Testimony of

Mark Shurtleff

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Testimony of Utah Attorney General Mark L. Shurtleff
Before the Senate Committee on the Judiciary
"Taxation Without Representation: The Constitutionality of S. 1257."
Chairman Leahy and Members of the Committee:

My name is Mark Shurtleff, and I am the Attorney General of the State of Utah. Thank you for the opportunity to speak in support of S. 1257 - "District of Columbia House Voting Rights Act of 2007," (hereafter "Voting Rights Act.") Last week, the Attorney General of the District of Columbia, Linda Singer, and I co-authored a bi-partisan letter to Congress and the White House communicating our strong support of Congressional efforts towards the official recognition that all citizens of the United States, regardless of where they reside, are entitled to the fundamental right to vote." Referring to the Declaration of Independence, Susan B. Anthony asked, "how can 'the consent of the governed' be given, if the right to vote be denied?"

As the top law enforcement officials for the District of Columbia and Utah, we have each taken an oath to defend the Constitution of the United States. It is therefore our obligation to ensure that any legislation we support be not only fair, but also constitutional. The Voting Rights Act is both.

History is full of unusual alliances forged in service of the public good. Our own alliance is no exception, as we come together to support expanding American democracy to better represent our two respective populations. We both believe the time has come to expand the United States House of Representatives to 437 members, adding a first-ever seat for the District of Columbia and an additional seat for Utah.

Linda Singer and I are two very different Attorneys General serving two very different constituencies. One of us is appointed, serving the 572,000 mostly Democratic residents who live in the 68 square miles that make up the District of Columbia. One of us is elected, serving the 2.5 million mostly Republican residents who live in the 85,000 square miles that make up the State of Utah.

Despite these differences, we have similar goals. The District of Columbia is seeking to right a longstanding wrong. The District's local budget and laws are subject to congressional approval. Its residents pay federal income taxes, go to war and serve on federal juries. Yet it has had no voting representation in Congress for more than 200 years, and remains the only democratic capital in the world with no voice in the national legislature. Utah's fight, a more recent one, is against under-representation. The Beehive State missed receiving a fourth House seat by just 857 people in the 2000 census, despite having more than 11,000 missionaries living overseas and

uncounted by census takers. North Carolina, by contract, had 18,360 overseas members of the military counted and received the additional seat.

Our interests are appropriately intertwined in legislation now before the Senate. The bill in question would permanently expand the House for the first time since 1911, adding a first voting seat for the District and a fourth voting seat for Utah. This addresses the concerns of our respective constituencies with a solution that is long overdue.

The proposed legislation is constitutional. The Framers of the Constitution did not intend to deprive the District's citizens of representation in Congress. To understand the Framers ' intention for the District of Columbia, it is important to understand the historical context in which the Nation's Capital was established, free from any control by the states. After an incident in 1783 in which the government of Pennsylvania refused to protect a Continental Congress meeting in Philadelphia against a militia uprising, the Framers of the Constitution resolved that the site of the federal government should be independent from the states and under total federal control. James Madison was convinced after the Philadelphia incident that there was an "indispensable necessity of complete [federal] authority at the seat of the government" and that this seat should be located on land ceded by the states and appropriated to the federal government.1

Accordingly, the Framers included in the Constitution the District Clause, which authorizes Congress [t]o exercise exclusive Legislation in all Cases whatsoever, over such District 2 (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States ...

The intent of the District Clause was to ensure federal authority over the Nation's Capital, not to deprive citizens living there of their rights of citizenship. There was no restriction regarding voting inserted in the District Clause. Nor was there any need to disenfranchise the District's citizens in order to maintain control of the capital site.3 Any such restriction on representation of the District's citizens would have been contrary to the principles and intent of the Framers to ensure a republican - that is, representative -- form of government.4 It is true that the Constitution has no affirmative provision guaranteeing voting representation for the District citizens in the Constitution. However, given the Framers' intention to establish a fully representative government,5 there would have been no need to make a special provision for District citizens. Second, there is evidence that the framers assumed that the ceding states would ensure that their citizens' liberty interests were protected. Madison wrote:

And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them... every imaginable objection seems to be obviated.6

Third, when the Framers wanted to restrict voting representation in the Constitution, they did so affirmatively, as in Article I, Section 2, where for apportionment purposes slaves and taxpaying Indians were counted as 3/5 persons. If the Framers wanted the District citizens to have even less representation, i.e. none at all, they surely would have included a provision to that effect.

