

Testimony of
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Before the Senate Committee on the Judiciary on Ending Taxation without Representation: The
Constitutionality of S. 1257
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Senate Judiciary Committee
DC Voting Rights Act of 2007
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Mr. Chairman, members of the Committee, I am honored to have the opportunity to speak to you today concerning the District of Columbia Voting Rights Act of 2007. It is entirely appropriate that the United States Senate has taken up this measure, in the same spirit that the House of Representatives has considered it. I am hopeful that Congress will be able to address one of the incredible incongruities in our philosophical goal of "one person one vote" in The United States of America.

As you know, I am the Jesse Climenko Professor of Law and Executive Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. I have written books and articles on a wide range of topics involving matters of race and justice, and hosted programs, moderated forums, and participated in dialogues on issues of citizenship, democracy, and equality as well as testified before both Houses of Congress. My full biographical information is attached and I will not use the committee's valuable time to review it now. In questions related to citizenship, democracy, and equality, there is no matter more compelling or more urgent than the District of Columbia Voting Rights Act of 2007. This is a measure rooted in the principle of promoting equality among citizens.

Before joining the faculty at Harvard Law School in 1985, I spent eight wonderful years here in the District of Columbia. I served as Staff Attorney, Chief of the Training Division, Chief of the Trial Division, and Deputy Director of the District for the Public Defender Service. In that capacity, I had many opportunities to assess the value of citizenship and the importance of equality of opportunity for all of our citizens. It was amazing to me to realize that America's greatest city, the District of Columbia, was treated as a second-class place of citizenship. While there are debatable arguments about what defines a state, it is without debate that the District of

Columbia is home to more than 600,000 citizens who pay taxes, who work and live here, and who send their children to public and private schools.

It is difficult to contemplate a rational argument in the 21st Century that would deny such a large group of citizens their most basic and fundamental right to representation in Congress. The right to vote, in fact, is made meaningful only by the right to have representative government as well. The fact that, within a matter of miles to the South, North, East and West, residents of the District of Columbia are treated dramatically differently than other citizens is untenable. It is particularly untenable in the 21st Century, when citizens find that they meet all the obligations of similarly-situated citizens just a few miles of where they live. Yet, they are denied their most fundamental right. Their votes simply do not count for as much as those of other citizens. It is regrettable that children who, by the accident of location, are born at a hospital in the District of Columbia, and who live here, have materially different and substantially less fulfilling rights than their counterparts in Maryland and Virginia. It is important that this Congress and particularly this Senate take on this issue with the vigor that makes all of our citizens whole, full, participating members with an equal voice.

The Charles Hamilton Houston Institute carries on the legacy of Charles Hamilton Houston, one of the 20th century's greatest legal minds, and one of the most effective educators and important civil rights lawyers. The Houston Institute is dedicated to the principle that a fundamental tenet of a democratic society is equal access for all residents to the benefits and responsibilities of citizenship. Houston, a Harvard Law School graduate and an African-American lawyer, embarked on his civil rights career after being subjected to racial discrimination in the military while he served his country in World War I. To Houston, it was not merely ironic but fundamentally unfair that he and others could be and were denied equal access to justice based on the color of their skin, something no less random than being born in one jurisdiction rather than another. Of course one has greater freedom to move from one place to another than to change one's race. It is for this reason that, painful as it is, I must address this sensitive topic.

As you may know, the Houston Institute just completed a major conference reflecting on the 150th anniversary of the Dred Scott v. Sandford decision, one of the truly painful blots on our nation's past. You will recall that this decision, handed down across the street from here, held that the rights of citizenship did not apply to a certain group of people, in this case African-Americans. It is awkward but necessary for me to remind you that many of our citizens currently denied the full right to equal representation (and thus equal voting rights) in the District of Columbia are not only the symbolic but actual descendants of Dred Scott and of the people affected by that 150-year-old Supreme Court decision that bore his name. It was with considerable dismay that I heard debates about coupling voting rights for residents of DC with an added seat for Utah. Those of you who remember your history will recognize the kind of horse trading that went on prior to Dred Scott; in which citizenship rights were used as political fodder.

Senator Orrin Hatch, in his reasoned testimony noted that this legislation is politically balanced, but also said: "There are many who wish the District voting rights issue would go away." I am sure that is true. Sadly, I am sure there are also many who wish the matter of racial justice that this legislation embodies would "just go away." But it will not go away -- not until we as a nation live up to our democratic principles and make real the assurances contained in our sacred

documents which, I might emphasize, include the 13th, 14th, and 15th Amendments as well as the various original articles being so closely scrutinized in this debate.

Representative Tom Davis noted: "no one can explain with a straight face why this country is willing to send soldiers around the world to extend liberty to every corner of the globe, yet Americans living in this Federal District don't have representation in the Federal legislature." It is indeed, difficult to appear here today in support of so fundamental a right. Why is it still necessary to underscore so obvious an injury.

