other to the state next in line for a newly reallocated one under the last census enumeration—presumptively Utah.

It is hard to think of a more obviously unconstitutional legislative proposal in recent years. Neither bill would admit D.C. to statehood, and neither would grant it representation in the Senate. Each would simply "consider[]" D.C. a "Congressional district" and grant it a seat in the House. But the Constitution says nothing about the existence of congressional districts, which were not mandated by federal law under the "Times, Places, and Manner" clause concerning House elections (Art. I, sec. 4, cl. 1) until 1842. That old law could be repealed at any time, of course—underscoring the point that under the Constitution, members of the House do not represent "districts" but states.

But there is far more obvious evidence for this on the face of the Constitution. We may begin with Article I, sec. 2, cl. 1:

> 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.

Not only are the "People" in each state the choosers of representatives, but their right of suffrage is defined here in such a way as to key it to choices locally made in each state, in respect of its legislature. The District of Columbia, not being a state, not only cannot have a "People" of a state to do the choosing of its representative, it also does not have a "State Legislature" with "Electors" among those people who can qualify to be the voters in a congressional election. A state legislature is the creature of a state constitution, and the qualifications of the voters in state legislative elections are set by that constitution and/or by the laws made by that legislature. D.C. has neither a constitution nor a legislature, properly speaking—and if it were to obtain either one without admission to statehood, it would be (as we will see below) by virtue of an act of Congress that could be repealed at any time.

The case for a D.C. seat in the House gets no better if we read on in the Constitution. Its next clause requires that a House member be "an Inhabitant of that State" he has been elected to represent. But no D.C. resident is an inhabitant of a state; could D.C.'s House member come from anywhere? Article I, sec. 4, cl. 1, already referenced above, places the regulation of congressional elections "in each State" in the hands of "the Legislature thereof," subject to Congress's own power to "make or alter such Regulations" itself. But Congress, in the proposed legislation for granting a House seat to a political unit that lacks a state legislature, would assume to itself the plenary power (perhaps delegated to local D.C. authorities, which makes no difference as to the question of power) to determine and administer the conduct of elections, and to fix the eligibility of candidates and voters—and ultimately the power to say whether the seat would continue to exist, since it would be created by legislative fiat, not as a consequence of a constitutional relationship between the Congress and the political community being represented.

Whence would come this unprecedentedly complete power of the Congress itself over one of its own member's seats? From the clause of the Constitution cited as the legislation's authority by its advocates: Article, sec. 8, cl. 17:

> [The Congress shall have 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...

Much stress is laid by the bill's proponents on the language "exclusive Legislation in all Cases whatsoever," the argument being that the plenary power here is compendious enough to do anything to or for the District of Columbia—including treating it like a state for some purposes, but not others. And a landmark ruling of the Supreme Court is cited to sustain this proposition: *National Mutual Insurance Co.* v. *Tidewater Transfer Co.* (1949), in which the Court upheld by a 5-4 vote the extension of the Article III courts' diversity jurisdiction to cases in which one party was a D.C. resident.

First let us consider the "seat of government" clause itself.

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The reason such a complete power "in all Cases whatsoever" was given to the Congress over the district chosen for the capital's location was that once the handover of power over the district was complete, the district and its residents would be "stateless." No state government would have any jurisdiction there any longer, and Congress—ordinarily possessed only of the limited powers delegated elsewhere by the Constitution—would need the undifferentiated mass of powers (later to become known as the "police power") of a state legislature in order to govern the district fully.

And why was it regarded as imperative for the nation's capital to be located outside the boundaries of any particular state? Because the framers desired that the national government's institutions be completely shielded from any potential interference by state authorities. A corollary to this principle of the national government's control over its own affairs is that no state should benefit from the location of the capital within its borders, or be able to leverage something out of that "ownership" in the Congress. But the states are all represented in Congress. If these principles are to be preserved, it is therefore essential that the nation's capital go unrepresented there. It may seem to do little damage to this arrangement to permit D.C. to have congressional representation without statehood. But the proposed legislation represents the worst of all possible worlds—a political unit represented in the Congress at the sufferance of the Congress, and wholly under the legislative authority of the Congress. No other political unit represented in Congress would be so completely Congress's own creature. In that respect, the idea is an offense against the federalism of the Constitution.

