UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ROBERT H. MICHEL, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action No. 93-0039 (HHG) |
| | ) | |
| DONNALD K. ANDERSON, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| _____ | ) | |

AMICUS CURIAE
ABRAHAM LINCOLN FOUNDATION FOR PUBLIC POLICY RESEARCH, INC.'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

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Date: February 5, 1993

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## INTRODUCTION

The Plaintiffs' Application for Preliminary Injunction asks that this Court enjoin a violation of the Constitution and laws of the United States by the U.S. House of Representatives. The House, with every Republican Member voting "no," has adopted a House Rules change permitting non-Member Delegates from the District of Columbia and the United States territories and the Resident Commissioner for Puerto Rico to vote on the floor a "Committee of the Whole House on the state of the Union" (hereinafter "Committee of the Whole"), in violation of Article I of the Constitution. While purporting to protect and enfranchise minorities, the majority party in the House has ridden roughshod over the rights of the minority party in the House, and has violated the rights of the citizens of the fifty states. The Abraham Lincoln Foundation for Public Policy Research, Inc., appearing as Amicus Curiae, views this case as presenting an

important and clear-cut Constitutional issue, and joins with Plaintiffs, on the grounds and for the reasons set out below, to ask that this Court intervene to prevent such an abuse of Congressional power.

## INTEREST OF THE AMICUS CURIAE

The Abraham Lincoln Foundation for Public Policy Research, Inc. (hereinafter "Abraham Lincoln Foundation") is a nonprofit corporation established under the laws of the Commonwealth of Virginia in 1988. Among the purposes of the Abraham Lincoln Foundation are to promote the social welfare through informing and educating the public and government officials on issues related to the foundational principles of the American republic.

The Abraham Lincoln Foundation, including more than 80,000 members and supporters throughout the United States, has a special interest in issues of concern to black and minority populations, including support for the free enterprise system, back-to-basics education, the constitutional, statutory and judicial protection of persons and property, and traditional family values. Since its inception, the Abraham Lincoln Foundation has taken an active role in educating the public and government officials regarding the troublesome issues associated with proposed statehood for the District of Columbia.[1]

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[1] In pursuing its social welfare goals, the Abraham Lincoln Foundation has often published and advanced the views of black conservatives. Some individuals have attempted to assert the view that opposition to voting representation in Congress for the District of Columbia (and by analogy the territories) is based on

The Abraham Lincoln Foundation appears before this Court to advance its view, and the view of its members, that the Constitutional provision limiting voting in the House of Representatives to Members precludes the extension of voting rights in the Committee of the Whole to Delegates, and that the Constitution and laws of the United States should not be circumvented or manipulated in order to advance the political agenda of any political party or ideological group.

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racism. [See Voting Representation for the District of Columbia: Hearings Before the Subcomm. on Constitutional Amendments of the Senate, Comm. on the Judiciary, 91st Cong., 2d Sess., p. 8 (1970) (statement of Sen. Edward Kennedy (D-MA)); and Voting Representation for the District of Columbia: Hearings Before the Subcomm. on Constitutional Amendments of the Senate, Comm. on the Judiciary, 95th Cong., 2d Sess., pp. 276-277 (1978) (statement of the National Conference of Black Lawyers).] The Abraham Lincoln Foundation rejects this assertion. In fact, as will be seen, infra, efforts to provide representation for the District of Columbia, as well as resistance to those efforts, began at the time the District of Columbia was created, when race clearly was not a factor, and the issues involved in this controversy, which have been argued for two centuries, will no doubt continue to be debated. Any effort to turn the disputed House Rules changes into a racial issue would be a transparent attempt to appeal to emotionalism and to mischaracterize the changes in order to sell themselves better to the American people, and to reviewing courts. Nevertheless, in view of the language of the Constitution itself, the statutory enactments creating the Offices of Delegate and Resident Commissioner, and in view of more than 200 years of history in the House of Representatives, no amount of rhetoric can constitutionalize or legalize the non-Constitutional grant of power, to Delegates or the Resident Commissioner, to vote on the floor of the House of Representatives in the Committee of the Whole.

## STATEMENT OF THE CASE

On January 5, 1993, the United States House of Representatives, in adopting its Rules for the newly convened 103rd Congress, with all Republicans voting in opposition, adopted Rules which, for the first time in the history of the United States of America, would permit Delegates from American Samoa, Guam, the Virgin Islands and the District of Columbia, as well as the Resident Commissioner for Puerto Rico, to vote in and chair the Committee of the Whole, despite the fact that none of these individuals is a Member of the House.

On January 7, 1993, sixteen Members of the House, each one included in the minority who opposed the Rules changes, filed a Complaint in this Court against the Clerk of the House of Representatives, the four Delegates, and the Resident Commissioner for Puerto Rico, seeking a declaratory judgment that the Rules changes are unlawful and an order enjoining their implementation.

On January 21, 1993, a First Amended Complaint was filed, adding four additional persons who are citizens and voters as Parties Plaintiff, but making the same allegations and requests for relief set forth in the original Complaint.

On January 21, 1993, the Plaintiffs filed their Application for Preliminary Injunction and their Memorandum in support thereof. This Memorandum is submitted by the Abraham Lincoln Foundation, as Amicus Curiae, in support of the Plaintiffs' Application for Preliminary Injunction.

