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Territorial Delegates to the U.S. Congress: Current Issues and Historical Background

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Summary

Territorial Delegates have served in the House since the late 1700s, representing territories that had not yet achieved statehood. In the 20th Century, the concept of Delegate grew to include representation of territories where the United States exercises some degree of control but which were not expected to become states.

Currently, the U.S. insular areas of American Samoa, Guam, the Virgin Islands, and the federal municipality of the District of Columbia are each represented in Congress by a Delegate to the House of Representatives. The individual elected to represent Puerto Rico is called the Resident Commissioner instead of delegate. The Delegates and Resident Commissioner are the successors of Delegates from statehood-bound territories, who first took seats in the House in the late 1700s.

Proposals offered in recent Congresses have sought to grant the Delegate from the District of Columbia voting rights on the floor of the House. Another proposal would expand territorial representation to include the Commonwealth of the Northern Mariana Islands. Floor action in the House and Senate on these bills could occur before the end of the 109th Congress.

Early laws providing for territorial Delegates to Congress did not specify the duties, privileges, and obligations of these representatives. It was left to the House and the Delegates themselves to define their role. On January 13, 1795, the House took an important step toward establishing the functions of Delegates when it appointed James White, the first territorial representative, to membership on a select committee. In subsequent years, Delegates continued to serve on select committees as well as on conference committees. The first fixed assignment of a Delegate to standing committee occurred under a House rule of 1871, which gave Delegates places as additional members on two standing committees. In these committees, the Delegates exercised the same powers and privileges as in the House; that is, they could debate but not vote.

In the 1970s, Delegates gained the right to be elected to standing committees and to exercise in those committees the same powers and privileges as Members of the House, including the right to vote. Today, Delegates enjoy powers, rights, and responsibilities identical, in most respects, to those of House Members from the states. Like these Members, Delegates can speak and introduce bills and resolutions on the House floor; and they can speak and vote in House committees. Delegates are not, however, full-fledged Members of Congress. Most significantly, they cannot vote on the House floor.

This report builds on earlier reports on territorial delegates prepared by former colleagues, Andorra Bruno and the late William H. Tansill, and also benefitted from the production assistance of Daphne Bigger. Paul Rundquist was a major contributor to this report. This report will be updated as events warrant.

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Territorial Delegates to the U.S. Congress: Current Issues and Historical Background

The office of territorial delegate was created by the Continental Congress through the Northwest Ordinance of 1787. The statutory authority was extended under the Constitution and territorial Delegates have been a regular part of congressional operations since. Through most of the 19th century, territorial Delegates represented areas that were on the way to ultimate statehood.

With U.S. acquisition of overseas territories beginning with the Spanish-American War, however, Congress created the post of Resident Commissioner to represent those areas which had, by treaty or law, a different relationship to the federal government. The office of Resident Commissioner was, however, used by the Congress to permit representation in the House in only two instances. The Philippine Islands, intended for ultimate independence, were represented by two Resident Commissioners until independence was declared in 1946. Puerto Rico, with commonwealth status and a treaty guaranteeing popular self determination, has been represented by a single Resident Commissioner since 1902.

Beginning in the 1970s, Congress returned to the concept of Delegate to provide representation to territories and the District of Columbia.

Currently, the U.S. insular areas of American Samoa, Guam, Puerto Rico, the Virgin Islands, and the federal municipality of the District of Columbia are each represented in Congress by a Delegate to the House of Representatives.[1] The Delegates enjoy many, but not all, of the powers and privileges of House Members from the states.

In the 109th Congress, several proposals are under consideration that would change the number of territorial Delegates in Congress and alter the legal authorities under which the post of territorial Delegate and that of Resident Commissioner serve.

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[1] In the case of Puerto Rico, the congressional representative is called a Resident Commissioner. Today, the offices of Resident Commissioner and Delegate are essentially the same, though the Resident Commissioner is elected to a four-year term, and Delegates are elected to two-year terms. The term "Delegates," as used in this report, includes the Puerto Rican Resident Commissioner, unless otherwise indicated.

109th Congress Legislative Issues

Northern Mariana Islands Delegate

During World War II, the United States took control of the Northern Mariana Islands from the Japanese. Following the war, the United Nations made the islands a trusteeship of the United States. In 1975, the United States and representatives of the islands reached an agreement, known as the "Covenant to Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," and in 1986 residents of the Northern Mariana Islands were granted U.S. citizenship. Under terms of the covenant, the Commonwealth makes its own laws.

The Commonwealth of the Northern Mariana Islands (CNMI), pursuant to the covenant agreement with the United States incorporated into P.L. 94-241 (48 U.S.C. 1801), currently elects a Resident Representative, which is different from the position of Resident Commissioner from Puerto Rico. The Resident Representative formally presents his credentials to the Department of State and is the representative of the CMNI government to the various governmental departments in Washington concerned with Northern Mariana Islands issues, primarily the Department of the Interior. Currently, the Resident Representative has no official status in Congress, although he has frequently testified before congressional committees.

Representation for CMNI in Congress was not discussed in the Covenant between the United States and the commonwealth in 1975. In 1986, a report to the Reagan Administration from a group known as The Commission on Federal Laws, called for granting the Northern Mariana Islands non-voting representation in the House, though no action was taken on this recommendation at that time.[2]

Delegate Proposals in Previous Congresses. When the United States and the Mariana Islands agreed to the covenant of association, it was thought that the Mariana Islands lacked sufficient population to warrant a congressional Delegate. Since then, as the population has grown, Members of the House have debated whether to create a new position of non-voting delegate for the Commonwealth of the Northern Mariana Islands. Bills to authorize the creation of such a post have been introduced regularly in the House since 1994, but such measures usually have not been acted upon. Prior to the 108th Congress, the most recent committee action occurred in 1996, when the House Resources Committee reported H.R. 4067 (104th Congress, second session). Introduced by Representative Elton Gallegly, the bill provided for the election of a Delegate from the Northern Mariana Islands for the congressional term beginning in 1999 (106th Congress).