Finally, at least one Framer, Alexander Hamilton, did want to include an affirmative provision for voting representation by District citizens in the House. He introduced an amendment in the New York ratifying convention to require that representation.7 There appears to be no congressional historical documentation as to why this amendment did not pass, but the circumstantial record indicates that it was because the Framers believed it was not needed since 1) the District's citizens could continue to vote with the ceding states, Maryland and Virginia - which they all in fact did for approximately 10 years after the District's creation in 1791, or 2) Congress could act to provide representation under the District Clause.8

It is the District Clause in the Constitution that allows Congress to now enact legislation to provide voting representation for the District. This provision in the Constitution has been described as "majestic in its scope,"9 giving Congress plenary and exclusive power to legislate for the District.10 Without an act by Congress, District residents have been unsuccessful in obtaining such rights from the courts, but there are numerous judicial opinions holding that Congress can act on behalf of the District. Thus, if Congress acts by passing the voting rights bill, it will be properly exercising its authority under the District Clause to enfranchise District citizens. In an early decision, Hepburn v. Ellzey, 2 Cranch 445 (1805), the Supreme Court considered whether the District could bring suits in federal court under the Constitution's Diversity Clause, which gives jurisdiction to federal courts to hear cases between citizens of different states.11 The Court held that while the District was not a "state" within the meaning of Article III for purposes of diversity jurisdiction, the District could be included by an act of Congress. Congress did subsequently enact such legislation, which was upheld by the Supreme Court in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), in a plurality opinion that upheld the action by Congress.12

Under these precedents, Congress can act pursuant to its "exclusive legislation" authority provided in the District Clause to enfranchise District residents through the passage of the voting rights bill. In a recent decision in Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000), aff'd 537 U.S. 940 (2000), a federal court held that the Constitution did not categorically require that District residents be given voting representation, but found in the end that while it was inequitable to continue to deny the vote, the "court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues." Id. at 122. By holding open this possibility; the Court indicated its view that it would be constitutional for Congress to grant the District voting representation.

Opponents of the voting rights bill maintain that Article I, Section 2 of the Constitution limits the House of Representatives to members elected by "the several States" and therefore cannot include the District of Columbia. But this argument ignores the fact that Congress, operating under the District Clause, has acted hundreds of times to treat the District as a "state" for specific legislative purposes, and these actions have not been successfully challenged. For example, Congress has acted to regulate commerce across the District borders, even though Congress's power under the Commerce Clause (Article I, § 8, c l. 3) is to regulate commerce "among the several States"13; to bind the District with an international treaty, which allows French citizens to inherit property in the "States of the Union."14; and to consider the District as a state for purposes of alcohol regulation.15 Certainly, Congress can also act here to allow District citizens to be enfranchised, a right which is at the core of our democratic principles.

The recent Congressional Research Service ("CRS") Report, dated March 16, 2007, argues against granting the District voting rights, but fails to establish any constitutional prohibition to Congress enacting the voting rights bill. In fact, the report acknowledges that it is not "beyond question" that Congress has authority to grant voting representation in the House of Representatives.16 While the CRS report raises concern that granting the District voting representation might extend such rights to the territories, this argument fails to recognize that the territories occupy a very different position than the District and have long enjoyed disparate rights and privileges. The fact that Congress's constitutional authority over the territories and the District emanates from two different constitutional clauses17, suggests that the Framers' intent was to treat the territories and the District differently. Moreover, unlike residents of the territories, the District's citizens pay income taxes, are subject to military conscription, and (as noted above) have repeatedly been regulated by Congress on a variety of subjects in the same way as the citizens of the fifty states. Absent convincing evidence that the Framers of the Constitution intended to deprive the District of Columbia of voting representation in the House of Representatives, the only conclusion that can be drawn is that the lack of representation resulted from inadvertence or historical accident. Indeed, the Framers risked their lives and families to establish representative government. It cannot be casually assumed that they cast this principle aside in creating the new nation's capital.

The District Clause must be read in light of events at the time of the founding--events which focused on securing every citizen a voice in Congress. See Thomas Jefferson, Letter to William Johnson (June 12, 1823), in 15 Writings of Thomas Jefferson 439, 449 (A. Lipscomb, ed. 1904) ("On every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out or the text, or invented against it, conform to the probable one in which it was passed.") (quoted in McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334, 371-72 (1995) (Scalia, J, dissenting)).

Finally, it is important that the current version of the voting rights bill contains provisions that remedy another failure to provide adequate representation in the House of Representatives for all U.S. citizens. The voting rights bill thus provides a unique opportunity for Congress to correct two wrongs. The text of the Constitution requires the federal government to conduct an "actual Enumeration" of the American population every ten years. U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. This federal decennial census has served as the basis for apportioning seats in the House of Representatives. See id. However, in the 2000 census the Census Bureau decided to enumerate only a portion of the Americans who were temporarily living abroad on census day (thereby excluding many Utahns who were providing religious and community service around the world) and used a technique for estimating population.18 The Bureau's actions resulted in a significant undercount of Utah's citizens and deprived Utah of a fourth seat in the House of Representatives. The voting rights bill remedies this deprivation, not by taking a vote away from another state, but by granting Utah an additional Member of the House of Representatives until the next decennial census.

In conclusion, the framers of the Constitution did not intend to deprive residents of the nation's capital of their fundamental right to vote. Indeed, for approximately 10 years after the District's creation in 1791, residents continued to vote for the Maryland and Virginia congressional

delegations. Their subsequent loss of this representation came not as a result of any constitutional provision, but from an act of Congress. What Congress taketh away, Congress can give again. The Constitution's District Clause gives Congress plenary and exclusive power to legislate for the District. This sweeping authority allowed Congress to create the District's system of local government in the 1970s, and it allows Congress to provide voting representation in the House today.