## STATEMENT OF FACTS

### Introduction

The central issue before the court is the constitutionality and legality of the House Rules change granting the right to vote to Delegates representing the District of Columbia and three territories, and to the Resident Commissioner from Puerto Rico.[2]

Both the District of Columbia and the territories were expressly provided for in the United States Constitution, and neither the District of Columbia nor the territories can be considered "states" eligible to send Members to the House with the right to vote. In fact, this lack of representation in Congress has frequently sparked debate; not about whether Delegates from the District of Columbia and the territories were entitled to vote in Congress, for it has long been established that they may not under the Constitution as it has existed since the founding of the Republic, but rather about the merits of amending the Constitution to change this lack of voting privilege. Not content with proceeding to attempt to amend the Constitution to enfranchise Delegates, the House Democrats have attempted to do so by a mere House Rule which violates both the Constitution and the statutes creating the Delegate positions.

It is quite apparent from the history of Delegate representation in Congress that there can be no possible

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[2] Unless otherwise stated or apparent from the context, "Delegate," as used in this Memorandum, includes the Defendant Resident Commissioner for Puerto Rico as well as the Defendant Delegates.

misunderstanding about the facts of this case, and that the underlying issue is one of power, involving a clear, misguided attempt by the Majority Party in the House to bypass the Constitution in order to provide voting representation in the House for the District of Columbia and the territories.

Delegate Representation of the District of Columbia

Article I, Section 8, Clause 17 ("the District clause") of the U.S. Constitution provides for a Federal seat of government by granting Congress exclusive legislative authority over a:

> 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.

After a long period of debate, it was agreed that the Federal seat of government would be formed from parts of the state of Maryland and the Commonwealth of Virginia, and by 1790 both Maryland and Virginia had ceded land to establish the seat of the government. It would be ten years, however, before Congress established exclusive jurisdiction over the federal city. During this interim period, residents of the District were under the jurisdiction of their respective states, and they continued to vote for members of Congress from those states to represent their interests. Soon after the elections of 1800, residents of the new District lost their Maryland or Virginia state citizenship, and, with it, their right to vote for representation in Congress. This loss of the right to vote was not unforeseen. Markman, S., Rep. to Attorney General on the Question of Statehood for the District of Columbia, pp. 6-8

(April 1, 1987). During the Constitutional Convention, Alexander Hamilton had moved that the District clause be amended as follows:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes Amount to __ such District shall cease to be parcel of the State granting the same, and Provision shall be made by Congress for their having a District Representation in that Body. [5 Papers of Alexander Hamilton 189-90 (H. Syrett ed.), 1962.]

The Convention rejected this proposed amendment.[3]

The Constitution was ratified, with residents of the new District of Columbia having no voting representation in Congress. Thereafter, the political debate continued, with many believing

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[3] When the State of New York met in convention to ratify the new Constitution, some notable advocates took exception to the District clause, including Thomas Tredwell, who argued:

> [T]he plan of the federal city, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. [2 Elliot's Debates in the Several State Conventions on the Adoption of the Constitution 402, reprinted in 3 The Founder's Constitution 225 (P. Kurland & R. Lerner, eds. 1987).]

that the treatment of the District voters in the Constitution was unfair.[4]

Over the years, the question arose in the context of challenges to federal taxing authority based upon the lack of Congressional representation. But in a decision by Chief Justice Marshall in Loughbrough v. Blake, 18 U.S. (Wheat) 317 (1820), the Supreme Court, confirming the lack of Congressional representation for the District of Columbia as well as the territories, expressly held that District of Columbia residents were subject to taxation. Id. at 324-25. The holding was repeated a century later, the Supreme Court again expressly stating that residents of the District of Columbia, lacking suffrage and having "politically no voice in the expenditure of the money raised by taxation," had no legal complaint because the Constitution does not limit the imposition of taxes upon those who have political representation. Heald v. District of Columbia, 259 U.S. 114, 124 (1922).

This issue of disenfranchisement of residents of the District of Columbia arose once again with the advent of the Twenty-third Amendment to the U.S. Constitution, ratified on

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[4] In 1800, an attorney, Augustus B. Woodward, wrote a series of articles in a local newspaper opposing the loss of voting rights that would come with the assumption of exclusive jurisdiction over the District by Congress. National Intelligencer, December 24, 26, 29, 31, 1800. These articles received wide publication.

Making the same point in a more dramatic fashion, Rep. John Smilie of Pennsylvania stated, "the people of the District will be reduced to the state of subjects and deprived of their political rights." 10 Annals of Cong. 992 (1801).

March 29, 1961, which granted the District of Columbia voting participation in the electoral college. The "purpose" statement of that amendment sets forth its rationale:

> The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our states.... Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed amendment.[5]

Congress was, of course, well aware of the District of Columbia's lack of representation in Congress at the time of this amendment; yet the remedy for what was viewed as a "constitutional anomaly" was voting in Presidential elections, with no provision for a voting Member in the House.

Congress has frequently considered the issue of representation for the District of Columbia. Over 150 separate Constitutional resolutions to provide representation for the District of Columbia have been introduced, with over 20 full hearings in Congress on this issue.[6] Apparently, at no time has it been seriously believed that voting representation in the House for the District or the territories could be accomplished

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[5] Granting Representation in the Electoral College to the District of Columbia, H.R. Rep. No. 1698, 86th Cong., 2d Sess., at 2 (1960).