The committee approved H.R. 4067 by voice vote on September 18, 1996. Four Members (Representatives Wes Cooley, Helen Chenoweth, Jack Metcalf, and Joel Hefley), however, later asked that the committee's report reflect their opposition. A

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[2] U.S. Congress, House Committee on Resources, *Northern Mariana Islands Delegate Act*, report to accompany H.R. 4067, 104th Cong., 2nd sess., H.Rept. 104-856 (Washington: GPO, 1996), p. 4.

fifth committee member, Representative George Miller, filed a formal written dissent. The measure was reported to the House on September 27, 1996. No further action occurred.

The Resources Committee report noted that "NMI is the last and only U.S. territory with a permanent population that has no voice [in Congress]." The report continued:

> The small population of NMI was cited by the Marianas Political Status Commission, which negotiated the Covenant for the islands, as the reason NMI was unable to obtain a nonvoting delegate in the Covenant despite the backing of the executive branch of the Federal Government. NMI population of 15,000 (1970 Census) was considerably less at that time than the populations of Guam (86,926) and the Virgin Islands (63,200) had been when those territories were granted nonvoting delegates in 1972. Two years after approving the Covenant without a provision for an NMI delegate, however, Congress granted a delegate to American Samoa with a resident population of 27,000, most of whom were not U.S. citizens. Today, with a U.S. citizen population of 27,512 and a total population of 59,913, NMI is clearly within the threshold of population established by precedents both historical and contemporary.[3]

In opposing the committee's recommendation, Representative Miller argued that the Resources Committee had given little formal consideration to the proposal, not even holding a hearing or Member briefing on H.R. 4067 before the markup. Representative Miller further charged that there were long-standing labor law abuses in CNMI, particularly with regard to working conditions that were unsafe or abusive and wage rates substantially below those found among the States of the United States or in neighboring Guam. Representative Miller urged that reform of labor conditions be a pre-condition for authorizing a Delegate for CNMI.

> This nation has a long history of requiring those who wish representation to change behavior such as polygamy or slavery, behaviors which are contrary to the beliefs and ethics of this nation as a whole. I recognize that some assert that we will have a better opportunity to pressure CNMI into accepting the legal changes we seek if it is represented in the Congress.... Rather, I believe that only by sending a clear message of disapproval, by denying membership in the House of Representatives until sustained and substantive reforms are implemented, will this House demonstrate that change within the CNMI is required to meet the standard for equal participation in the Congress commensurate with that of other delegates.[4]

Delegate Proposals in the 108th Congress. On September 29, 2004, the House Resources Committee reported by voice vote H.R. 5135, which was introduced by Representative Richard Pombo. The bill saw no further action in the 108th Congress. The bill would have established the position of non-voting Delegate from the Commonwealth of the Northern Mariana Islands, and it would have provided for the election of the first such Delegate in the 2006 election cycle. The bill required, in a manner that parallels the requirements for service as a Member of

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[3] H.Rept. 104-856, pp. 2-4.

[4] H.Rept. 104-856, pp. 10-11.

the House, that the Delegate from the Northern Marianas be at least 25 years old, a citizen of the United States for seven years, and a resident of the territory. Additional eligibility requirements stipulated that the delegate also be a "domicilary" of the Commonwealth, a qualified voter in the Northern Marianas, and, at the time of his or her election, not be a candidate for any other elected office. The bill saw no further action in the 108th Congress.

The committee report specifically addressed concerns about labor abuses which caused Member opposition in past Congresses. The report said:

> Congressional influence, Administrative actions and local changes have resulted in reduced allegations of worker exploitation and human rights violations. The Committee supports the actions taken by Governor Juan Babauta, including labor law enforcement and improved coordination with the federal agencies that oversee the local immigration and labor practices. H.R. 5135 will provide for a better means for the CNMI to keep Congress abreast of its progress and request further assistance in areas of need to address their unique economic base.[5]

The markup was preceded by a February 25, 2004 hearing by the House Resources Committee entitled: "Examination of the Potential for a Delegate from the Commonwealth of the Northern Mariana Islands." Testifying before the committee were the Governor of CMNI, Juan N. Babauta; Pedro A. Tenorio, the elected Resident Representative of the CMNI to the United States; Joaquin G. Adriano, President of the Senate of CMNI; David B. Cohen, Deputy Assistant Secretary of the Interior for Insular Affairs; and Mrs. Ruth G. Van Cleve, former Director of the Office of Territories at the Interior Department. Mr. Cohen was accompanied by James J. Benedetto, Federal Ombudsman, Office of the Ombudsman of the Interior Department, who answered questions from Members.

While making it clear that the Administration recognizes that it is the House's prerogative to decide its membership, Cohen said that "the Administration continues to support the general concept that the CNMI should be represented by a non-voting delegate to the U.S. House of Representatives."[6]

All three elected officials from the CNMI testified in support of the proposal. "The people of the Northern Marianas do have a fundamental right to have a voice in their own government," said Governor Babauta. "I urge you to introduce Delegate legislation and see it successfully through the legislative process."[7]

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[5] U.S. Congress, House Committee on Resources, *Northern Mariana Islands Delegate Act*, report to accompany H.R. 5135, 108th Cong., 2nd sess., H.Rept. 108-761 (Washington: GPO, 2004), p. 2.

[6] Testimony of David Cohen, in U.S. Congress, House Resources Committee, *An Examination of the Potential for a Delegate from the Commonwealth of the Northern Mariana Islands,* hearings, 108th Cong., 2nd sess., Feb. 25, 2004. The testimony is available online from the committee website at [http://resourcescommittee.house.gov/archives/108/full/02_25_04.htm], visited June 13, 2005.