But what of the "voting rights" of the District's residents—so prominently noticed in the official captions of the proposed bills? The fact is that there really are no such things in America as federal voting rights, titles on statutes like "Voting Rights Act" to the contrary notwithstanding. All voting rights in the United States—all those recognized by the Constitution for the filling of its great public offices—are accorded and defined by states. The Constitution speaks of political units—states—being represented in the Congress and in the electoral college, and leaves in the primary care of those states the representation of persons. Federal law, both constitutional and statutory, is confined to forbidding certain denials or restrictions of those state-level voting rights. In House, Senate, and presidential elections, with one exception, one's right to vote is entirely a function of state laws. That exception is the suffrage of D.C. residents in presidential elections—notably accomplished, as it only could be, by constitutional amendment (the Twenty-third) and the federal legislation pursuant thereto.

Now is not the *Tidewater Transfer* ruling support for the Congress's treating D.C. as though it were a state, although it is not one? This is a pretty thin reed to lean on, as was argued a year ago by Kenneth R. Thomas of the Congressional Research Service. *Tidewater Transfer* was very much a divided ruling—I would say a wrong one, but it is unlikely to be reversed—in which three different positions were staked out by the Justices: that D.C. residents could be admitted to the federal courts' diversity jurisdiction owing to the plenary power of Congress over D.C. in Art. I, § 8, cl. 17 (the view of Jackson, Black, and Burton); that such an extension of jurisdiction could go forward on a latitudinarian reading of the word "State" as having different meanings in different contexts in the Constitution (Rutledge and Murphy); and that the jurisdiction was forbidden by the unitary meaning of "State" and could not be expanded via the "seat of government" clause (Vinson, Douglas, Frankfurter, and Reed). As CRS's Mr. Thomas points out, only the first faction in *Tidewater Transfer* could even arguably—and somewhat doubtfully—be read as employing reasoning that would endorse the creation of a full-fledged House seat for D.C.

Even Justice Jackson, author of the controlling opinion, qualified Congress's power over the District in the following way: "We could not of course countenance any exercise of this plenary power... if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government." Certainly there has been no delegation of power to Congress to alter the constitutive basis of its own power by expanding its membership beyond the states of the Union. The effort to sustain an anything-goes reading of the "seat of government" clause, even on the basis of *Tidewater Transfer*, collapses under its own weight.

This conclusion is strengthened by the 1923 ruling in *Keller* v. *Potomac Electric Power Co.*, in which a unanimous Supreme Court held that while Congress could, as akin to a state legislature for D.C. pursuant to the "seat of government" clause, authorize a local court to undertake essentially legislative duties sitting in review of the decisions of the District's public utilities commission, it was unconstitutional to permit appeal of such proceedings to the constitutional courts of the Union, which can only hear the genuine "cases" and "controversies" fit for judicial decision as marked out by Article III. *Keller* was undisturbed by *Tidewater Transfer*, and stands for the proposition that Congress's power to legislate for the capital or its residents cannot extend to matters that interfere with the constitutional basis of the national government's essential institutions. This is just what the so-called "District of Columbia House Voting Rights Act" would do.

A last-ditch argument employed by advocates of the bill is that it only restores what Congress took away in 1801—the argument being that when Maryland (and originally Virginia) ceded land for the capital's creation in 1789, and Congress "accepted" the cession of lands in 1790, District residents continued to vote in congressional elections until Congress took away their suffrage in 1801. This is a rewriting of history. For the duration of the 1790s, what had been identified as the District of Columbia *was not* the "Seat of the Government," and Congress did not fully employ its power to govern the District until the congressional session that began there in December 1800, at which point it *was* the capital. In legislation passed in February 1801 (the same law that famously made William Marbury a justice of the peace), Congress assumed full control of local government in the District. Only then did D.C. residents lose their status as congressional electors—but not owing to any language in the statute, which was completely silent on the subject. They lost that status because now, and only now, was their transition complete, from being state residents to no longer being so. This was a consequence not of the statute as such, but of a constitutional principle on which the statute

was predicated, and which it in turn served to activate. This is the constitutional principle that some in Congress today wish to turn on its head. Neither was the loss of congressional voting rights for the capital's residents a fluke or an oversight on the framers' part. It was clearly anticipated in *Federalist* No. 43, and was understood in 1801 to be the natural *and permanent* consequence of the Congress's assumption of its full power under the "seat of government" clause.

I have said nothing so far on the subject of any alleged unfairness or injustice to D.C. residents in their present lack of full representation in Congress. Here I have space only to aver that whatever merit there is in the case for "fairness" to D.C. residents, the remedy lies in a constitutional amendment, for the Constitution "as is" does not guarantee, or even permit, all good things. The only other possibility is a retrocession of the District's residential neighborhoods back to Maryland (as Virginia's original portion was retroceded in 1846), in keeping with the as-yet unaltered principle that only the residents of states may vote for members of Congress.