[6] For a listing of these hearings, see Hatch, Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment, 7 Fordham Urban L.J. 479, 495-96 (1979).

without an amendment to the Constitution. Such a proposed Constitutional Amendment (H.J. Res. 554) was submitted to the states by the Congress in 1978, but at the expiration of the seven-year period allowed for ratification by the states, it had garnered the support of only 16 of the 38 states needed for ratification. Markman, Rep. to Attorney General on the Question of Statehood for the District of Columbia, supra, at pp. 15-16. Under Article V of the Constitution, an amendment must be ratified by at least three-fourths of the States.

With respect to attempts to obtain Congressional representation for the District of Columbia, therefore, the efforts have been continuous, albeit unsuccessful. Finally, Congress itself stepped in with a right of limited participation when the office of Delegate for the District of Columbia was created in 1970. 84 Stat. 848 (D.C. Delegate Act, September 22, 1970). The D.C. Delegate Act vested the District of Columbia Delegate to the House of Representatives "with the right to debate, but not of voting." 2 U.S.C. sec. 25a(a) (1988). As explained further, below, the House later expanded this right of debate to one of voting in standing committees with the express understanding, based upon agreed statements that any further voting rights would be an unconstitutional exercise of legislative power, that such voting rights would not be extended to voting in the Committee of the Whole or to voting on the House floor. With the 1993 amendment of House Rule XII, of course, that commitment to Constitutional limitations has been abrogated.

Delegate Representation of the Territories

The Constitution (Art. IV, Sec. 3, Cl. 2) grants to Congress certain express powers with respect to the territories:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States....

In 1784, the Continental Congress appointed a committee to prepare a plan for the temporary government of the western territories. By 1789, Congress approved the Northwest Ordinance, authorizing politically organized territories with a sufficient population to elect to Congress a delegate "with a right of debating, but not of voting". 1 Stat. 50 (August 7, 1789).

The first territorial Delegate to Congress was James White, who presented his credentials to the House on November 11, 1794. White was admitted by the House "on the theory that it might admit to the floor for debate merely anybody whom it might choose." I Hinds, Precedents of the House of Representatives (hereinafter "Hinds"), sec. 400 (1904). Pursuant to the Northwest Ordinance, White was given the right to debate, but not to vote. Id. Other Delegates followed James White, and were given the same right of debating but not of voting. It was recognized that Delegates were not members of the House under the Constitution, but were merely the creation of statutes.

> In the first place, Is a Delegate from a Territory a Member of the House of Representatives within the meaning of the Constitution? The second section of the first article says: "The House of Representatives shall be composed of Members chosen every second year by the people of the

> several States...." There is no provision in the Constitution for the election of Delegates to the House of Representatives or to the Senate. They are entirely the creature of statute. They are clearly not within the clause of the Constitution last above quoted....Delegates have never been regarded as Members in any constitutional sense, because their powers, duties, and privileges on the floor of the House, when admitted, are limited. They may speak for their Territories; they may advocate such measures as they think proper; they may introduce bills and serve on committees; but they are deprived of the right to vote. [I Hinds, sec. 473 (emphasis added).]

As years passed, territorial Delegates became more involved with the day-to-day workings of Congress. Delegates were given the right to serve on committee (II Hinds, sec. 1296), to move for impeachment of a judge (II Hinds, sec. 1303), to be chairman of a select committee (II Hinds, sec. 1299), and to make any motion which a Member could make, except a motion to reconsider, because such a motion was dependent upon the right to vote (II Hinds, sec. 1292). It is not clear whether delegates voted in committee in the early 1800's, but a proposed resolution in 1884 to permit committee voting by territorial Delegates was not adopted.[7] In the Organic Act, 31 Stat. 77, 86 (April 12, 1900), the position of nonvoting Resident Commissioner for Puerto Rico was created. In 1932, a special committee was appointed to inquire into the possibility of Delegate voting. The committee

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[7] Sheridan, The Evolution of Functions of Non-Voting Delegates in the House of Representatives: A Brief History. Cong. Res. Serv. Rep. at 4 (May 11, 1982) (hereinafter, "Sheridan").

concluded in its report that there was no basis under the Constitution or statutes for a Delegate to vote in committee. Sheridan, supra, at 6; Cong. Rec., 72nd Cong., 1st Sess. pp. 2163-64 (1932).

The situation remained unchanged until October 26, 1970, when the Resident Commissioner of Puerto Rico was given the right to vote in committee. P.L. 91-510 (1970). The vote on this issue in the House was preceded by serious debate regarding the constitutionality of such an action. Resident Commissioner Cordova of Puerto Rico offered the amendment of Rule XII of the Rules of the House to permit him a vote in committee. In floor debate, Rep. B.F. Sisk (D-CA) challenged the constitutionality of the proposal:

> In view of the fact that the committees are merely the creatures of the House and are an extension of the House, and in view of the fact that -- as I understand by the statement of the distinguished Resident Commissioner -- there is no question he could not vote on the floor of the House, as a constitutional matter, therefore it is certainly my position, and I know that of many scholars, then to vote in a committee would raise the same constitutional question....
>
> Nowhere in the Constitution nor in the statutes can the intention be found to clothe the Delegate with legislative power. [116 Cong. Rec. at 31849 (September 15, 1970).]