[7] Testimony of Juan Babauta, in U.S. Congress, House Resources Committee, *An Examination of the Potential for a Delegate*.... The testimony is available online from the

(continued...)

"The purpose of my testimony today is to respectfully request that Congress authorize a nonvoting Delegate position in Congress for the CNMI," said Tenorio. "Such legislation would extend democratic representation to American citizens in the commonwealth and affirm Congress' commitment to the democratic principles of our Republic."[8]

Cohen told the committee he believed the cost of an additional Delegate from CNMI would be about $1.1 million each year or the same as the costs for the Delegate from Guam. Those funds would come from the legislative branch appropriation.

Representative George Miller discussed the concerns he had in 1996 and then said that he believed from the testimony delivered at the hearing that a "majority of these changes have been made." Miller said he continues "to have serious concerns" about the proposal to grant CNMI a Delegate, but felt it is "worth continuing the discussion."

Legislatively, House measures proposing to establish the office of territorial Delegate are referred to the Committee on Resources, the successor to the earlier Committee on Territories and Committee on Insular Affairs that considered bills concerning delegates in the 19th and early part of the 20th centuries. (The only modern exception to this referral practice was the bill to establish the office of Delegate from the District of Columbia. This measure was reported from the former Committee on the District of Columbia, the duties of which are now performed by the Government Reform Committee).

Delegate Proposals in the 109th Congress. On February 17, 2005, Representative Pombo again introduced legislation to provide a non-voting delegate for the Northern Mariana Islands (H.R. 873). The bill was ordered reported by the House Resources Committee on May 18, 2005, by unanimous consent. On June 8, 2005, the committee filed a written report on the bill (H.Rept. 109-110), addressing one concern that the population of the island was not sufficient to merit a non-voting delegate to the House. That report found that with a U.S. citizen population of "35,000 and a total population of 69,221, according to the 2000 Census, the CNMI is clearly within the threshold of population established by precedents both historic and contemporary."[9] Further action in the House could take place later during the 109th Congress. Action by the Senate would be required for the bill to become law and for the Northern Marianas islands to receive a non-voting delegate.

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[7] (...continued)
committee website, [http://resourcescommittee.house.gov/archives/108/full/02_25_04.htm], visited June 13, 2005.

[8] Testimony of Pedro A. Tenorio in U.S. Congress, House Resources Committee, *An Examination of the Potential for a Delegate....* The testimony is available online from the committee website, [http://resourcescommittee.house.gov/archives/108/full/02_25_04.htm], visited June 13, 2005.

[9] U.S. Congress, House Committee on Resources, *Northern Mariana Islands Delegate Act*, report to accompany H.R. 873, 109th Cong., 1st sess., H.Rept. 109-110 (Washington: GPO, 2005), p. 3.

DC Delegate Rights and Additional House Seat

Another issue under discussion in the 109th Congress is whether to grant the Delegate from the District of Columbia voting rights on the floor of the House and, if so, how it should be done. House Government Reform Chair Tom Davis introduced legislation (H.R. 5388)[10] that would grant DC a full-fledged Member of the House of Representatives, one who would be able to vote on the House floor. The bill also would create a new House seat for another state, most likely Utah, which narrowly missed gaining such a position following the 2000 Census. Davis introduced similar legislation in the 108th Congress.[11]

Under Davis's plan, the District of Columbia would be considered a congressional district for the purpose of electing a Member to the House. That Member would have the same rights as other Members, including the right to vote on the House floor. Regardless of the population of the District, it would be limited to one representative in the House. The bill would not provide for representation for the District in the Senate. Also, an additional House Member would be added to the state delegation most qualified by population for an additional representative. That additional representative would be elected by a statewide ballot until the next reapportionment. The bill calls for the number of Members in the House to increase permanently to 437 Members.

The House Committee on Government Reform approved the bill by a vote of 29-4 on May 18, 2006. The bill was also referred to the House Judiciary Committee. Press reports indicate that the chair of that committee has promised Davis that the Judiciary Committee will consider the bill. Some Members during the markup questioned whether the bill would violate the constitution because it would give voting rights to an individual who did not represent a state.[12] The House, the Constitution says in Article 1, section 2, "shall be composed of Members chosen every second Year by the People of the several States."

Other Members have proposed granting voting rights to DC residents in other ways. DC Delegate Eleanor Holmes Norton has also introduced legislation (H.R. 398) that would provide full voting representation to the citizens of the District by

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[10] Davis also introduced a similar bill earlier in the 109th Congress, H.R. 2043. That bill had the same intent as H.R. 5388, , though its provisions are slightly different. The biggest differences is that H.R. 5388 calls for a permanent increase in the size of the House to 437 from 435, the earlier bill, H.R. 2043, would have allowed the size of the House to increase by two Members only until the next census, after which the size of the House would revert to 435 voting Members.

[11] Jennifer Yachnin, "House Trio to Offer D.C. Voting Rights Bills in 2004," *Roll Call*, Jan. 20, 2004, p. 3. For a discussion of the census enumeration issues affecting North Carolina and Utah, see CRS Report RS21638, *House Apportionment: Could Census Corrections Shift a House Seat?*, by David Huckabee.

[12] Mary Beth Sheridan, "House Panel Endorses D.C. Vote; Bill Needs Approval from Judiciary Committee," *Washington Post*, May 19, 2006, B1; Isaiah J. Poole, "House Plan to Give the District a Vote Clears Hurdle," *CQ Weekly*, May 22, 2006, p. 1418.

treating DC as a state, with a House Member and two Senators representing it in Congress. This bill was referred to the Judiciary Committee.