No Taxation Without Representation

*By Richard P. Bress**

In April 2007, the House of Representatives passed a bill that would give the District's residents a voting member in that body. The DC House Voting Rights Act of 2007 ("DC VRA") would create one House seat for the District of Columbia and one new seat for the state presently next in line to receive an additional representative (Utah). Although the House bill (H.R. 1905) garnered considerable bipartisan support—it was co-sponsored by Representative Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC)—and easily passed in the House by a vote of 241 to 177, its counterpart in the Senate (S. 1257) stalled in September when a minority filibustered the bill.

The United States is the only democratic nation that deprives its capital city residents voting representation in the national legislature. Citizens in the District of Columbia are represented in Congress only by a non-voting delegate to the House of Representatives. These Americans pay federal income taxes, are subject to military draft, and are required to obey Congress's laws, but have no say in their enactment. Moreover, because Congress has authority over local District legislation, District residents have no voting representation in the body that controls the local budget to which they must adhere, and the local laws which they are required to obey. District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important constitutional right.

Opponents of the DC VRA cite constitutional concerns and fears that the bill portends a slippery slope toward all manner of expansions in House and Senate membership. To be sure, the proposed legislation raises a legitimate constitutional question. But, in my view, Congress has the authority to pass the DC VRA; and there is no reason it should not get a final vote on the Senate floor.

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The Constitutional Question

Those who argue that Congress lacks the power to enact the proposed legislation (and must therefore proceed via retrocession or constitutional amendment) rely principally on the Constitution's express provision of voting representation to citizens of "States." That is not, however, the end of the constitutional inquiry. Another provision of the Constitution, the District Clause, gives Congress plenary 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."[1] Congress and the federal courts have on a number of occasions applied to the District constitutional provisions that speak only of "States." Seen in light of these cases and the relevant history, the Framers' express guarantee of voting representation to citizens of the states should not be read as an implied prohibition against representation for citizens of the District.

The District Clause grants Congress broad authority to create and legislate for the protection and administration of a distinctly federal district. Congressional power is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the fifty states.[2] Although no case specifically addresses Congress's authority to provide the District voting representation in the House, Supreme Court precedent confirms the plenary nature of Congress's power to enact laws for the welfare of the District and its residents, absent express prohibition elsewhere in the Constitution. One Supreme Court case, *National Mutual Insurance Company v. Tidewater Transfer Company*, merits considerable attention, owing to its in-depth discussion of this issue.[3]

In order to appreciate fully the import of *Tidewater*, one must begin with an earlier case, *Hepburn v. Ellzey*.[4] In that case, the Court held that Article III, Section 2 of the U.S. Constitution—providing for diversity jurisdiction "between citizens of different *States*"—did not extend to suits between state residents and residents of the District of Columbia. The Court found it "extraordinary," however, that residents of the District should be denied access to federal courts that were open to aliens and residents in other states, and invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."

Nearly 145 years later, Congress accepted the *Hepburn* Court's invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Court in *Tidewater*. A plurality concluded that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide the same diversity jurisdiction to District residents under the District Clause. Because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, the *Tidewater* plurality explained, it

surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.

Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may by legislation take the more modest step of providing citizens of the District with a voice in the House of Representatives. Indeed, Congress has *already* granted voting representation to citizens not actually living in a state. Through the Overseas Voting Act, Congress ensured that Americans living abroad would retain the right to vote in federal elections, even though they no longer reside in a "state."[5] There is no reason to suppose that Congress lacks the authority to give the same right to the citizens of the nation's capital, as members of the House represent the people—not the states qua states.

Concurring in *Tidewater*'s result, two justices argued that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III. Of course we cannot know for certain, but it seems likely that these justices would also have concluded that the District is a "state" for purposes of voting representation. Observing that the Constitution had failed explicitly to accord District residents access to federal courts through diversity jurisdiction, Justice Rutledge remarked, "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[6] Having concluded that the Framers did not intend to deprive District residents of access to the federal courts, Justice Rutledge reasoned that the term "state" should include the District of Columbia where it is used with regard to "the civil rights of citizens." Access to the federal courts via diversity jurisdiction, he concluded, fell within that category of usage. The same is, of course, true with respect to the right conferred by the D.C. Voting Rights bill, as the right to vote is among the most fundamental of civil rights; in the context of congressional elections, it is a right not of the states, but of the people "in their individual capacities." Based on Justice Rutledge's reasoning, the concurring justices in *Tidewater* would likely have upheld Congress's determination to redress the denial of voting representation to District residents.[7]

