

MEMORANDUM

TO:	Hon. Eleanor Holmes Norton, District of Columbia Delegate to Congress Hon. Anthony Williams, Mayor of the District of Columbia Hon. Linda Cropp, Chairman, District of Columbia City Council Hon. Robert Rigsby, District of Columbia Corporation Counsel
FROM:	Walter Smith, Executive Director, DC Appleseed Center L. Elise Dieterich, Esq., Swidler Berlin Shereff Friedman, LLP
DATE:	May 22, 2002
RE:	Congress' Authority to Pass Legislation Giving District of Columbia Citizens Voting Representation in Congress

We have been asked by the District of Columbia and by the District of Columbia's Delegate to Congress, the Honorable Eleanor Holmes Norton, to address the question of Congress' authority to provide, by legislation, that citizens of the District of Columbia shall have voting representation in the Congress.¹ The legal precedents relevant to this question are familiar to us, because we represented the District (on a *pro bono* basis) in litigation designed to determine whether the Constitution already requires that District citizens be given voting representation. That litigation, known as *Alexander v. Daley*,² was ultimately decided in the United States Supreme Court; it determined that the Constitution does not categorically require that D.C. citizens be given voting representation and, therefore, that the Court lacks authority to provide it.

However, as we will explain, the key court opinion in that litigation made clear that Congress does have authority to grant D.C. citizens voting representation and that there are compelling reasons for Congress to do so. As we will also explain, the *Alexander* decision is consistent with the other relevant legal precedents on the question of Congress' authority over this issue. *Alexander* is furthermore consistent with actions that Congress itself has taken in treating citizens of the District as if they were citizens of a State for other limited purposes under the Constitution. For all these reasons, discussed below, we conclude that Congress has the requisite authority under the Constitution to give D.C. citizens what the Supreme Court has called the most precious right of American citizens. In the Court's words:

¹ The District of Columbia has a non-voting delegate in the House of Representatives, but has never had full voting representation in the House or Senate.

² 90 F. Supp. 2d 35 (D.D.C. 2000).

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.³

The half million citizens of the District of Columbia, like citizens of the fifty states, bear all of the obligations of American citizenship: they are required to obey the laws passed by Congress; they pay federal taxes; they serve in the military; and, they fight and die in our wars. Yet, they lack the most basic right that should accompany American citizenship – the right to full voting representation in the Congress. The time is now ripe for Congress to exercise its authority to remedy this longstanding inequity.

I. CONGRESS' BROAD AUTHORITY TO LEGISLATE FOR THE DISTRICT OF COLUMBIA

The District of Columbia, the seat of the federal government, was established pursuant to Article I, Section 8, Clause 17 (the so-called “District Clause”) of the United States Constitution. That Clause provides:

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[.]

The courts have repeatedly emphasized the magnitude of Congress' power under this Clause. It has been held, for example, that Congress may "provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end."⁴ Given the breadth of Congress' power under the District Clause, it would appear that Congress has the authority to provide for the "general welfare" of D.C. citizens by providing them the most important right they as citizens should possess – the right to vote. And in fact, the *Alexander v. Daley* decision confirms that is so.

II. THE *ALEXANDER V. DALEY* DECISION

In 1998, a group of District citizens and the District of Columbia brought suit seeking a declaratory judgment that the Constitution commands that District citizens be afforded voting representation in Congress. On March 20, 2000, a three-judge federal court in the District of Columbia decided that case, *Alexander v. Daley*. The court held, by a 2-1 vote, that the Constitution does not require that citizens of the District be given

³ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁴ *Neild v. District of Columbia*, 110 F.2d 246, 250 (D.C. Cir. 1940).

voting representation in Congress. The court based its decision on the fact that Article I of the Constitution gives representation only to "people of the several States" and the District is not a State. On October 16, 2000, the U.S. Supreme Court affirmed this decision. *Alexander* is therefore the governing legal authority on the question whether District residents are constitutionally entitled to voting representation in the Congress; under *Alexander* they are not.

But *Alexander* also constitutes the best, most current legal authority on the question whether Congress has legislative power to grant D.C. citizens voting representation; under *Alexander*, Congress does have that power.

The *Alexander* court did not hold that the Constitution precludes District residents from having voting representation. Instead, the Court held only that "this court lacks authority to grant" voting representation.⁵ The court furthermore made clear that even though it lacked authority to grant relief, that did not mean plaintiffs were without recourse. The court stated that plaintiffs could seek relief "in other venues," including "through the political process."⁶ Indeed, the court specifically noted that counsel for the defendant House of Representatives asserted in the litigation that "only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise."⁷

The *Alexander* court's interpretation and application of the relevant judicial precedents is consistent with House counsel's position. Two key precedents relied on by the court were Chief Justice John Marshall's 1805 decision in *Hepburn v. Ellzey*,⁸ and Justice Robert Jackson's 1949 plurality opinion in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Company*.⁹ It is important to describe those two precedents before explaining how the *Alexander* court applied them.