Representatives Dana Rohrabacher has introduced legislation (H.R. 190) that would permit a House Member to represent the District of Columbia in exchange for a new Member from the state next in line for an additional Member, most likely Utah. The bill would explicitly direct that District of Columbia residents be counted as residents of the state of Maryland for purposes of federal elections. District residents would be eligible to vote for a Representative in Congress (the bill prohibits the division of the District of Columbia into separate Maryland congressional districts), the two Senators from the State of Maryland, and for President. Separate electoral votes for the District of Columbia would be ended, and the post of District of Columbia Delegate would be abolished. Representative Rohrabacher had introduced similar legislation in the 108th Congress.

Action in the 108th Congress. On June 23, 2004, the Government Reform and Oversight Committee held a hearing on Chairman Davis' proposal. The committee heard testimony from Representatives Dana Rohrabacher and Ralph Regula, who also had introduced legislation to provide some form of voting representation to residents of the District of Columbia. DC Mayor Anthony Williams and several others also testified.

Also in the 108th Congress, Representative Regula introduced legislation (H.R. 381) that would have returned most of the territory now associated with the current District of Columbia to Maryland[13] and transformed the DC Delegate into a House Member from Maryland, but his bill would not have authorized another seat for Utah. The bill would have carved out a section of the District, called the National Capital Service Area, over which Congress would have retained legislative control.

The Davis, Rohrabacher, and Regula bills were all referred to the House Judiciary Committee and the House Government Reform Committee. Under House Rule X, the Government Reform Committee has jurisdiction over issues relating to the District of Columbia, while the Judiciary Committee has jurisdiction over measures relating to the elections of Members to the House of Representatives and to the apportionment process. None of the measures saw action in the 108th Congress.

Replacement of Delegates and the Resident Commissioner. On March 3, 2005, the House passed H.R. 841, a measure sponsored by Representative F. James Sensenbrenner requiring states to hold expedited special elections to fill vacancies in the House of Representatives in the wake of a catastrophic event. The bill sets deadlines for primaries and special elections and would apply these provisions to territories with delegates or resident commissioners: the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam and the U.S. Virgin Islands. A similar bill passed the House in 2004, but that version did not include the territories in its language. The Senate took no action on that bill.

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[13] In the 1830s, a portion of the District of Columbia, formerly part of Virginia, was retroceded to it.

Evolution of Territorial Delegates

Northwest Ordinance

The office of Delegate — sometimes called "nonvoting Delegate" — dates to the late 1700s, when territories bound for statehood were granted congressional representation. The Northwest Ordinance of 1787, which was enacted under the Articles of Confederation in order to establish a government for the territory northwest of the Ohio River, provided for a territorial Delegate.[14] Earlier, the Ordinance of 1784 had made provision for territorial representation in Congress, but it had never been put into effect.[15]

Following ratification of the U.S. Constitution, the first Congress reenacted the Northwest Ordinance.[16] The ordinance specified that the government of the Northwest Territory would initially consist of a governor and other officials appointed by Congress. According to Section 9, once the free adult male population in the district[17] reached 5,000, qualified voters would be able to elect representatives from their counties or townships to a house of representatives.[18] This elected house together with an appointed legislative council would elect a Delegate to Congress, as stated in Section 12 of the Northwest Ordinance:

> As soon as a legislature shall be formed in the district, the Council and house assembled in one room, shall have authority by joint ballot to elect a Delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary Government.[19]

The Delegate's duties, privileges, and obligations, were otherwise left unspecified.

First Delegate

In 1790, Congress extended all the privileges authorized in the Northwest Ordinance to the inhabitants of the territory south of the Ohio River and provided that

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[14] "The Northwest Ordinance: An Annotated Text," in Robert M. Taylor, Jr., ed., *The Northwest Ordinance, 1787* (Indianapolis: Indiana Historical Society, 1987), pp. 51-53.

[15] Julian P. Boyd, ed. and others, *The Papers of Thomas Jefferson,* 30 vols. (Princeton: Princeton University Press, 1950-2000), vol. 6, p. 615. Still earlier references to territorial representation in Congress can be found in a 1776 letter from Silas Deane to the Select Committee of Congress and in Thomas Paine's *Public Good* (1780). See Hulbert, Archer Butler, ed., *Ohio in the Time of the Confederation* (Marietta, Ohio: Marietta Historical Commission, 1918), pp. 1, 3, 6, 12.

[16] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50-53. The act made some modifications to the original ordinance in order to adapt it to the Constitution.

[17] The ordinance established the territory as one district but allowed for subdivision in the future, as expedient. "The Northwest Ordinance: An Annotated Text," p. 31.

[18] "The Northwest Ordinance: An Annotated Text", pp. 36-51.

[19] Ibid., p. 51.

"the government of the said territory south of the Ohio, shall be similar to that which is now exercised in the territory northwest of the Ohio."[20]

Four years later, the territory south of the river Ohio sent the first territorial Delegate to Congress. On November 11, 1794, James White presented his application to the House of Representatives for seating in the Third Congress.[21] A House committee reported Mr. White's application favorably and submitted a resolution to admit him, touching off a wide-ranging discussion about the Delegate's proper role.[22]

An immediate question arose: Should the Delegate serve in the House or in the Senate? The Northwest Ordinance, which had been enacted by the unicameral Congress under the Articles of Confederation, had only specified a "seat in Congress." Some Members of Congress argued that the proper place for Delegate White was the Senate since his method of election, by the territorial legislature, was similar to that of Senators. Others suggested that perhaps Mr. White should sit in both chambers. Proposals for seeking Senate concurrence in the matter of admitting Delegate White and for confining his right of debate to territorial matters were dismissed. On November 18, 1794, the House approved the resolution to admit Delegate White to a nonvoting seat in that body.[23] At least one Delegate has served in every Congress since, with the single exception of the Fifth Congress (1797-1799).

