

Delegate Eleanor Holmes Norton's team of lawyers has raised a series of questions about a developing proposal by Congressman Tom Davis to provide voting representation for D.C. residents in the U.S. Congress. Since the outlines of the Davis proposal that have been made public so far correspond to legislation proposed by the Committee for the Capital City (CCC), the CCC presents the following answers to the questions posed by Delegate Norton's team as would be applicable if Congressman Davis' proposal were to adopt the details of the CCC approach.

*The questions presented to Congresswoman Norton by the D.C. Voting Rights Lawyers Task Force are based on the following assumptions about the current description of the Davis proposal:*

*The size of the House of Representatives would increase from 435 members to 437 members, but would return to 435 members following the next census;*

*The District would receive voting representation in the House and the state of Utah would receive an additional seat. [Utah barely missed gaining another seat in the last reapportionment];*

*The population of the District would be included with the population of Maryland for apportionment and redistricting purposes; and*

*D.C. residents would be treated as if they were residents of the state of Maryland for the purposes of voting for a member of the House.*

The first three assumptions are accurate with respect to the CCC proposal. The fourth assumption is close, except that under the CCC proposal D.C. residents are treated not "as if" they were Maryland residents for congressional voting purposes. Instead, the CCC proposal restores their Maryland citizenship rights to vote for U.S. Representatives and Senators. These rights, taken away by statute (the Organic Act of 1801) would be restored by another statute--the District of Columbia Voting Rights Restoration Act.

*The questions the Task Force raises follow.*

*(1) Political and Geographic Cohesiveness of the District of Columbia*

*In order to justify creating a new congressional District in Maryland and treating D.C. residents as if they were residents of that new Maryland district, Mr. Davis' proposal would include some actual Maryland residents in the new congressional District. The total population of the new proposed district (including all of D.C. and some portion of Maryland) would be approximately 650,000 residents. In the next apportionment following the creation of the new district, what is to keep the Maryland legislature from splitting D.C. and joining it with two or more Maryland congressional districts? Since the Constitution reserves redistricting to the states, could Congress constitutionally ensure that Maryland would not split D.C. into two or more parts through simple legislation, eliminating the present cohesive geographic, political and legal character of the District?*

The D.C. Voting Rights Restoration Act would require in any new congressional redistricting by the Maryland legislature that D.C. be kept intact in the new congressional district, with contiguous territory from adjacent Maryland counties added as necessary to produce a district equal in population to the other Maryland districts.

Such a requirement is entirely constitutional. Article I, Section 4 permits Congress to supersede the states in matters relating to congressional elections. The controlling Supreme Court opinion in *Oregon v. Mitchell* (the 18-year-old vote case) goes into detail how this section of the constitution has always been understood to include Congressional authority over redistricting, and in fact Congress has exercised this authority to the extent of prohibiting states with more than one representative from having at-large congressional districts. Further authority for the "intact D.C." requirement comes from Article I, Section 8, Clause 17, which provides for Congress' power of "exclusive legislation" over the District.

*(2) Effect on Senate Representation*

*Does granting the District a vote in the House bring the District one step closer to full representation in the Senate, or does it virtually preclude Senate representation? If District residents are treated as residents of Maryland for the purpose of voting in the House, is there a constitutional obligation to allow D.C. residents to vote for Maryland Senators? Conversely, can Maryland residents be deprived of their right to vote for Senators by being placed in a D.C. district? Does it violate the Equal Protection clause of the Constitution to have some residents in a congressional district voting for Senators while others are barred from doing so?*

The D.C. Voting Rights Restoration Act provides for full representation for D.C. residents in the U.S. Senate by restoring their rights to vote for U.S. Senators from Maryland. It does so, not because of any constitutional requirement that might flow from House representation, but because providing full congressional representation for D.C. residents in both Houses of Congress is the right thing to do.

*(3) Representation of the D.C. District by a D.C. Resident*

*Does the Constitution allow D.C. residents who do not actually live in Maryland to choose the representatives of that state? If it were constitutional to treat D.C. residents as if they were residents of the state of Maryland for the purposes of voting, would D.C. residents be constitutionally precluded from representing the new Maryland district, given the language of Article I specifically requiring that representatives be inhabitants of the state in which they are chosen?*

In addition to restoring congressional voting rights, the D.C. Voting Rights Restoration Act also restores Maryland citizenship rights to be a candidate for, and to serve as, U.S. Representative, U.S. Senator, and presidential elector from Maryland.

*(4) Effect of Changes in D.C. or Maryland Population on Redistricting*

*If, as seems likely, the proposal would require both Maryland and Utah to redistrict, could the new district be eliminated entirely if the population of Maryland or the District decreases to a level that would not support the additional district? In addition, if the population of Maryland or the District rises significantly, allowing either jurisdiction to claim additional House members, would Maryland or would the District receive the additional seat? Would the effect of redistricting in Utah be to make the lone Utah Democrat's reelection*

*more difficult? Would the proposal encounter difficulty because Members fear they would lose a seat because the overall number of representatives under the proposal will decrease from 437 to 435 after the next census?*

Under the D.C. Voting Rights Restoration Act, the population of the District of Columbia would be included in the population of Maryland for congressional apportionment purposes. Whatever number of U.S. Representatives that population total entitles Maryland to under the existing formula will be the number it gets.