Rep. Thomas Foley (D-WA) then responded to Rep. Sisk's constitutional objection to Committee voting by delegates:

> Now it is very clear, as the Resident Commissioner has said, that a constitutional amendment would be required to give the Resident Commissioner a vote in the Committee of the Whole or the full House. This

> amendment proposes only to give the Commissioner a vote in standing committees.... The point is that the constitutional issue does not touch preliminary advisory votes which is what standing committee votes are, but only the votes which are cast in the Committee of the Whole or the full House. These votes can be cast only by Members of Congress. [Id. at p. 31849 (emphasis added)].

Rep. Sisk then expressed his concern that the House was establishing a precedent that could allow voting by the Resident Commissioner in the Committee of the Whole.

> But I am curious to know if it would be interpreted that he would be entitled to vote in the Committee of the Whole House on the State of the Union, as the Committee of the Whole certainly is separate and apart from the House and in the same sense is a creature of the House in the same sense that a committee is a creature of the House.... I am very much concerned about the precedents that you are setting because what we are talking about may well apply to Delegates who come to the House in the future. [Id. at 31851.]

Commissioner Cordova reassured Rep. Sisk 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." Id.

Without spoken dissent to the view that the right to vote in the Committee of the Whole could not constitutionally be extended to Delegates, Congress approved the amendment, which was enacted as part of the Legislative Reorganization Act of 1970, Pub. L. 91-510 (October 26, 1970). The other territories also were authorized to be represented by Delegates in accordance with statute. P.L. 92-171 (April 10, 1972) (regarding Guam and the

Virgin Islands), see 48 U.S.C. sec. 1711 (1988); P.L. 95-556 (October 31, 1978) (regarding American Samoa), see 48 U.S.C. sec. 1731 (1988). And, as mentioned above, the D.C. Delegate Act had provided such a Delegate position for the District of Columbia. See 2 U.S.C. sec. 25a(a) (1988). The House then extended the privilege of voting in standing committees, which Congress had already granted to the Resident Commissioner, to the Delegates from Guam, the Virgin Islands, American Samoa, and the District of Columbia.

Disputed House Rules Changes of January 5, 1993

The 1993 changes, at issue in this lawsuit, came about in the form of new provisions (House Rules XII and XXIII) adopted by the House when it convened on January 5, 1993.

House Rule XII ("Resident Commissioner and Delegates") was amended, in pertinent part, to extend to each Delegate, "in a Committee of the Whole House on the state of the Union ... the same powers and privileges as Members of the House."

House Rule XXIII ("Committee of the Whole") was amended, in pertinent part, to permit a Delegate to preside over a Committee of the Whole, and it also contained a provision whereby, whenever a "recorded" vote on which the votes cast by the Delegates "have been decisive," the vote would immediately be retaken without the Delegates' participation.

These changes in the House Rules would permit Delegates to have a significant voice in virtually all important proposed legislation emanating from the House of Representatives, as well

as bills that are defeated in the House and are never even transmitted to the Senate. In effect, these changes would permit the Delegates to exercise legislative power under Article I of the Constitution.

## SUMMARY OF ARGUMENT

Article I of the Constitution provides, inter alia, that all legislative powers granted by the Constitution shall be vested in a Congress, consisting of a Senate and a House of Representatives (Section 1), and that the House shall be composed of "Members," who must be chosen by "the People of the several States" (Section 2).

The Delegates are not "Members," and the District of Columbia and the territories are not "States." Since all legislative power is vested in the Senate and a House of Representatives composed of "Members" from "States," it is apparent that the exercise of legislative power in the House by the Delegates would constitute an unconstitutional exercise of legislative power.

The question in this case is whether voting in the Committee of the Whole constitutes an exercise of legislative power. If so, exercise of such a power by the Delegates would be unconstitutional. The Abraham Lincoln Foundation agrees with plaintiffs that the nature of such voting and its practical effect, as well as legislative and judicial precedent interpreting such action, require the conclusion that Delegate

voting in the Committee of the Whole would be an unconstitutional exercise of legislative power in direct violation of Article 1, sections 1 and 2, of the Constitution. One of the Defendant Delegates, Eleanor Holmes Norton, has described the House Rules change as giving her the right to vote in the Committee of the Whole where "virtually all the business of the House is done...." In view of the Congressional debate on this issue, it appears that the defendants have acted with full knowledge of this Constitutional infirmity, but have nevertheless decided to provide for Delegate voting because they feel they have the power to do so and that they are willing, in this instance, to circumvent the Constitution.

The Abraham Lincoln Foundation also submits that this Constitutional question is vitally important, justifying the entry of the requested relief, that the Court has subject matter jurisdiction, and that this case presents a justiciable controversy. The plaintiffs have standing to maintain this action and to seek the declaratory and injunctive relief they have requested. And any objection by the defendants on grounds of lack of jurisdiction or nonjusticiability should be foreclosed by the decision of the Supreme Court in Powell v. McCormack, 395 U.S. 486 (1969). Indeed, one of the Defendant Delegates, Eleanor Holmes Norton, was one of the attorneys in Powell v. McCormack, who argued very effectively that an attempt by the House of Representatives to exclude one of its members (the converse of this case, where the House is attempting to effectively increase

its membership without regard to the Constitution) presented a justiciable issue, and that the exercise of legislative power by Congress is indeed limited by, and subject to, the Constitution.