Debate surrounding Delegate White's taking the oath further revealed House Members' various perceptions of his status. Some Members believed that Mr. White should be required to take the oath. Representative James Madison disagreed. He argued:

> The proper definition of Mr. White is to be found in the Laws and Rules of the Constitution. He is not a member of Congress, therefore, and so cannot be directed to take an oath, unless he chooses to do it voluntarily.[24]

Describing Delegate White as "no more than an Envoy to Congress," Representative William Smith maintained that it would be "very improper to call on this gentlemen to take such an oath." He characterized Mr. White as "not a Representative from, but an Officer deputed by the people of the Western Territory." In making the case that it "would be wrong to accept his oath," Representative Jonathan Dayton emphasized Mr. White's lack of voting power: "He is not a member. He cannot vote, which is the essential part." Representative Dayton compared Delegate White's influence in the House to that of a printer who "may be

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[20] Act of May 26, 1790, ch. 14, 1 Stat. 123.

[21] *Annals of Congress*, vol. 4, 3rd Cong., 2nd sess., Nov. 11, 1794, p. 873.

[22] Everett S. Brown, "The Territorial Delegate to Congress," in *The Territorial Delegate to Congress and Other Essays* (Ann Arbor, Mich.: George Wahr Publishing Company, 1950), pp. 4-5.

[23] *Annals of Congress,* vol. 4, 3rd Cong., 2nd sess., Nov. 18, 1794, pp. 884-889.

[24] Ibid., p. 889.

said to argue and influence, when he comes to this House, takes notes, and prints them in the newspapers."[25]

Ultimately, the House decided that since Mr. White was not a Member, he was not required to take the oath.[26] At the same time, Congress, by law, granted Mr. White the same franking privileges and compensation as Members of the House.[27]

The White case established several precedents for the treatment of future Delegates. In 1802, Congress passed legislation that extended the franking privilege to, and provided for the compensation of, "any person admitted, or who may hereafter be admitted to take a seat in Congress, as a delegate."[28] Like Mr. White, all future Delegates would sit in the House. This practice was written into law in 1817. The law stated, in part:

> ... such delegate shall be elected every second year, for the same term of two years for which members of the house of representatives of the United States are elected; and in that house each of the said delegates shall have a seat with a right of debating, but not of voting.[29]

Subsequent statutes authorizing Delegates specified service in the House. The decision not to administer the oath to Delegate White, however, did not become precedential. All future Delegates, beginning with the second, would take the oath.

Unincorporated Territories

After the U.S. acquisition of overseas territories following the Spanish-American War, the Supreme Court put forth a new concept of territorial status. In a series of cases known as the Insular Cases (1901-1922), the Court distinguished between "incorporated" and "unincorporated" territories. Incorporated territories were considered integral parts of the United States, to which all relevant provisions of the U.S. Constitution applied. They were understood to be bound for eventual statehood. The newly acquired territories were considered unincorporated, however, and, as such, only the "fundamental" parts of the Constitution applied of their own force. The political status of unincorporated territories, the Court said, was a matter for Congress to determine by legislation.[30]

Congress did grant representation to two of the territories acquired from Spain — Puerto Rico and the Philippines. It did so, however, in a way that distinguished their situation from that of statehood-bound territories. Rather than authorizing

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[25] Ibid., pp. 889-890.

[26] Ibid., pp. 890.

[27] Act of Dec. 3, 1794, ch. 2, 1 Stat. 403-404.

[28] Act of Feb. 18, 1802, ch. 5, 2 Stat. 130-131.

[29] Act of Mar. 3, 1817, ch. 42, 3 Stat. 363.

[30] Frederick R. Coudert, "The Evolution of the Doctrine of Territorial Incorporation." *Columbia Law Review*, vol. 26 (Nov. 1926), pp. 823-850.

Delegates, Congress provided for Resident Commissioners to the United States from Puerto Rico[31] and the Philippines,[32] who were to be entitled to "official recognition as such by all departments." According to Abraham Holtzman:

> [N]o reference to Congress or the House of Representatives was made in the authorizing statutes. Apparently, it was Congress's intent that the mandate of these representatives be broader than service in the U.S. legislature....This suggests a role for resident commissioners more akin to that of a foreign diplomat than that of a legislator. Nevertheless, the representatives from these two territories did serve in the House ....[33]

The Resident Commissioners from Puerto Rico and the Philippines did not enjoy the same privileges as the nonvoting Delegates; initially, they were not even allowed on the House floor. In 1902 and 1908, respectively, the House of Representatives granted them the right to the floor.[34] In 1904, the Puerto Rican Resident Commissioner was given the "same powers and privileges as to committee service and in the House as are possessed by Delegates" and was deemed "competent to serve on the Committee on Insular Affairs as an additional member."[35] The Resident Commissioners from the Philippines, however, were never permitted to serve on standing committees.

The posts of resident commissioners differed from those of delegates in other significant ways. Initially, the Philippines, owing to its substantially larger population and dispersed land mass, was authorized two Resident Commissioners who served for three-year terms. It was not until the Tydings-McDuffie Act of 1934, setting a timetable leading to the ultimate independence of the Philippines, that the second Resident Commissioner position was abolished. The Resident Commissioner from Puerto Rico was initially chosen for a two-year term, but Congress, at the initiative of the Puerto Rican government, later extended it to four years.[36]

The Delegates' ranks continued to grow with the authorization of congressional representation for the territories of Guam and the Virgin Islands in 1972.[37] And through further amendment of House rule XII, "each Delegate to the House" was given the same committee assignment rights and committee powers and privileges

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[31] Act of Apr. 12, 1900, ch. 191, 31 Stat. 77, 86.

[32] Act of July 1, 1902, ch. 1369, 32 Stat. 691, 694.

[33] Abraham Holtzman, "Empire and Representation: The U.S. Congress," *Legislative Studies Quarterly*, vol. 11 (May 1986), p. 253.

[34] *Congressional Record*, vol. 35 (June 28, 1902), p. 7608; *Congressional Record*, vol. 42 (Feb. 4, 1908), p. 1540.