The federal government's legislative branch is the proper venue for this change. No judicial solution exists for the problem of the District's lack of representation, or for the problem of Utah's under representation. The United States Supreme Court refused to take on the District problem by denying certiorari in Adams v. Clinton in 2000. Likewise, the Court opted not to overrule the Utah Census process in Utah v. Evans in 2002. Congress alone has the authority and responsibility to right these wrongs.

Countless legal scholars from across the political spectrum, including Whitewater special prosecutor Kenneth Starr and PATRIOT Act architect Viet Dinh, agree with our assessment of the Voting Rights Act's constitutionality. Dinh calls the District of Columbia's lack of representation "a political disability with no constitutional rationale."

Attorney General Singer and I urge the Senate to end the injustices suffered by our respective constituencies and approve the House expansion without delay.

1 The Federalist No. 43 at 288 (James Madison) (The Easton Press Ed., 1979).

2 At the time that the Constitution was ratified, the "District" included in the District Clause did not refer to the District of Columbia because it was not yet established. However, references hferein to "District" refer to the District of Columbia.

3 In contrast to concerns about limiting the rights of District citizens, some Framers, including George Mason, expressed concern that these citizens situated in the Nation's capital would get special treatment and "become the object of the jealousy and envy of the other states. "Debates on the Federal Constitution 433 (J. Elliot ed. 1876) ("Elliot's Debates").

4 Madison strongly believed that the ceding states should protect their citizens' rights. He declared during the ratification debates that any violation of the agreement by the ceding states under which they protected the rights of their citizens would be "usurpation". Elliot's Debates, Vol. 3 at 439. See also The Federalist, supra, No. 43 at 288.

5 See Statements of another Framer, Luther Martin, Attorney General of Maryland and a Delegate to the Constitutional Convention of 1787, 3 Records of the Federal Convention of 1787 (M. Farrand ed. 1911) at 175 (There should be an "equitable rate of representation, namely, in proportion to the whole number of white, and other free citizens and inhabitants of every age, sex, and condition...")

6 The Federalist, supra, No. 43 at 288. See also Elliot's Debates, Vol. 3 at 439. Madison stressed that any failure by the federal government to protect the rights of the citizens of the ceding states would be "usurpation".

7 The Papers of Alexander Hamilton at 189-190 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

8 Some congressional members believed that District residents would be disenfranchised only temporarily. Representative Benjamin Huger of South Carolina pointed out during a post-enactment debate over the federal authority under the Organic Act of 1801, effective February 27, 1801, 2 Stat. 103, ch. 15 (establishing the District of Columbia as the Nation's capitol) that just "because [District residents] are now disenfranchised of their rights, it does not follow that they are always to remain so." Annals, 7th Congress, 2d Sess. 1803: 488.

9 Testimony of the Honorable Kenneth W. Starr Before the House Government Reform Committee, in support of a prior version of legislation to give the District voting representation in the House of Representatives (June 23, 2004).

10 Palmore v. United States, 411 U.S. 389, 397 (1973); United States v. Cohen, 733 F.2d 128, 140 (D.C. Cir. 1984) (Congress has extraordinary and plenary power to act for the District in ways that it cannot act for the 50 states).

11 Article III, § 2, cl. 1

12 The recent Congressional Research Service ("CRS") Report, dated March 16, 2007, criticizes Tidewater for being a plurality opinion with no majority holding. However, this criticism overlooks the fact that a majority of justices voted to uphold the legislation by Congress to include the District under the Diversity Clause, albeit that there was a split on whether the authority for the legislation was found in the District Clause or by considering the District a "state" for purposes of the Diversity Clause.

13 Stoutenburgh v. Hennick, 129 U.S. 141 (1889).

14 DeGeofroy v. Riggs, 133 U.S. 258, 268-69 (1890).

15 Milton Kronheim v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996).

16 CRS Report at 24.

17 See U.S. Const. Art. IV, §3, cl. 2.

18 In 2000 the Census Bureau elected to enumerate (a) U.S. citizens living abroad temporarily while employed by the U.S. military or an agency of the federal government, and (b) all dependents of such persons who were living with them. See Prepared Statement of Kenneth Prewitt, Director, U.S. Bureau of the Census, Before the Subcommittee on the Census, Committee on Government Reform, U.S. House of Representatives, at 2-4 (June 9, 1999). These individuals were apportioned to their respective home states and were thus considered part of the "population" of the United States within the meaning of the Census Act. Id. However, the Bureau elected to exclude from the enumeration other U.S. citizens temporarily living abroad. See id. at 2-4, 6-7. Utah would have been entitled to an additional seat in the House of Representatives if an additional 857 individuals had been counted in its resident population. A large number of Utahns were temporarily overseas on census day, yet were excluded from the census by the

Bureau's actions. For example, on April 1, 2000 (census day), 11,176 Utah residents were serving temporary assignments abroad as missionaries for the Church of Jesus Christ of Latter-day Saints.