This Court, it is submitted, should decide the substantive question presented by the plaintiffs, determine that exercise of voting privileges by the Delegates in the Committee of the Whole would be unconstitutional, and enjoin the defendants from taking any such action.

## ARGUMENT

### I. THE EXERCISE OF VOTING RIGHTS BY DELEGATES IN THE COMMITTEE OF THE WHOLE WOULD CONSTITUTE AN ILLEGAL AND UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER

#### A. Delegates are Not Entitled to Exercise Legislative Power

The language of Article I, Sections 1 and 2, of the Constitution is clear and has been consistently interpreted during the 204-year life of this Republic with respect to the proper repositories of federal legislative authority. These sections provide, inter alia, that all legislative powers granted by the Constitution shall be vested in a Congress, consisting of a Senate and a House of Representatives (Section 1), and that the House shall be composed of "Members," who must be chosen by "the People of the several States" (Section 2).

The Delegates are not "Members," and the District of Columbia and the territories are not "States." There should be no serious debate about this. See Hepburn v. Ellzey 6 U.S. (Cranch) 445 (1805) (District of Columbia not a "state" under the Constitution); Loughbrough v. Blake, supra, 18 U.S. (Wheat) at 324-25 (residents of District of Columbia and U.S. territories taxable despite lack of Congressional representation). Since the Delegates are not Members, and since all legislative power is vested in the Senate and a House of Representatives composed of "Members," it is clear that the exercise of voting rights by the Delegates in the Committee of the Whole is unconstitutional if such voting constitutes the exercise of legislative power.

Such a proposition would seem to be self-evident and already seems to have been admitted by the defendants. Nevertheless, it is important to point out that the vesting of legislative power is fixed by Article I, Section 1, of the Constitution, and that such power (assuming it is a valid exercise of power even by Congress) cannot be transferred to others. See, e.g., A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (statute, which would also constitute excessive delegation of legislative power, was invalid because it exceeded Congressional power); Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980) (agency regulations exceeded legislative authority). Nor can Congress expand its membership by treating the Delegates as Members when they clearly do not meet the Constitutional definition of Members. Cf. Powell v. McCormack, 395 U.S. 486, 547-50 (1969) (holding, inter alia, that the power of Congress to judge the qualifications of its members is limited to the standing qualifications prescribed in the Constitution).

It is almost inconceivable that the defendants will attempt to justify the disputed House Rule changes with an argument that their extension of voting rights to non-Members -- effectively expanding the membership of the House -- is within Constitutional bounds. On the other hand, it is entirely predictable that the defendants will argue that the House Rules changes do not really extend voting rights to non-Members and that, although the Rules changes would concededly allow Delegates to vote in the Committee of the Whole, they do not constitute a grant or delegation of

"legislative power." Such a defense, however, would require an unreasonable interpretation of the Constitution, would ignore the real effect of Delegate voting in the Committee of the Whole, and would be in direct contradiction of the defendants' own words and their own appraisal of the significance of the disputed changes.

B. Voting in the Committee of the Whole Constitutes an Exercise of Legislative Power

The disputed change in House Rule XII allows the Delegates, who are not Members of the House, to have all powers and privileges of Members in a Committee of the Whole, including the right to vote in the Committee of the Whole.[8] At least two important initial observations that should be made on this issue are susceptible of little debate. The first is that a vote in the Committee of the Whole effectively constitutes an exercise of legislative power, just as Delegate voting in committees constitutes an exercise of legislative power; indeed, in view of the function of the Committee of the Whole, voting in the Committee of the Whole would normally be considered a very important exercise of legislative power. The second is that the defendants themselves pushed for this grant of legislative power,

[8] As mentioned above, a change in House Rule XXIII, also complained of by plaintiffs, would permit the non-Member Delegates to chair a Committee of the Whole. In keeping with the Constitutional grant of legislative power to Members of Congress only, Rule VIII of the Rules of the House, setting forth the duties of the Members, states in section 3(b), "No individual other than a Member may cast a vote or record a Member's presence in the House or the Committee of the Whole." This is inconsistent with the disputed Rules changes.

in full knowledge of the fact that they would be circumventing the Constitution if they were successful, and they did so to obtain the legislative power they now deny they have.

As to whether casting votes in the Committee of the Whole legally constitutes an exercise of legislative power, the critical question would appear to concern the function of the Committee of the Whole. If a vote cast in the Committee of the Whole determines what will or will not become federal law, for example, such voting undeniably would constitute an exercise of legislative power under any definition of that term.

Technically, the Committee of the Whole is "the House of Representatives operating as a committee on which every member of the House serves."[9]

> The House of Representatives uses this parliamentary device to take procedural advantage of a somewhat different set of rules governing proceedings in the Committee than those governing proceedings in the House. The purpose is to expedite legislative consideration.[10]

The Committee of the Whole, in the minds of some, "is simply the House in another form. Every legislator is a member. House rules require all revenue raising or appropriations bills to be considered first in the Committee of the Whole."[11] It appears

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[9] Wolfensberger, Don, Minority Chief of Staff, House Rules Committee, "Committees of the Whole: Their Evolution and Functions." Cong. Rec., (daily ed., January 5, 1993), H27.

[10] Id., citing Nichols, Ilona B., "Committee of the Whole: An Introduction," p. 1. Congressional Research Service Report for Congress (85-943 Gov), Sept. 12, 1985.