[35] *Congressional Record*, vol. 38 (Feb. 2, 1904), pp. 1523, 1529. Until 1921, the Puerto Rican Resident Commissioner, like the other Delegates, served a two-year term. Effective that year, however, the Resident Commissioner's term was extended to four years. Act of Mar. 2, 1917, ch. 145, 39 Stat. 951, 963.

[36] CRS Report RL31856, *Resident Commissioner from Puerto Rico*, by Paul S. Rundquist. The report also briefly discusses the Philippine resident commissioners.

[37] P.L. 92-271, Apr. 10, 1972, 86 Stat. 118.

as Members of the House.[38] In 1978, the territory of American Samoa likewise gained the right to send a Delegate to the House. According to the authorizing statute:

> Until the Rules of the House of Representatives are amended to provide otherwise, the Delegate from American Samoa . . . shall be entitled to whatever privileges and immunities that are, or hereinafter may be, granted to the nonvoting Delegate from the Territory of Guam.[39]

Delegates Rights and Responsibilities

Since the first Delegate was sent to Congress, the House has struggled with the role Delegates should play in the House. Some Members, noting that the Constitution, in Article I, Section 2, requires that the House be made up of people "chosen every second year by the People of the several states," have expressed concerns that allowing Delegates to have the same rights and responsibilities as Members would be unconstitutional. Because Delegates, by definition, do not represent states, Members have on several occasions debated what rights they should exercise in the House.

Evidence of this debate is the variation in the role Delegates have played in committees. For significant periods, Delegates were not appointed to standing committees, and could not vote during committee consideration of measures or matters even on committees where they were permitted to serve. Which committees Delegates could serve on and their rights on those committee became themes in Congress over the last 200 years.

Currently, Delegates enjoy powers, rights, and responsibilities identical, in most respects, to those of House Members from the states. Delegates can speak and introduce bills and resolutions on the floor of the House and can speak and vote in House committees. Delegates are not, however, full-fledged Members of the House. They cannot vote on the House floor, whether the House is operating as the House, or as the Committee of the Whole House on the State of the Union, a parliamentary device used by the House to expedite the consideration of legislation. In addition, Delegates cannot offer a motion to reconsider a vote and are not counted for quorum purposes.

Committee Assignments and Voting. The House began to define the functions of Delegates when, on January 13, 1795, it appointed Mr. White a member of a select committee to investigate better means of promulgating the laws of the United States.[40] During several subsequent Congresses, the House continued the practice of allowing Delegates to serve on select committees. William Henry Harrison, the Second Delegate of the Northwest Territory, served on a number of select committees, some of which he had moved to create, that addressed issues such

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[38] *Congressional Record*, vol. 119 (Jan. 3, 1973), pp. 17, 27.

[39] P.L. 95-556, Oct. 31, 1978, 92 Stat. 2078-2079.

[40] *Annals of Congress*, vol. 4, 3rd Cong., 2nd sess., Jan. 13, 1795, p. 1082.

as public land laws and the judiciary in the territories.[41] According to historians, in December 1799, Mr. Harrison became the first Delegate to chair a select committee.[42] An active participant in House debates, Delegate Harrison likewise served as a House conferee in disputes with the Senate.[43]

The first regular assignment of Delegates to standing committee duty occurred under a House rule adopted in December 1871. The rule directed the Speaker of the House to appoint a Delegate as an additional member of the Committee on the Territories and to appoint the DC Delegate as an additional member of the Committee for the District of Columbia.[44] Additional committee assignments were authorized in 1876, 1880, and 1887.[45] Describing the concurrent development of the Delegates' non-legislative role, Earl Pomeroy wrote:

> The territorial delegate increased in stature appreciably between 1861 and 1890. Without the formal powers of a congressman, he acquired more of a congressman's influence and general functions. He was disseminator of information, lobbyist, agent of territorial officers, of the territorial legislature, and of his constituency, self-constituted dispenser of patronage. He interceded at times in almost every process of control over the territories, and generally no one challenged his right to intercede.[46]

Along with the right to belong to a standing committee, the House also debated what rights Delegates once on the committees could exercise. Historians differ on whether delegates were allowed to vote in committees prior to the early 1970s. One account states that as "additional members" of standing committees from 1871 through 1971, Delegates did not have the right to vote in committee.[47]

Some evidence suggests that Delegates were allowed to vote in committee in and around 1841. According to a September 3, 1841, report of the Committee of Elections:

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[41] See, for example, *Annals of Congress*, vol. 10, 6th Cong., 1st sess., Dec. 1799-Apr. 1800, pp. 193, 197-198, 209-210, 477, 510, 513, 660.

[42] There is disagreement, however, over which select committee Delegate Harrison was first appointed to chair. See Dorothy Burne Goebel, *William Henry Harrison* (Philadelphia: Porcupine Press, 1974) (Reprint of the 1926 edition), pp. 44, 49; and Jo Tice Bloom. "Early Delegates in the House of Representatives," in *The American Territorial System* (Athens, Ohio: Ohio University Press, 1973), p. 67.

[43] U.S. Congress, House, *The Journal of the House of Representatives*, vol. 4, 6th Cong., 1st sess. (Wilmington, Del.: Michael Glazier, Inc., 1977), pp. 187, 372.

[44] *Congressional Globe*, vol. 102, 42nd Cong., 2nd sess., Dec. 13, 1871, pp. 117-118.

[45] *Hinds' Precedents*, vol. 2, Sec. 1297, p. 864. In committee, the Delegates had the same powers and privileges as on the floor of the House (and thus, could not vote), and could make any motion except to reconsider (which presumes that the mover had previously voted).

[46] Earl S. Pomeroy, *The Territories and the United States, 1861-1890* (Philadelphia: University of Pennsylvania Press, 1947), p. 80.

