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RSC Policy Brief:

District of Columbia House Voting Rights Act

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Next week, the House is scheduled to consider the District of Columbia House Voting Rights Act. While it is unclear whether the House will take up the Senate-passed bill (S. 160), the House version (likely H.R. 157), or use the Senate bill as a shell into which to insert the House language, the RSC wanted to pass along some background on the issue to prepare you for next week's debate. More information will be disseminated next week when more details about floor consideration are revealed.

Summary of House legislation: The DC House Voting Rights Act would *statutorily* deem (without amending the U.S. Constitution) the District of Columbia ("DC") as a congressional district for purposes of representation in the U.S. House of Representatives. The permanent number of members in the House of Representatives would be increased to 437, including any DC representative. The bill would also have the effect of increasing the Electoral College by one vote – from 538 to 539 (presumably going to Utah).

Within 30 days of this bill's enactment, the President would have to transmit to Congress a revised version of the most recent statement of apportionment (of House seats based on population) to take into account this legislation. Within 15 calendar days of receiving the revised version of the statement of apportionment, the Clerk of the House of Representatives would have to send to the executive of each state a certificate of the number of representatives to which such state is now entitled, and submit a report to the Speaker of the House of Representatives identifying the state (other than the District of Columbia) that is entitled to one additional representative (Utah is currently next in line for a new seat under the latest apportionment report, so presumably this new representative would go to Utah, at least at first. **After the next reapportionment in 2012, the seat could go to another state.**) *Note: The Senate version, unlike the House version, explicitly states that the new seat would go to Utah.

For the 111th and 112th Congresses, this additional representative would have to represent a state at-large (after a special election). The other representatives to which such state is entitled would be elected on the basis of the congressional districts in effect in the state for the 110th Congress.

Additionally, the bill would provide that reapportionment of congressional districts could never yield DC more than one additional seat and it would preserve DC's three electoral votes in presidential elections.

The bill contains a nonseverability clause, which provides that: "If any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law." (This nonseverability clause was narrowed by an amendment in the Senate Homeland Security and Governmental Affairs Committee.)

While the House version does not contain expedited judicial review language, the Senate-passed bill contains a provision that would allow for expedited judicial review by the U.S. District Court for the District of Columbia which could be followed with a direct appeal to the U.S. Supreme Court *if any provision of the bill is challenged.*

Background: The American Founding Fathers put in the United States Constitution, in one clause, the power for Congress to create the District of Columbia and to control it legislatively. Specifically, Article I, Section 8, Clause 17 gives Congress the 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, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." (emphasis added)

Note: This clause does not give Congress the ability to do whatever it wants within the boundaries of the District. For example, Congress cannot violate the Constitution in its exercise of "exclusive Legislation" over the district. Congress can merely exercise its enumerated powers (primarily listed in Article I, Section 8) in the District. Congress, for example, cannot establish a religion in the District, since the Constitution says that "Congress shall make no law respecting an establishment of religion" (First Amendment).

As is evident in Article I, Section 8, Clause 17 (often known as "The District Clause"), the District of Columbia was created specifically so that it would NOT be a state or have the legislative function of a state. On the contrary, the Founders gave the District the same legislative stature as forts and dock-yards. The District was never intended to have independent legislative or representational authority; that is why a separate capital district was carved out of two states (Maryland and Virginia) in the first place. Otherwise, the capital city could have just been a city in an existing state, with its residents being represented in Congress like any other citizens.

The Founders deliberately crafted DC as a representationally neutral zone in order to help quell the North-South regional conflict that had already emerged—decades before the Civil War. (Northern states were afraid of a permanent American capital in a southern state, and southern states were afraid of a permanent American capital in a northern state. Thus, the capital was created as a neutral non-state.)

In addition to the district clause of the Constitution, Article I, Section 2, Clause 1 of the Constitution deems that the House of Representatives "shall be composed of Members chosen every second Year by the People of the several States…." In other words, the Founders intended for the House to be comprised of representatives of people living in states—not territories or

other non-state entities—otherwise they would not have qualified "People" with "of the several States." This clause could have read, "by the American People" or "by the People of the several States, territories, districts, forts…" But the clause limits the representatives to those of the people who live in states.

The 23rd Amendment to the Constitution, ratified in 1961, gave DC the right to appoint "a number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State." (emphasis added) That is, for DC to be treated like a state for the purposes of choosing presidential electors, the Constitution was amended. The amendment continues: "they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform, such duties as provided by the twelfth article of amendment." Again, for DC to be treated like a state for the purposes of choosing presidential electors, the Constitution was amended.

There is no reason to believe that treating DC as a state for the purpose of choosing House Members (a function listed in Article I of the Constitution) can be done statutorily, when treating DC as a state for the purpose of choosing presidential electors (a function listed in Article II of the Constitution) was done by constitutional amendment.

Possible Conservative Concerns: Some conservatives may be concerned that this bill is unconstitutional in its statutory attempt to treat the District of Columbia as a state for the purpose of representation in the U.S. House of Representatives. Some conservatives may also be concerned that one state, presumably Utah at first, would have residents who each are represented by two Members of the U.S. House, itself a constitutionally dubious proposition.

Additionally, the likely court challenges to this legislation could last for many years. Meantime, the House would presumably continue to consider and pass legislation with 437 Members, including a DC representative. If this bill were eventually found to be unconstitutional (which is likely), it is possible that the court could also rule that all legislation passed with a DC representative is invalid, undoing years of legislative work and negating the representative voices of American citizens nationwide. Or the court could rule that any legislation passed in the House by a margin of one or two votes (in which the DC representative and the 437th representative made the difference) is invalid.

Furthermore, some conservatives, who may be less likely to oppose this legislation because of the creation of a congressional seat from traditionally Republican Utah as a counterbalance to the creation of a reliably Democrat seat for DC, may be concerned that **the House bill does not guarantee the additional seat for Utah**, nor does it guarantee that the seat be Republican. The extra seat could easily be given to a Democrat-leaning state in a future reapportionment, or Utah, even if it retains the seat, could elect a Democrat for it (just as the "red state" of South Dakota has elected and re-elected its Democrat House Member, and just as the Democrat representative from eastern and central Utah has been re-elected for a fifth term).

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