[11] Oleszek, Walter J., Congressional Procedures and the Policy Process, p. 147 (Congressional Quarterly, Inc.,

that the most important legislation in the House is reserved for consideration by the Committee of the Whole, and that the work done by the Committee of the Whole is seldom reversed by the House. See Wolfensberger, supra, Cong. Rec., (daily ed. Jan. 5, 1993), H30.

As mentioned above, important legislation is reserved for initial consideration by the Committed of the Whole. For example, House Rule XXIII(3) mandates that "All motions or propositions involving a tax or charge upon the people, all proceedings touching appropriations of money, or bills making appropriations of money, or property...shall be first considered in the Committee of the Whole...."

Raising and spending revenue is often considered the chief business of the House of Representatives. And the Rules mandate that this chief business be considered first in the Committee of the Whole. Obviously, anyone with voting power in the Committee of the Whole can have a significant impact on what happens to such proposed legislation. The inescapable conclusion is that voting in the Committee of the Whole is doing the business of the House, and is therefore the exercise of legislative power. This is another reason for the supplemental proscription in House Rule VIII against all but Members of the House from voting in the

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Washington, D.C., 1989).

Committee of the Whole or on the House floor. See footnote 8, supra.[12]

This view of the role of the Committee of the Whole is apparently well understood by Defendant Eleanor Holmes Norton. Her public statements with regard to the status of the Committee of the Whole clearly evidence an understanding of its legislative function. In her press release concerning the action of the House in granting voting rights to Delegates in the Committee of the Whole, she stated:

> Congresswoman Eleanor Holmes Norton won the right to vote on the House floor today, a historic first for the District of Columbia. She and the four other delegates will vote in the Committee of the Whole, where virtually all of the business of the House is done....
>
> The Congresswoman also won the right to preside as chair of the Committee of the Whole, in place of the Speaker and expects to chair the next time that the Committee of the Whole meets. [Press Release from the Office of District of Columbia Delegate Eleanor Holmes Norton (January 6, 1993).]

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[12] Jefferson's Manual of the House of Representatives contains the following instructive admonition regarding abuses of power by majorities: "Mr. Onslow, the ablest among the Speakers of the House of Commons, used to say, (It was a maxim he had often heard when he was a young man, from old and experienced Members, that nothing tended more to throw power into the hands of...the majority of the House of Commons, than a neglect of, or departure from, the rules of proceeding; that these forms, as instituted by our ancestors, operated as a check and control on the actions of the majority, and that they were, in many instances, a shelter and protection to the minority, against the attempts of power.)" [Brown, Wm., Parliamentarian, Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States 102nd Congress, 117-18 (1991) (emphasis added).]

In a recent newspaper column written by Delegate Norton, she stated, "[t]he Committee of the Whole is the working committee of the House, where most of the work gets done...." and "[a] vote in the Committee of the Whole would give the District a vote on most matters, several steps up from being confined to debating while other members vote on your laws."[13]

Again, several days later, in the same newspaper, Ms. Norton declared, "On 99 percent of the business of the House, the District will have a vote."[14]

Delegate Norton apparently believes that the right to vote in the Committee of the Whole will give her real legislative power.

> The change will have practical political benefits as well, Norton said. "I'll get to do some trading," she said. "House members build coalitions by trading votes, but I haven't had anything to trade on the floor until now." [Washington Post, Dec. 9, 1992, at A4.]

Defendant Delegate Norton's opinions regarding the Committee of the Whole reveal the practical ramifications of the disputed Rules changes, ramifications which were well understood by the Democrat majority in the House of Representatives which voted for them. Those votes were for political purposes, but they violated fundamental Constitutional principle; for all of these politicians know that voting in the Committee of the Whole is indeed an exercise of legislative power, which, under the

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[13] Washington Post, Jan. 4, 1993, at A20.

[14] Washington Post, Jan. 6, 1993, at A1.

Constitution, nay be engaged in only by Members of the House, chosen by the people of the several States.

There should be little question, therefore, that the Committee of the Whole plays an important legislative function, and it is clear that the defendants themselves have admitted what a critical legislative function it is. Can the defendants truly be heard to say, now that suit has been filed, that the right to vote in this important committee does not constitute the exercise of legislative power?

The anticipated defense -- injected into new House Rule XXIII as part of the defendants' plan in promoting the disputed Rules changes -- is the "savings clause" purporting to guarantee that no Delegate vote would constitute a decisive vote on any final legislative matter reported out or passed by the House. It is respectfully submitted, however, that the "savings clause" does not immunize the defendants in this suit. As plaintiffs have shown in their memorandum in support of their Application for Preliminary Injunction, and the affidavits accompanying that Application, the practical effect of the disputed Rules changes is to give the Delegates effective voting rights in the House. Accordingly, the Rules changes are unconstitutional. Any argument by the defendants that the "savings clause" renders the Delegate vote meaningless does not take into effect the real effect of voting in the Committee of the Whole. It ignores the fact that the quorum rules in the House and the Committee of the Whole are different. And it ignores bills in the Committee of

the Whole, which significantly alter proposed legislation and cannot be raised again on the floor of the House during final passage. These are ways in which the exercise of voting rights in the Committee of the Whole constitutes a very effective exercise of legislative power and, as already pointed out by plaintiffs, there are others. The disputed House Rules changes are therefore unconstitutional.