[47] Holtzman, "Empire and Representation: The U.S. Congress," p. 261.

> With the single exception of voting, the Delegate enjoys every other privilege and exercises every other right of a Representative. He can act as a member of a standing or special committee and vote on the business before said committees, and he may thus exercise an important influence on those initiatory proceedings by which business is prepared for the action of the House. He is also required to take an oath to support the Constitution of the United States.[48]

Even if the Delegates at one point had that right, they had lost it by the late 1880s. On February 23, 1884, a proposition was made in the House that Delegates be allowed to vote in committee. The proposition was referred to the Committee on Rules, but no action was taken.[49]

The right of Delegates to vote in committee resurfaced as an issue in the 1930s. After a lengthy investigation, a House committee reported that neither the Constitution nor any statutes supported such a committee vote. Although a House rule provided for the appointment of territorial Delegates as additional members on certain committees, the report noted, "the House could not elect to one of its standing committees a person not a Member of the House." According to the report:

> The designation "additional member" applied to a Delegate clearly indicates the character of the assignment. Expressly the Delegate shall exercise in the committee . . . . the same powers and privileges as in the House, to wit, the "right of debating, but not the right of voting."[50]

In the 1970s, the system of territorial representation in Congress underwent significant change as more territories were granted Delegates and as Delegates were given increased powers.[51] For 11 years following the admission of Hawaii to the Union in 1959, the Resident Commissioner from Puerto Rico had been the only territorial representative in Congress. Then, in 1970, the District of Columbia was

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[48] U.S. Congress, House Committee on Elections, *David Levy*, 27th Cong., 1st sess., H.Rept. 10 (Sept 3, 1841), p. 5. Quoted in Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States,* 5 vols (Washington: GPO, 1907), vol. 2, p. 865, (Hereafter cited as *Hinds' Precedents*). This report excerpt raises the question of whether Delegates served on standing committees around, or prior to, 1841. According to Abraham Holtzman, they did not: "As standing committees began to emerge in the late eighteenth and early nineteenth centuries, however, the House adopted a practice of excluding territorial representatives from these important centers of decision making." Holtzman, "Empire and Representation: The U.S. Congress," p. 257. Similarly, Jo Tice Bloom writes: "During the early period [1794-1820], delegates were never barred from serving on standing committees by any action of the House. They probably did not serve on these committees for the simple reason that a delegate was never appointed and, therefore, the tradition never began." Bloom, "Early Delegates in the House of Representatives," p. 67. Nevertheless, the Court in *Michel v Anderson* (817 F.Supp. 123, note 22) was persuaded that delegates had voted in committee during the early 19th Century, and only agreed to relinquish that right in return for guaranteed seats on committees dealing with territorial affairs.

[49] *Hinds' Precedents*, vol. 2, Sec. 1300, p. 865.

[50] *Congressional Record*, vol. 75 (Jan. 18, 1932), pp. 2163-2164.

[51] See **Table 1**.

authorized to elect a Delegate.[52] That same year, Congress enacted the Legislative Reorganization Act, which contained a provision to amend the House rule on Delegates (rule XII) to read:

> The Resident Commissioner to the United States from Puerto Rico shall be elected to serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other Members.[53]

The provision was contained in a floor amendment offered by Puerto Rico's Resident Commissioner Jorge Cordova.

> My amendment would abolish this privilege [service on a committee as an "additional member"]. It would provide for the election of the Resident Commissioner to standing committees in the same manner as Members of the House are elected. This would mean, in effect, that the Resident Commissioner may be fortunate to secure election to one of the three committees on which he now serves. But my amendment would also provide that the Resident Commissioner have the same rights in committee as other members, which means, of course, that he would have the right to vote within the committee.

Representative Thomas S. Foley supported the amendment claiming that the grant of voting rights in committee to delegates was within the power of the House.

> The committees of the House of Representatives are creatures of the House of Representatives. They can be extinguished at will and created at will. It does not even require concurrence of the other body when we take such an action. Depriving members of the right to vote in a committee is fully within the power of the House, by abolishing the committee. Giving them additional rights to vote is within the power of the House by creating a new committee.... Nothing that the Resident Commissioner could do in a committee vote could become a final decision unless a majority of the elected Members of Congress supported his position. However, in the standing committee itself I think that the Member from Puerto Rico should have a vote. I think the House has the constitutional authority to give him a vote in that limited area.

The amendment was opposed by Representative B.F. Sisk, the floor manager of the bill and a senior member of the House Rules Committee. Sisk asked rhetorically whether the Cordova amendment "would be interpreted so that he would be entitled to vote in the Committee of the Whole House on the State of the Union." In response, sometime later, Cordova observed that "The amendment which I have offered refers expressly to the standing committees. I believe the Committee of the Whole House is not a standing committee." The Cordova amendment was agreed to by voice vote.[54]

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[52] P.L. 91-405, Sept. 22, 1970, 84 Stat. 845, 848. Congress had previously authorized a DC Delegate (Act of Feb. 21, 1871, ch. 62, 16 Stat. 419, 426), but soon afterward revoked that provision (Act of June 20, 1874, ch. 337, 18 Stat. 116).

[53] P.L. 91-510, Oct. 26, 1970, 84 Stat. 1140, 1161.

[54] The full debate on the Cordova amendment can be found in *Congressional Record*, vol.

(continued...)

In 1971, the House rewrote rule XII, according the rights in committee set forth in the Legislative Reorganization Act to the Resident Commissioner from Puerto Rico as well as to the newly authorized DC Delegate.[55]

Committee of the Whole Voting Rights. During the 103rd Congress, Delegates were allowed to vote in the Committee of the Whole, a development that became the focus of intense partisan controversy. In January 1993, the Democratic majority proposed to amend House Rule XII to permit such Delegate voting. In the event that a matter before the Committee of the Whole was decided by the margin of the Delegates' votes, however, another amendment (to House Rule XXIII) provided for an automatic re-vote in the full House, where Delegates could not participate.[56] Supporters of the rule XII change portrayed it as a logical extension of the Delegates' right to vote in committee.