Hepburn was the first Supreme Court decision addressing whether the District of Columbia may be treated as a "State" within the meaning of the Constitution. The case concerned the fact that Article III of the Constitution authorizes the federal courts to hear cases "between citizens of different States." The question in *Hepburn* was whether District of Columbia residents are eligible under this Article III provision to bring suit in federal court. Chief Justice Marshall said they are not, relying primarily on the fact that the District is not a State within the meaning of the clauses of Article I of the Constitution granting congressional representation only to States. He believed that just as the District is not a State under Article I, it also is not a State under Article III.

⁵ 90 F. Supp. 2d 35, 72 (emphasis supplied).

⁶ *Id.*, at 72, 37.

⁷ *Id.*, at 40 (emphasis supplied).

⁸ 6 U.S. 445 (1805).

⁹ 337 U.S. 582 (1949).

Nevertheless, Chief Justice Marshall closed his *Hepburn* opinion by noting that: (1) citizens of the District are "citizens of the United States"; (2) they are "subject to the jurisdiction of congress"; (3) it is "extraordinary" that they should be denied rights to which "citizens of every state in the union" are entitled; and (4) this inequity is "a subject for legislative, not for judicial consideration."¹⁰

Nearly 150 years later Congress addressed the inequity by passing a law, under its District Clause power, treating D.C. citizens as if they were citizens of a State for purposes of federal court jurisdiction. In the *Tidewater* case, the Supreme Court was asked to decide whether this law was valid. The Court held that it was, although the Justices had different reasons for reaching that conclusion. The important opinion from *Tidewater* is the plurality decision issued by Justice Jackson, because it is the decision relied on by the *Alexander* court.

Justice Jackson said that the clear implication of Chief Justice Marshall's opinion in *Hepburn* was that Congress had the power under the District Clause to treat the District as if it were a State for purposes of federal diversity jurisdiction. As noted, Chief Justice Marshall said in his opinion that it was "extraordinary" that citizens of the District, which is "subject to the jurisdiction of Congress," do not have the same rights as "citizens of every state in the union," but that this is "a subject for legislative, not for judicial consideration." Justice Jackson interpreted this to mean that "Congress had the requisite power under Art. I [the District Clause]" to address the inequity facing District citizens.¹¹

It is true, said Justice Jackson, that Chief Justice Marshall's reference to this being a subject for "legislative" consideration is "somewhat ambiguous, because constitutional amendment as well as statutory revision is for legislative, not judicial, consideration."¹² Even so, Justice Jackson concluded, the better reading of Chief Justice Marshall's opinion is that Congress has power under the District Clause to treat the District as if it were a State. And, in any case, Justice Jackson said, "it would be in the teeth of his language to say that it is a denial of such power."¹³ Finally, Justice Jackson said, "congress had acted on the belief that it possesses that power" and Congress' determination is entitled to great deference.¹⁴ This is particularly true given that "congressional power over the District, flowing from Art. I, is plenary in every respect."¹⁵ Thus, the Court in *Tidewater* approved Congress' legislative expansion of federal diversity jurisdiction to embrace the District, notwithstanding the use of the word "State" in Article III.

Based in part on *Tidewater* and *Hepburn*, plaintiffs in the *Alexander* case argued that the court should treat the District as if it were a State under the provisions of Article I

¹⁰ 6 U.S. 445, 453.

¹¹ 337 U.S. 582, 589.

¹² *Id.*, at 587.

¹³ *Id.*, at 589.

¹⁴ *Id.*, at 603.

¹⁵ *Id.*, at 592.

giving voting representation to States. The dissenting judge in *Alexander* agreed with this argument.¹⁶ The two-judge majority disagreed, but it disagreed in a way that clearly validated Congress' power to treat the District as if it were a State under Article I.

First, the majority said that *Tidewater* "reconfirmed Marshall's conclusion that the District was not a state within the meaning Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District."¹⁷ Then, and more importantly, the *Alexander* majority declared in the closing section of its opinion that "many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation."¹⁸ Yet "it is the Constitution and judicial precedent that create the contradiction" and "that precedent is of particularly strong pedigree."¹⁹ That "pedigree," the *Alexander* majority said, was primarily *Hepburn* and *Tidewater*; to support that view, the *Alexander* majority quoted this passage from *Tidewater*:

Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claim which his decision denied to residents of the District . . .²⁰

The *Alexander* majority then closed by stating:

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues.²¹

Taken together, these statements by the *Alexander* court constitute persuasive legal support affirming the legislative authority of Congress to address the voting inequity described by the court, for the reasons that follow.