## II. THIS COURT HAS JURISDICTION TO RESOLVE THE PRESENT DISPUTE, WHICH IS A JUSTICIABLE CONTROVERSY, AND IT SHOULD GRANT THE REQUESTED RELIEF

It is possible, if not probable, that the defendants herein will object to the intervention of this Court in a matter of the House Rules, arguing that the Court lacks subject matter jurisdiction or that the plaintiffs have presented the Court with a nonjusticiable "political" question. Those anticipated defenses have been foreclosed by numerous pronouncements of the federal judiciary, including a Supreme Court case remarkably analogous to the instant case. See Powell v. McCormack, 395 U.S. 486 (1969). Both this case and Powell v. McCormack arise under Article I, Sections 1 and 2, and involve the proper reading of Article I, Section 5, Clause 1, of the United States Constitution dealing with Congress' powers to judge the qualifications of its own Members and to determine its own rules.[15]

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[15] Plaintiffs, including certain members of the House of Representatives who would be directly affected as legislators by the unconstitutional Rules changes, as well as all of the plaintiffs who would be directly affected as individual voters,

A. Subject Matter Jurisdiction

The dispute underlying Powell began in 1967, when Congress refused to seat a duly elected Member of the House, Rep. Adam Clayton Powell (D-NY), based on alleged violations of ethics by Powell. Powell filed suit in this Court, which dismissed the complaint for lack of subject matter jurisdiction, but also held that the case involved a nonjusticiable political question. The Court of Appeals for the District of Columbia Circuit determined that there was subject matter jurisdiction, but it nevertheless affirmed dismissal of the suit on the ground of nonjusticiability by virtue of the political question doctrine.

The Supreme Court agreed with the Court of Appeals on the first question, finding that subject matter jurisdiction was proper because the suit presented a case or controversy arising under the Constitution within the broad grant of jurisdiction

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clearly have standing to maintain this action against the defendants. See Vander Jagt v. O'Neill, 699 F.2d 1166, 1168 (D.C. Cir. 1983). With respect to other possible defenses, it is clear that the Rulemaking Clause of the Constitution, Article I, Section 5, Clause 2, does not preclude the plaintiffs' suit and that the House's power to determine its own rules is subject to constitutional review. Id., at 1173. See Powell v. McCormack, supra, 395 U.S. at 548. The Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1, also is clearly no bar to maintenance of this action. The purpose of the Speech and Debate Clause was "to prevent intimidation [of legislators] by the executive and accountability before a hostile judiciary," United States v. Johnson, 383 U.S. 169, 181 (1966), quoted in Powell v. McCormack, supra, 395 U.S. at 502, and the legislative immunity thereby created "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." Id., at 503. But the Speech and Debate Clause does not bar judicial review of legislative acts, at least where, as here, the suit is brought against congressional employees involved in carrying out those acts. Id., at 504-06.

contained in 28 U.S.C. sec. 1331. In Powell v. McCormack, it had been contended that the delegations of power conferred upon Congress by the Constitution were akin to "judicial" powers, unreviewable by the federal courts in any way. The Supreme Court disagreed, as follows:

> It has long been held that a suit "arises under" the Constitution if a petitioner's claims "will be sustained if the Constitution [is] given one construction and will be defeated if [it is] given another." [Citations omitted.] Thus, this case clearly is one "arising under" the Constitution as the Court has interpreted that phrase. Any bar to federal courts reviewing the judgments made by the House or Senate in excluding a member arises from the allocation of powers between the two branches of the Federal Government (a question of justiciability), and not from the petitioners' failure to state a claim based on federal law. [Powell v. McCormack, supra, 395 U.S. at 514.]

The stated rationale compels the conclusion that the controversy in the present case "arises under" the Constitution, for plaintiffs' claims will be upheld if this Court determines that voting in the Committee of the Whole is an exercise of the legislative powers reserved exclusively to Members of Congress under Article I, Section 1 of the Constitution, and plaintiffs' claims will be defeated if this Court rules that the exercise of legislative powers under Article I, Section 1 does not include voting in the Committee of the Whole. As the Supreme Court also held in Powell v. McCormack, this broad grant of jurisdiction in Section 1331 of Title 28, United States Code, includes suits, such as this case, turning directly on the construction of the

Constitution. Id., at 516. For the above reasons, this Court clearly has jurisdiction over the subject matter of this case.

B. Justiciability

1. General Criteria

Any question about the justiciability of the underlying claim in this case depends, like it did in Powell v. McCormack, supra, upon the answers to two questions.

The first question in "whether the claim presented and the relief sought are of the type which admit of judicial resolution. Powell v. McCormack supra, 395 U.S. at 517. In other words, it is for the courts to determine whether a judicially identifiable duty exists whose breach can be judicially determined, and whether the judiciary can effectively protect the asserted right. Id. See Baker v. Carr, 369 U.S. 186, 198 (1962). These questions are easily answered in this case, as they were in Powell v. McCormack, supra. Indeed, the issues of Congressional rulemaking under Article I, Section 5, Clause 2 of the Constitution are almost identical in both cases. Paraphrasing the rationale in Powell v. McCormack, supra, the asserted duty and its breach can be judicially determined because, if plaintiffs are correct, persons who are not "Members" of the House are not entitled to vote in the Committee of the Whole. It is undisputed that the defendants are not "Members" but that the House has nevertheless extended them the right to vote. And as to the form of relief, both the declaratory judgment sought by plaintiffs, as well as the injunction prohibiting the defendants from performing the

prohibited acts related to unlawful voting, are appropriate. See Powell v. McCormack, supra, 395 U.S. at 517-18.