A group of Republican House Members filed a lawsuit challenging the amendment to rule XII. They argued that the rule change violated Article I of the Constitution by granting legislative power to Delegates who were not "Members [of the House of Representatives] chosen every second Year by the People of the several States."[57] They took issue with the characterization of the Committee of the Whole as a committee and maintained, instead, that it was tantamount to the full House. In their complaint, the plaintiffs stated:

> [N]on-member voting in the Committee of the Whole impairs and dilutes the constitutional rights of the plaintiff-Representatives, both as Members of the House and as voters who enjoy the right to full, fair and proportionate representation in the House of Representatives.[58]

They further alleged that the House did not have the authority to unilaterally expand the powers of the Delegates.

The House defendants[59] countered that the House of Representatives was constitutionally empowered to "determine the Rules of its Proceedings."[60] They argued that the Committee of the Whole, like other congressional committees, was an advisory body and was not subject to Article I requirements. They rejected the plaintiffs' contention that the Committee of the Whole effectively controlled action

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[54] (...continued)
116 (Sept. 15, 1970), pp. 31848-31852.

[55] *Congressional Record*, vol. 117 (Jan. 21-22, 1971), pp. 14, 143-144. Rule XII, as amended, also stipulated that the DC Delegate serve on the Committee on the District of Columbia.

[56] *Congressional Record*, vol. 139 (Jan. 5, 1993), pp. 50-99.

[57] U.S. Constitution. Art. I, Sec. 2.

[58] *Michel* v. *Anderson*, No. 93-0039 (HHG), Complaint for Declaratory and Injunctive Relief, at 4 (D.D.C. Jan. 7, 1993).

[59] The House defendants were the Clerk of the House and the five Delegates.

[60] U.S. Constitution. Art. I, Sec. 5.

in the House, citing both the preliminary nature of its proceedings and the provision for an automatic re-vote in cases in which Delegate votes were decisive.[61]

In March 1993, Judge Harold H. Greene of the U.S. District Court for the District of Columbia upheld the changes to the House rules. As his opinion made clear, however, he did so only because of the automatic re-vote provision. "If the only action of the House of Representatives had been to grant to the Delegates from the District of Columbia, Guam, Virgin Islands, and American Samoa, and the Resident Commissioner from Puerto Rico the authority to vote in the Committee of the Whole," he wrote, "its action would have been plainly unconstitutional."[62] His opinion further stated:

> [W]hile the action the House took on January 5, 1993 undoubtedly gave the Delegates greater stature and prestige both in Congress and in their home districts, it did not enhance their right to vote on legislation....[B]y virtue of Rule XXIII they [the votes of the Delegates] are meaningless. It follows that the House action had no effect on legislative power, and that it did not violate Article I or any other provision of the Constitution.[63]

In January 1994, the U.S. Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the House rule changes.[64]

In January 1995, at the start of the 104th Congress, the House of Representatives, under a Republican majority, amended Rule XII to prohibit Delegate voting in the Committee of the Whole.[65]

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[61] *Michel* v. *Anderson*, No. 93-0039 (HHG), House Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Preliminary Injunction (D.D.C. Feb. 2, 1993).

[62] *Michel* v. *Anderson*, 817 F.Supp. 126, 147 (D.D.C. 1993).

[63] *Michel*, 817 F.Supp. at 147-148.

[64] *Michel* v. *Anderson*, 14 F.3d 623 (D.C.Cir. 1994).

[65] *Congressional Record*, vol. 141 (Jan. 4, 1995), pp. 447-530.

Table 1. Territories Represented in Congress

Territory	Statute	Year
Northwest of the river Ohio	1 Stat. 50	1789[a]
South of the river Ohio	1 Stat. 123	1790
Mississippi	1 Stat. 549	1798
Indiana	2 Stat. 58	1800
Orleans	2 Stat. 322	1805
Michigan	2 Stat. 309	1805
Illinois	2 Stat. 514	1809
Missouri	2 Stat. 743	1812
Alabama	3 Stat. 371	1817
Arkansas	3 Stat. 493	1819
Florida	3 Stat. 654	1822
Wisconsin	5 Stat. 10	1838
Iowa	5 Stat. 10	1838
Oregon	9 Stat. 323	1848
Minnesota	9 Stat. 403	1849
New Mexico	9 Stat. 446	1850
Utah	9 Stat. 453	1850
Washington	10 Stat. 172	1853
Nebraska	10 Stat. 277	1854
Kansas	10 Stat. 283	1854
Colorado	12 Stat. 172	1861
Nevada	12 Stat. 209	1861
Dakota	12 Stat. 239	1861
Arizona	12 Stat. 664	1863
Idaho	12 Stat. 808	1863
Montana	13 Stat. 853	1864
Wyoming	15 Stat. 178	1868
District of Columbia	16 Stat. 426	1871

Territory	Statute	Year
Oklahoma	26 Stat. 81	1890
Puerto Rico	31 Stat. 86	1900
Hawaii	31 Stat. 141	1900
Philippine Islands	32 Stat. 694	1902
Alaska	34 Stat. 169	1906
District of Columbia	84 Stat. 848	1970
Virgin Islands	86 Stat. 118	1972
Guam	86 Stat. 118	1972
American Samoa	92 Stat. 2078	1978

Source: "Nonvoting Samoan Delegate to House," *Congressional Record*, vol. 124 (Oct. 3, 1978), p. 33287.

a. The measure of the First Congress re-enacted with changes necessitated through the ratification of the Constitution the provisions of the Northwest Ordinance of 1787, enacted by the Articles of Confederation Congress.