Admittedly fractured, the *Tidewater* decision does not stand alone. The Supreme Court and the D.C. Circuit have upheld at least three other federal statutes that treat the District as a "state" for constitutional purposes. In *Loughborough v. Blake*, a unanimous Supreme Court held that Congress had the authority, under the District Clause, to lay and collect taxes from District residents, notwithstanding Article I, Section 2's direction that "representatives and direct taxes shall be apportioned among the several *States* which may be included within this union."[8] In *Mills v. Duryee*, the Court upheld a federal statute that treated the District as a "state" for purposes of the "full faith and credit" clause.[9] Like Article I, Section 2, the Full Faith and Credit Clause speaks only of the *states*: "Full faith and credit shall be given *in each State* to the public acts, records, and judicial proceedings *of every other State*." And in *Kronheim & Co. Inc. v. District of Columbia*, the D.C. Circuit upheld Congress's authority under the District Clause to treat the District as a state for purposes of the 21st Amendment.[10]

Opponents of this bill read Article I, Section 2 of the Constitution—which requires that the House of Representative be chosen by the "people of the several States"—as an implied prohibition against extending District residents the right to vote. That is one plausible reading of the text. But, as *Tidewater*, *Loughborough*, *Mills*, and *Kronheim* demonstrate, that is not the only permissible inference to draw from the Framers' enumeration of "States" in a particular constitutional provision. And, reading the text of Article I, Section 2 in context, as we must, it is doubtful that the Framers intended to bar the door to district representation.

Indeed, there is simply no evidence that the Framers ever adverted to the rights of the District's residents when crafting the language of Article I, Section 2. Rather, the Framers' word choice reflects two compromises. First, they were divided over whether the House should be elected by the "people" or by state legislatures. They decided that members of the House should be elected by *the people*, not the states. Second, there was debate over whether voting qualifications should be set at the federal or state level—a debate that was resolved by letting states decide who would vote. At no point during either debate did anyone suggest that all residents of the new Federal "District" would lack this fundamental, individual right.

Nor do the debates leading to the creation of the District support the opponents' view. The Framers' insistence on a separate and insulated federal district arose from an incident that took place in 1783, while the Continental Congress was in session in Philadelphia. When a crowd of Revolutionary War soldiers who had not been paid gathered outside the building in protest, Congress requested protection from the Pennsylvania militia. Pennsylvania refused, and Congress was forced to adjourn and reconvene in New Jersey. The episode convinced the Framers that the seat of the national government should be under exclusive federal control, for its own protection and the integrity of the capital.[11] As James Madison remarked in *Federalist No. 43*, without a federal district, "the public authority might be insulted and its proceedings interrupted with impunity;" "the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence."[12]

The need for a federal district was fairly uncontroversial, and elicited relatively little debate. Moreover, nowhere in the historical record is there any evidence that the participants in the constitutional convention affirmatively intended to deprive the residents of the new district of their voting representation or other civil liberties by virtue of their residence in the new federal enclave. To the extent the problem of District representation was considered at all, debates at the state ratifying conventions suggest that it was assumed that the states from which the District was carved would take care of the residents of the ceded lands.[13] Indeed, delegates at the Virginia and North Carolina ratifying conventions repeatedly observed that the states donating the land for the District could be expected to protect their residents' liberties as a condition of the cession. James Madison, for example, dismissed as unwarranted the

Anti-Federalists' fear that Congress would exercise its power to strip the District's residents of basic liberties, because nothing could be done without the consent of the states.

In retrospect, it not surprising that the Framers failed specifically to address the voting rights of District residents. When the District Clause was drafted, the eligible citizens of every state possessed the same voting rights. The problem of ensuring the continuation of these voting rights for citizens in the lands that would be ceded to create the federal district received little attention until after the Constitution was ratified and the District had been established—unremarkable, given the purpose of the District and the fact that, at the time, it was merely a contemplated entity.[14]

It is understandable that, even once the District was situated and operating in its present location, few were concerned about the issue. Its 10,000 residents were too few to merit a separate representative, and the humble ten-square-mile home to the fledgling federal government was hardly the vibrant demographic and political entity it is today.

What is crystal clear from the historical records is that the Framers viewed the right to vote as the single most important of the inalienable rights that would be guaranteed to the citizens of their Nation. It seems quite implausible that they would have purposefully deprived those residents in areas that would later be ceded to form the national capital of their voting rights—much less that they intended to prohibit Congress from taking steps to ensure that those living in the capital would retain their right to vote.