2. Political Question Doctrine

If the defendants contend that this case presents only a non-justiciable political question, it is difficult to conceive of any reasonable basis for their argument. As the Supreme Court noted in Baker v. Carr, supra, the political question cases involve one of the following six formulations:

> ...a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking an independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of potential for embarrassment from multifarious pronouncements by various departments on one question. [Id., 369 U.S. at 217.]

It is clear that none of those factors exist in this case and that no such considerations would cause this Court to declare the case nonjusticiable under the political question doctrine.

The reasoning of the Supreme Court in Powell v. McCormack, supra, is especially pertinent in this case as well. The respondents in Powell v. McCormack had argued that a "textually demonstrable constitutional commitment" had been made exclusively to the House to determine member qualification. The Supreme Court held, however, that "we must first determine what power the

Constitution confers upon the House through Article I, Section 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review," adding that, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation...." Powell v. McCormack, supra, 395 U.S. at 519, 521.

The "textual commitment" issue in Powell v. McCormack, of course, concerned the meaning of the phrase in Article I, Section 5, "be the Judge of the Qualification of its own members." After reviewing history and precedent, the Supreme Court concluded that the commitment to Congress in Article I, Section 5, was at most one to judge only the qualifications of Members expressly set forth in the Constitution, "that the Constitution does not rest in the Congress a discretionary power to deny membership by a majority vote," and that the textual commitment formulation of the political question doctrine did not bar the adjudication of the challenged claims. Powell v. McCormack, supra, 395 U.S. at 548.

This result was reached with the assistance of arguments from "friends of the court." By coincidence, Defendant Delegate Norton was among the attorneys filing an amicus curiae brief for the American Civil Liberties Union ("ACLU") in the Powell case. At that time, Attorney Norton argued:

> First, the intention of the framers of the Constitution regarding the meaning of the constitutional provisions in question is clear: a House of Congress is not free to set qualifications of its members for the purposes of exclusion.... [Brief Amicus Curiae of the American Civil Liberties Union at 14, Powell v. McCormack, 395 U.S. 486 (1969).][16]

In the instant case, a majority in Congress has exceeded its Constitutional authority under Article I, Section 5, and changed the rules to extend voting (i.e., legislative) powers to delegates who are not Members of Congress elected by the people of the several States. As Defendant Delegate Norton argued so persuasively in her brief as Attorney Norton in Powell, there is no "textually demonstrable commitment" of such majoritarian abuse

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[16] The ACLU brief cited Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175, 178 (1803) for the proposition that the exercise of legislative power is limited by our written constitution:

> A greater infringement on the right to vote than the right of a majority in the House to exclude the elected representative can scarcely be imagined. An important justification for judicial intervention in the reapportionment cases was that malapportioned legislatures could not be relied upon to cure themselves -- i.e., that a system which relies upon legislatures to cure fundamental legislative abuses involving the rights of people to be represented in those legislatures, does not adequately protect those rights at all. The same is true in this case. [Id. at 15, (emphasis added).]

Ms. Norton's reasoning in the Powell case applies with equal force in the present action, where the issue also involves the inadequate protection in legislature of the right of representation, necessitating judicial review.

to a "coordinate political department by the Constitution." ACLU Brief, Powell v. McCormack, at 13. The Supreme Court in Powell agreed with the view, then advanced by Delegate Norton, that Congress had, in fact, exceeded its authority under Article I, Section 5, and the same result should obtain here. Just as the Supreme Court determined in Powell that Congress did not have the discretion to deny membership by majority vote, this court should conclude that there is no authority in Congress, and certainly no textually demonstrable commitment to Congress, to effectively grant membership by majority vote.

With respect to the other formulations of the political question doctrine recognized by the Supreme Court, it is clear in this case, as in Powell, that judicial resolution of plaintiffs' claims would not produce "a potentially embarrassing confrontation between coordinate branches" of the federal government. Powell v. McCormack, supra, 395 U.S. at 548. To the contrary, such judicial resolution is entirely in keeping "within the traditional role accorded courts to interpret the law." Id. This would not involve an initial policy determination reserved for nonjudicial discretion and there are "judicially manageable standards" for interpreting the Constitution as plaintiffs requested, the use of which would not imply any lack of respect due to a coordinate branch of government. See Powell v. McCormack, 395 U.S. at 548-49. Finally, a ruling by this Court on the merits of the plaintiffs' claims would not result in "multifarious pronouncements by various departments on one

question." Id., at 549. On the contrary, the correct interpretation of the Constitution by this Court will eliminate the various possibilities of further expanding or even limiting the future right to vote in the House that might otherwise come about. The question presented involves the direct interpretation of the Constitution, a task that has been committed to the federal judiciary.

Clearly, therefore, the political question doctrine does not apply, and the plaintiffs' claims in this important case arise under the Constitution and present a justiciable controversy.

## CONCLUSION

On the grounds and for the reasons stated hereinabove, the Abraham Lincoln Foundation for Public Policy Research, Inc. supports the Plaintiffs' Application for Preliminary Injunction and respectfully urges this Court to grant such Application as well as all other proper relief.

Respectfully submitted,

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