In our April, 2007 report, *We The People: Race, Ethnicity and Citizenship in the United States*¹, the Houston Institute measured the status of citizenship for people of color in our nation. In particular, we noted: "The District of Columbia counts a larger share of residents as racial minorities than any other state besides Hawaii." If we consider the history of the District, we cannot help but be struck by the fact that it is a city built, at least in part by slave labor. As historian Bob Arnebeck documents in his book, "Through a Fiery Trail: Building Washington 1790-1800," slaves were an important part of the labor force that built the nation's capital. As Arnebeck writes: ". . .the 50 to 100 slaves hired each year, roughly half the work force, were relegated to the less skilled tasks such as cutting trees, squaring and sawing lumber, hauling stone and bricks and helping skilled white masons and carpenters. There were a handful of slave carpenters, some slave quarries, perhaps a few stone cutters, and at least one slave bricklayer who were hired by the federal government's commissioners in charge of the building." ²

Similarly, in their 1986 book, written in cooperation with the National Geographic Society, historians Seale William and Harry N. Abrams tell a similar story. They write: "Since much was accomplished very quickly there must have been many; the conditions of their labor from daybreak to dark. . .can only be imagined." The White House master stonemason, they write, trained tired slaves at the quarry to cut the stone used to build the foundation of the White House. ³

Today, Washington, D.C. is inhabited significantly by the descendants of slaves. It is them to whom we are continuing to deny full citizenship.

Finally, opponents of the D.C. Voting Rights bill -- or more accurately, those who have raised constitutional concerns about it - are over-relying on the simple text in the Constitution that says that voting representation is granted to "States." Others offering testimony today will argue that this represents an oversimplified reading of a complex document. Also important, the argument ignores history. In fact, there exists no evidence that the Framers of the Constitution intended to deny representation to the federal district, now known as Washington, D.C.

Indeed, in the 1949 case, *National Mutual Insurance Company v. Tidewater Transfer Company*,⁴ the Court noted that at the time of the ratification of the Constitution, the District of Columbia was little more than a "contemplated entity." There was no evidence, the Court stressed, that the Founders, "pressed by more. . .immediate anxieties, thought of the special problems of the District of Columbia. . ." The federal district was created so that the place of residence for the federal government would be free from control or influence by the particular state in which it might be located.⁵ There is no record whatsoever that the Framers discussed the eventual denial of a voting Congressional Representative to the imagined federal district. There was no argument

made about the need to deny the federal district a vote in Congress. This has led scholars to conclude that most likely, the lack of representation was not purposeful, but simply an oversight during the planning of a distinct federal district that, at the time of its establishment was home to about 10,000 people.⁶

It is difficult to believe that the Framers of our Constitution, might they have foreseen the development of Washington, D.C, would have intended to disenfranchise the now nearly 600,000 residents of what is now the District of Columbia. There would have been no justification for this. Indeed, the Framers never stated one. Clearly, this was an unforeseen level of what is now serious disenfranchisement. It is an oversight that could easily be corrected through simple legislation.

In conclusion, there exist so many reasons for Congress to finally correct an unjustifiable disenfranchisement of the nearly 600,000 people of our nation's capital. The current inequality is simply incongruous with our most deeply held principles. I suspect other people testifying today will touch on other important matters and tensions that this legislation provokes. I will say, though, that granting the District of Columbia a voting representative is so clearly within Congress' power, that the more appropriate question for us all to ponder might be: Why has it taken so long?

I would like all of you to know, as well, that our Institute's namesake, Charles Hamilton Houston, was himself born and raised in Washington, D.C. He attended public schools here and after completing his successful legal studies at Harvard, returned to his hometown and transformed Howard Law School into the preeminent training ground for African American attorneys. He and many of those attorneys he trained and mentored went on to dismantle the separate but equal doctrine that for so long denied rights of citizenship to black Americans across our country. It is beyond irony that I must come here today to make the plea to you to honor the legacy of Houston by granting this most basic right to your neighbors.

I am pleased that the men and women of this Congress have the power to finally right a long-standing wrong. Thank you.

¹Report available at:

<http://www.charleshamiltonhouston.org/assets/documents/events/150th%20Anniversary%20of%20Dred%20Scott/We%20The%20People%20-%20Full%20Report.pdf>

² Arnebeck, Bob. "The Use of Slaves to Build the Capitol and White House, 1791-1801." Available at www.geocities.com/bobarnebeck/slaves.html.

³ See, Seale, William and Harry N. Abrams, White House Historical Association with the Cooperation of the National Geographic Society, 1986, vol. 1, Pages 38, 50, 52, 57, 60)

⁴ 337 U.S. 582 (1949).

5 For example, see Markman, Stephen J. Statehood for the District of Columbia: Is It Constitutional? Is it Wise? Is It Necessary? 48 (1988) Federalist Paper No. 43 James Madison stated: "The gradual accumulation of public improvements at the stationary resident of the Government, would be . . .to great a public pledge to be left in the hands of a single State."

6 Bowling, Kenneth R., The Creation of Washington, D.C.: The Idea and Location of the American Capital., (1991). Also, Bress, Richard P. and Lori Alvino McGill. "Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905. The American Constitution Society for Law and Policy.