The history of and policies behind the Framers' creation of the District, the purpose of the Framers' enumeration of "States" in the Constitution's provisions for congressional representation, and the fundamental importance of the franchise support the view that those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents. Since there is no prohibition to be found elsewhere in the Constitution, Congress may establish a voting representative for the District pursuant to the District Clause.

A Slippery Slope?

Some who oppose the enactment of the DC VRA have expressed concern that passage of the DC VRA might strengthen the federal territories' case for congressional representation. That argument is unpersuasive. As a matter of policy and politics, District and territorial residents are situated very differently. Unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. And unlike the territories, the District was part of the original thirteen states; until the Capital was established in 1801, residents of what is now the District enjoyed full voting representation in the Congress.

Even putting those practical considerations aside, as a constitutional and historical matter territories occupy a position fundamentally different from the District in the overall schema of American federalism and have long enjoyed disparate rights and privileges. Congress's authority over the territories stems from an entirely different constitutional provision, which empowers Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[15] Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers' use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.[16] The Supreme Court has recognized as much, specifically noting that, "[u]nlike either the States or Territories, the District is truly sui generis in our governmental structure."[17] Accordingly, the case law that supports Congress's power to provide District residents congressional voting representation cannot be applied uncritically to support the same argument for the territories.

Taken together, these differences between the territories and the District render unlikely the suggestion that granting voting rights to District residents would lead, as a legal or policy matter, to granting similar privileges to residents of the U.S. territories.

Finally, it bears noting that the "constitutional question" presented by the DC VRA should not further delay an up-or-down vote on the Senate floor. To be sure, the Congress is charged with supporting and defending the Constitution, and it should not legislate without regard to its limits. But the DC VRA and its predecessor bills have been the subject of lively academic and political debate for years; there can be no serious argument that the Congress would benefit from further debate on its constitutionality. The District now has a population of nearly 600,000 people—greater than the population of all of the thirteen original states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens.

Endnotes

1 U.S. Const. art. I, § 8, cl. 17.

2 *See* Palmore v. United States, 411 U.S. 389, 397-98 (1973); Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 592 (1949) (District Clause grants Congress power over the District that is "plenary in every respect"); Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886); *see also* Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004); Viet Dinh & Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives (2004), *available at* http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf.

3 337 U.S. 582 (1949).

4 6 U.S. 445 (1805).

5 *See* 42 U.S.C. § 1973ff-1.

6 337 U.S. at 625.

7 Because interpreting the term "state" to include the District for purposes of voting representation would not have required overruling *Hepburn*, Justice Rutledge's opinion might have garnered additional votes if that issue had been presented to the *Tidewater* Court.

8 5 *Wheat.* 317 (1820).

9 7 *Cranch* 481 (1813).

10 91 F.3d 193, 201 (D.C. Cir 1996) ("[W]e will treat the District of Columbia as a state for purposes of Twenty-first Amendment analysis. As noted above, Congress determined at the time of the passage of the ABC Act in response to the repeal of Prohibition in the Twenty-first Amendment that the District would function in a state-like manner for alcohol regulation purposes. We have no warrant to interfere with Congress's plenary power under Art. I, sec. 8, cl. 17 [the District Clause] '[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District.'").

11 *See* Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital, 30-34 (1991); *see also* The Federalist No. 43 (James Madison).

12 The Federalist No. 43, *supra*, at 279-80.

13 Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis,* 12 Harv. J. on Legis. 167, 172 (1975).

14 *See Tidewater, supra*, at 587 ("There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia…. This is not strange, for the District was then only a contemplated entity.").

15 U.S. Const. art. IV, § 3, cl. 2.

16 *See* Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 How. L.J. 333, 349-50 (1994) ("The Territories Clause is minimally relevant to the District. The existence of a separate District Clause strongly suggests that the District is not among the territories covered by the Territories Clause. Moreover, courts generally have agreed that the Territories Clause does not apply to the District.") (citing O'Donoghue v. United States, 289 U.S. 516, 543 -51 (1939) and Dist. of Columbia v. Murphy, 314 U.S. 441, 452 (1941)). *Cf.* Dist. of Columbia v. Carter, 409 U.S. 418, 430-31 (1973) (comparing Congress's exercise of power over the District and territories, noting federal control of territories was "virtually impossible" and had little practical effect.).

17 *Carter*, 409 U.S. at 432.