In *Hepburn*, Chief Justice Marshall concluded that the District is not a State under Article III, but he strongly implied that this inequity (denial of federal court jurisdiction to District citizens) could be remedied by Congress under the District Clause. *Tidewater* later made express what Chief Justice Marshall had implied – that Congress does have

¹⁶ 90 F. Supp. 2d 35, 94-96.

¹⁷ *Id.*, at 54-55 (emphasis supplied).

¹⁸ *Id.*, at 72.

¹⁹ *Id.*

²⁰ *Id.*, at 72 (emphasis supplied) (citing *Tidewater*, 337 U.S. at 586-87).

²¹ *Id.*

the power under the District clause to give D.C. citizens the same rights that citizens of States have under Article III. Indeed, the Judiciary Committee of the House of Representatives recommended the Act of April 20, 1940, which defined the word “States” as used in the diversity jurisdiction statute to include the District of Columbia, as a “reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia.”²²

Alexander now makes clear that Congress may use this same District Clause power to remedy the other inequity identified by Chief Justice Marshall – denial of voting representation to District residents. The *Alexander* court gave its guidance on this issue in essentially the same way as had Chief Justice Marshall; *i.e.*, once the court found that the District was not a State for purposes of Article I, it offered a closing statement regarding the best manner to address that inequity – just as Chief Justice Marshall had done.

Thus, in *Hepburn*, Chief Justice Marshall expressed his view that it is “extraordinary” that District citizens should be denied rights available to citizens of every state in the union; the *Alexander* court similarly stated that it was inequitable and contrary to our “democratic ideals” that District citizens are denied the voting representation enjoyed by other U.S. citizens. Likewise, Chief Justice Marshall specifically referenced the fact that citizens of the District are subject to the jurisdiction of Congress, referring to Congress’ power under the District Clause; the *Alexander* court, in turn, quoted the passage from *Tidewater* noting that Chief Justice Marshall was reluctant to “deny federal power” regarding District residents, given the “equitable claim” they presented. The “federal power” available to address the “equitable claim,” as *Tidewater* explained, is plainly Congress’ District Clause authority.

Perhaps most important of all, just as Chief Justice Marshall had noted that the inequity presented in *Hepburn* presented a “subject for legislative” consideration, so too the *Alexander* court noted that District citizens could take their claim to “other venues,” including the “political process.”²³ Indeed, the *Alexander* opinion is even stronger on this point than was Chief Justice Marshall’s opinion because the *Alexander* court specifically referenced Congress’ own position that the inequity at issue could be addressed through “congressional legislation *or* constitutional amendment.”²⁴

For all these reasons, the recent *Alexander* decision, affirmed by the United States Supreme Court in October 2000, has made clear the authority of Congress under the District Clause to pass legislation treating citizens of the District of Columbia as though they are citizens of a State for purposes of voting representation. Furthermore, although *Alexander* only recently made that authority clear, past actions by Congress and other relevant legal precedents confirm that authority.

²² H.R. Rep. No. 1756, 76th Cong., 3d Sess., p. 3.

²³ 90 F. Supp. 2d 35, 37.

²⁴ *Id.*, at 40 (emphasis supplied).

III. OTHER AUTHORITY CONFIRMING CONGRESS' DISTRICT CLAUSE POWER

Beyond *Tidewater* and *Alexander*, there are other examples in which the courts have approved the extension by Congress to District residents of a constitutional protection otherwise applicable only to residents of the states. The most important example is found in the cases construing 42 U.S.C. § 1983, the federal statute implementing the protections of the 14th Amendment. In *District of Columbia v. Carter*,²⁵ the Supreme Court held that, because the 14th Amendment does not apply to the District of Columbia, Section 1983 did not apply to District residents. “[T]he commands of the 14th Amendment are addressed only to the State or to those acting under color of its authority. . . . [S]ince the District of Columbia is not a ‘State’ within the meaning of the 14th Amendment . . . neither the District nor its officers are subject to its restrictions.”²⁶ For this reason, the Court held, “[I]nclusion of the District of Columbia in § 1983 cannot be subsumed under Congress’ power to enforce the 14th Amendment but, rather, would necessitate a wholly separate exercise of Congress’ power to legislate for the District under [the District Clause].”²⁷ In response, Congress subsequently enacted legislation, pursuant to its power under the District Clause, making Section 1983 expressly applicable to the District. The validity of that legislation has never been challenged, and the courts have since assumed its applicability in many cases brought under its auspices.²⁸