The additional (4th) Utah seat will not cause any current Member to lose a seat, since Utah will have four congressional districts after the 2010 census apportionment regardless of whether this proposal is adopted in the meantime. The additional Maryland seat will have the effect of either denying some state an additional district or causing a state to lose a seat that it would not otherwise lose. But that's arguably just a fair consequence of restoring rightful congressional representation to U.S. citizens who are currently unfairly denied that representation.

As for Utah redistricting, Utah Republicans would be well advised (whether in 2011 or earlier) not to "overreach" by trying to change a 2-1 delegation into a 4-0 delegation, since such overreaching could well have the unintended effect of producing a 2-2 delegation instead. The Georgia redistricting experience has provided an object lesson in the pitfalls of overreaching.

*(5) Disposition of the District's Electoral College Votes*

*Because representation in the Electoral College is based on the number of Senators and Representatives in the states, wouldn't Maryland receive only one more electoral vote to correspond with the new district? If so, and the District's three reliably Democratic electoral votes were eliminated, wouldn't the result be to tilt the votes in the Electoral College in favor of a Republican presidential candidate, if a presidential election were determined by a small number of votes?*

Yes, the D.C. Voting Rights Restoration Act would result in adding one electoral vote to Maryland's total, and would eliminate D.C.'s current three electoral votes. But just as noted above, that's arguably a fair consequence of providing full and equal federal representation to D.C. residents.

*(6) Political Controversy*

*While the proposal on its face has some rough Democratic and Republican parity, does this equivalence ultimately break down? For example, is the proposal politically feasible, considering the likelihood of objections from Maryland elected officials and residents because of the "transfer" of some Maryland residents to a district dominated by D.C. and the resulting dilution of Maryland representation, as well as because of objections from some in the District to being incorporated into Maryland for representation purposes? Would Maryland's Republican governor and representatives object to a new Democrat in the Maryland delegation or to having another electoral vote that would likely be Democratic in presidential elections?*

There are necessarily political consequences to providing fair federal representation to people who have been unfairly denied it for 200 years. We believe the D.C. Voting Rights Restoration Act is both fair and balanced, perhaps causing some relatively small amount of political pain for both parties. Any other approach (including keeping the status quo) involves its own political controversies.

*(7) Effect on Home Rule*

*Once D.C. is subject to Annapolis for redistricting, can the proposal guarantee the District's ability to continue to govern itself and that the power of the Maryland legislature over the new district would be strictly limited to redistricting? Could there be language ensuring that the District's existing home rule authority be protected? Could the very act of redistricting produce intended or unintended substantive policy and political inhibitions?*

The D.C. Voting Rights Restoration Act specifically provides that the D.C. Home Rule Act will not be affected. The only exception is that Maryland's statewide election laws will control D.C.'s participation in federal elections only, and only to the extent that such laws are not superseded by federal law. In cases where Maryland allows discretion to its local governments in administering federal elections, that discretion must also be allowed to D.C. The requirement that the territory of D.C. be kept intact in redistricting greatly limits the amount of "coercion" that Maryland could apply to D.C. through the redistricting process.

*(8) Severability*

*Shouldn't the bill creating two new House seats for D.C. and Utah have a clause that the bill is not severable, meaning if the D.C. portion of the bill were found to be unconstitutional, the Utah portion also would fall, or could Utah get a seat leaving the District with nothing?*

The current draft of the D.C. Voting Rights Restoration Act does not contain a non-severability clause (mainly because that question wasn't raised during the drafting process).

*(9) Creating a D.C.-only District*

*Would many of the potential problems raised by the proposal be avoided if, instead of treating District citizens as if they were residents of Maryland for congressional voting purposes, it simply treated the District as if it were a state solely for voting purposes?*

Attempting to create a D.C.-only congressional district by a statute stating that the District will be considered to be a state for voting purposes doesn't work, either politically or constitutionally.

An initial question would be whether such a proposal would include voting rights for the U.S. Senate. If not, then D.C. residents would still be denied their rightful Senate voting rights. If so, creating two new U.S. Senate seats for D.C. alone, as with the Lieberman/Norton "No Taxation Without Representation Act," is not just highly controversial, but politically undoable. The political questions raised above about the "Davis proposal" pale in comparison to the controversy involved in trying to create two U.S. Senators for one smaller-than-one-congressional-district city.

But the even bigger problem is that such a proposal is simply and clearly unconstitutional. The federal court decision (affirmed by the U.S. Supreme Court) in the Adams v. Clinton and Alexander v. Daley cases states emphatically, repeatedly and with overwhelming evidence that

D.C. cannot constitutionally be considered a state for the purposes of voting representation in the U.S. Congress. On the other hand, the same decision, through its discussion of the Organic Act of 1801 and the status of federal enclaves, leaves open the door for Congress, as with the D.C. Voting Rights Restoration Act, to restore rights by statute that it took away by statute.