The Supreme Court also has upheld instances where Congress has used its power under the District Clause to extend to District citizens certain burdens of citizenship that, under the Constitution, apply to citizens of “states.” The most important example is *Loughborough v. Blake*.²⁹ In that case, the Supreme Court held that Congress, under the District Clause and in conjunction with its Article I, Section 8 power “to lay and collect taxes,” could impose a direct tax on the people of the District, notwithstanding that Article I, Section 2 states that “direct taxes shall be apportioned among the several States.” Taken together, these cases confirm that Congress has authority under the District Clause to extend the benefits and burdens of U.S. citizenship to District residents, even where the Constitution applies those benefits and burdens only to citizens of the States.

A final confirmation that Congress has power under the District Clause to give D.C. citizens the vote is the fact that Article IV, Section 3 of the Constitution gives Congress the power to grant all the privileges of statehood – including the vote – by simple legislation. Accordingly, there should be no doubt that Congress also has the lesser power to grant a single attribute of statehood – the right to voting representation in Congress – if it deems that appropriate. As Justice Jackson said in *Tidewater*, when

²⁵ 409 U.S. 418 (1973).

²⁶ *Id.*, at 423-24.

²⁷ *Id.*, at 424 n.9.

²⁸ See, e.g. *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998).

²⁹ 18 U.S. 317 (1820).

Congress treated the District as a State for purposes of Article III of the Constitution, it was "reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution."³⁰ And Congress did so in circumstances where "no good reason is advanced" for denying Congress that power.³¹ All of this applies equally to Congress' power to treat citizens of the District as if they were citizens of a state under Article I solely for voting purposes.

IV. THE 1978 PROPOSED CONSTITUTIONAL AMENDMENT

The only remaining question is whether Congress' power under the District Clause is somehow undermined by the proposed constitutional amendment adopted by Congress in 1978. We do not think it is.

As you know, in 1978, a bi-partisan, two-thirds majority in Congress approved a proposed constitutional amendment, which provided: "For purposes of representation in the Congress . . . the District constituting the seat of government of the United States shall be treated as though it were a State." At that time, there appears to have been consensus that an amendment to the Constitution would be the simplest and most durable remedy to the District's disenfranchisement. Several experts consulted by Congress in connection with the 1978 Amendment argued that Congress could, by simple legislation, enfranchise citizens of the District of Columbia, but took the position that a constitutional amendment would be preferable.³² Others, including the spokeswoman for the administration of then-President Carter and a task force convened to examine the problem, apparently assumed that, to effectuate a legislative solution to the problem, Congress would exercise its authority pursuant to Article IV, Section 3 of the Constitution to confer full statehood on the District, a step perceived by many as problematic.³³

The House Judiciary Committee in its report ultimately said: "The committee is of the opinion that the District should not be transformed into a State . . ."³⁴ Indeed, it seems clear from the record that Congress in 1978 was seeking a solution that would permanently enfranchise District citizens without the possibility of a later legislative reversal, while still maintaining the unique status of the District as the national capital, under federal control. Thus, the Committee concluded, that: "If the citizens of the

³⁰ 337 U.S. 582, 603.

³¹ *Id.*

³² See, e.g., *Proposed Constitutional Amendments (H.J. Res. 139, 142, 392, 554, and 565) to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 95th Cong. 86-100 (1977) (testimony of Peter Raven-Hansen, Attorney at Law, and Herbert O. Reid, Professor of Law, Howard University School of Law).

³³ See, e.g., *Proposed Constitutional Amendments (H.J. Res. 139, 142, 392, 554, and 565) to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 95th Cong. 125-126 (1977) (testimony of Patricia Wald, Assistant Attorney General, Office of Legislative Affairs).

³⁴ H.R. Rep. No. 95-886, at 4 (1978).

District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.”³⁵

Despite this definitive-sounding statement, the Committee was not unanimous in believing that a constitutional amendment was necessary. Representatives Thornton, Hungate, Butler, Hyde, and Kindness filed separate views with the House Judiciary Committee Report on an early version of the proposed constitutional amendment, stating: “[I]t would be desirable for the residents of the District of Columbia to have voting representation in Congress . . . [but] we are not convinced that a constitutional amendment is either wise or necessary. More careful consideration should be given to the possibility that statutory provisions could be used to achieve this goal.”³⁶ Representative Holtzman of the Committee also filed supplemental views, stating that: “the Committee [should] explore the possibility, suggested by Rep. Ray Thornton, of providing the District of Columbia with representation through the normal legislative process.”³⁷

Taking the record as a whole, we conclude that Congress, confronted with conflicting views on whether legislation would suffice, having heard the recommendation of several experts favoring the permanency of a constitutional amendment, and wishing to avoid debate on whether Congress should confer statehood on the District, determined that the proposed constitutional amendment afforded the most straightforward means to the desired end. It also appears from the record that Congress was confident that the proposed amendment would soon be ratified. The Committee on the Judiciary, in the 1975 report on an early version of the constitutional amendment, stated that:

On June 16, 1960, Congress proposed the 23rd amendment to the Constitution. On April 3, 1961 – less than 1 year later – that amendment was ratified. It represented a national consensus that the District of Columbia was entitled on a permanent basis to participate in the election of the President and Vice President of the United States. Based upon the testimony received by the committee we conclude that there is an equally broad consensus that the denial of representation in the Congress for District citizens is wrong and that correction of this injustice is long overdue.³⁸

In 1978, the Committee on the Judiciary, considering the final resolution proposing the constitutional amendment, said: “The committee is of the opinion that the District should not be transformed into a State, and it is confident that this proposed

³⁵ *Id.*; H.R. Rep. No. 94-714, at 4 (1975).

³⁶ H.R. Rep. No. 94-714, at 15 (1975).

³⁷ *Id.*, at 9.

³⁸ *Id.*, at 3.

constitutional amendment when submitted to the States will be quickly ratified.”³⁹ As it turned out, however, the proposed constitutional amendment failed to gain the approval of three-fourths of the states within the allotted seven year time period, as required, and was not ratified, leaving District citizens disenfranchised, as they still are today.

We believe there are two points from the 1978 Amendment's legislative history that are relevant to Congress' power now. The first is that there were strong differences of opinion in 1978 whether a constitutional amendment was required, and it is clear that many who supported a constitutional amendment did so because they thought one would be quickly passed and would render a permanent solution to the problem. It is also clear that many believed even in 1978 that Congress had the power to address the problem by simple legislation. The *Alexander* decision has now provided persuasive judicial support for that power. Subsequent experience has also shown that those who believed quick ratification would be forthcoming were mistaken; the fact is that even where a proposed constitutional amendment is supported by an overwhelming majority of the people (which polls show is the case with regard to giving D.C. citizens the vote),⁴⁰ obtaining ratification by three fourths of the states is very difficult.

The other important lesson to be drawn from the 1978 Amendment is that the majority view in Congress was then, and presumably still remains, that some means should be found to address the inequity facing D.C. citizens. As Senator Strom Thurmond stated in defense of the passage of the proposed amendment:

I think it is a fair thing to do. We are advocating one man, one vote. We are advocating democratic processes in this country. We have more than 700,000 people in the District of Columbia who do not have voting representation. I think it is nothing but right that we allow these people that representation. We are advocating democratic processes all over the world. We are holding ourselves up as the exemplary Nation that others may emulate in ideas of democracy. How can we do that when three-quarters of a million people are not allowed to have voting representation in the capital city of this Nation?⁴¹

As Senator Dole similarly stated:

The absence of voting representation for the District in Congress is an anomaly which the Senate can no longer sanction. It is an unjustifiable gap in our scheme of representative government – a gap we can fill this afternoon by passing this resolution.

³⁹ H.R. Rep. No. 95-886, at 4 (1978).

⁴⁰ *Metro in Brief*, WASH. POST, April 13, 2000, at B3.

⁴¹ 124 Cong. Rec. 27,253 (1978).

It seems clear that the framers of the Constitution did not intend to disenfranchise a significant number of Americans by establishing a Federal District. I believe that the framers would have found the current situation offensive to their notions of fairness and participatory government.⁴²

The *Alexander* decision has confirmed the correctness of these statements by Senators Thurmond and Dole. As noted, that decision declared that there is "a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation."⁴³ And, most importantly, the *Alexander* decision demonstrates that Congress has authority to correct this contradiction and include District residents in our democracy.

CONCLUSION

The *Alexander* decision, affirmed by the United States Supreme Court, has made clear that Congress has legislative authority to give voting representation to the citizens of the Nation's capital. That court has also confirmed Congress' own stated view that denial of that voting representation is a serious inequity that should be corrected. Now that Congress' authority has been established, it seems appropriate that Congress should act expeditiously to correct the inequity.

⁴² 124 Cong. Rec. 27,254-55 (1978).

⁴³ 90 F. Supp. 2d 35, 72.