Testimony of

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May 23, 2007

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Hearing on the District of Columbia House Voting Rights Act of 2007
United States Senate Committee on the Judiciary
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Senator Feingold, Members of the Committee: Thank you for this opportunity to discuss the constitutionality of the pending District of Columbia House Voting Rights Act of 2007, which would provide representation for District residents in the U.S. House of Representatives. I mention initially that this is a return visit to Congress for me on the same basic mission: nearly 30 years ago I appeared as the official spokesperson for the Carter Administration supporting a constitutional amendment to give full voting representation in both Houses to the District of Columbia.1 The proposed amendment, as you well know, made it through Congress but failed to capture the needed approval in three-fourths of the States. That route looks no more promising today and the question before you is whether there is a constitutionally permissible way to give District residents a right to representation in the one House whose members have been since the founding of the Republic directly elected by the people and apportioned according to their numbers.2

I would be less than candid if I did not say up front that you have before you a close and difficult constitutional question. We are, in my view, faced with two pieces of constitutional text, both in Article I dealing with the Legislative power of the United States, either one of which, read alone, could lead one to a quick conclusion, albeit different ones, as to whether the bill is constitutional. Those two sentences must, of course, be read together and in the further context of other controlling principles embedded in the Constitution, with a purpose to harmonize them, if that is possible. The "District Clause" upon which the bill's supporters rely (Article I, Section 8, Clause 17) providing Congress with authority to "exercise exclusive Legislation in all cases, whatsoever, over such District" appears to grant comprehensive and plenary power on all; District matters, of national and local import. And, indeed, when courts have referred to this Clause they have used such terms as "a unique and sovereign power" an "extraordinary and plenary power" (United States v. Cohen, 713 F.2d 128 (D.C. Cir. (1984)) as well as a mandate to "provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end" (Neil v. District of Columbia, 110 F.2d 246 (D.C. Cir. 1940)).

Yet traditional modes of constitutional analysis and plain common sense tell us that a literal reading of this Clause in isolation from the rest of Article I or the rest of the Constitution cannot provide us with a definitive answer. For there are many other parts of the Constitution that guarantee rights and regulate processes that Congress in wielding power as a District legislator cannot ignore or violate. For instance, the Congress could not legislate racial segregation in the

District or deny the right to vote in local elections to women. Congress must wield its plenary legislative power over the District in harmony with other constitutional mandates and principles.

Thus your primary inquiry may be whether there are other parts of Article I in the Constitution generally that require Congress to refrain from granting the District residents the right to a representative in the House. I stress here that we are talking about Congress' power to legislate not whether an individual District resident can claim such a voting right under the Constitution (cf. Adams v. Clinton, Alexander v. Daley, 90 F. Supp. 2d 35 (D. D.C. 2000), 531 U.S. 940 (2000) [hereinafter Adams]). Congress' power to grant and District citizens' power to demand voting rights are different questions with quite possibly different answers.3 The principal provision raised as an express constitutional bar to the bill is Article I, Section 2 which says that the House shall "be composed of Members chosen . . . by the People of the several States and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."4 Again, were we to view this directive in isolation, we might well conclude, as critics of the bill indeed do, that Congress is powerless, short of a constitutional amendment, to provide to District residents and participation in the exercise of its legislative power, because the District is not a State whose "people" are qualified to choose members of the House.5 But this position, too, becomes problematic as an absolute when looked at in the context of other parts of the Constitution as well as key judicial interpretations of the scope of Congress' legislative powers, including those specifically exercised pursuant to the District Clause.

To begin with, Congress has the power under a separate clause, Article IV, Section 3, to admit all parts of the District, with the exception of federal buildings and lands constituting the Seat of Governments into the Union as a State. While practical and political considerations may well militate against such a move, Congress' constitutional power to do so provides a reasonable basis for the proposition that the greater power to confer statehood contains the lesser one, i.e., granting voting representation in the House to District residents. Clearly, the Constitution accords Congress the core power to decide which new entities can attain representation in the House as States.6 Such power is entirely consonant with and indeed paralleled by the "Exclusive" legislative power "in all Cases whatsoever" conferred on Congress by the "District Clause." Thus an exercise of District Clause authority to confer House voting powers would not seem in any way to disturb the separation of powers or the federalism principles underlying the Constitution. As others have testified at greater length, the States were the sole components of the Union at the time of the adoption of the Constitution and it is natural that in defining the processes of choosing Members of the House, they should have been designated as the location of congressional elections.7 There certainly is no evidence in the text or history of the Constitution signifying the Framers wanted to deny the District the franchise forever for any legitimate reason.

In the past Congress has indeed exercised powers to pass the Uniformed and Overseas Citizens Voting Act, 42 U.S.C. § 1973 ff-1, allowing Americans living abroad to vote in federal elections held in their last State of residence in the United States, regardless of whether they were citizens of that State or would qualify as electors for the State legislature in those States as Article I, Section 2 on its face requires.8 The Supreme Court, in turn, has ruled that U.S. citizens living in a federal enclave within a State, governed by the same exclusive congressional authority as the

District, may not be denied the right to vote in state or federal elections by the State.9 The overseas voter legislation, on the books since 1975, has never been challenged in court.

The message I carry from these two examples authorizing voting by U.S. citizens overseas and in federally regulated enclaves is that neither Congress nor the Court feels compelled to comply rigidly with the exact textual provisions of Article I, Section 2, i.e., that a State affiliation requirement is not a must that cannot be adjusted or accommodated with other powers, duties and rights under the Constitution.10

There are many other instances in which the courts have acceded to Congress' unique power to legislate for the District when it exercises that power to put the District on a par with States in critical constitutionally-related areas such as § 1983 civil rights remedies11; federal tax duties12 (Article I, Section 2, prior to 16th Amendment); regulation of commerce (Article I, Section 8).13 Most frequently cited is the Supreme Court case of National Mutual Insurance Company v. Tidewater Transfer Company, 337 U.S. 582 (1949), a case which merits and will receive further discussion below. The rationale of the courts in all these cases has been that Congress, under the District Clause, has the power to impose on District residents similar obligations and to grant similar rights as the States claim power to do under the Constitution itself. Given that the District is in reality a City-State of 600,000 people engaged in a multitude of private businesses and occupations, there is realistically no other way that a federalist union can do business under our Constitution. The only possible distinction between those exercises of congressional power and this one would be if it is concluded that the Constitution forbids any deviation or extension from the precise terms of Article I, Section 2 in franchising voters for congressional elections. The overseas and federal enclave examples demonstrate that is not the case.

The Tidewater case deserves special attention for several reasons. The Supreme Court, per Justice Jackson, dealt with the authority of Congress under the District Clause to confer upon Article III federal courts additional jurisdiction to hear controversies between citizens of the District and citizens of other States. Article III, Section 2 states clearly enough that the judicial power of the United States shall extend to "Controversies . . . between Citizens of different States." The Court reasoned, however, that Congress could treat District residents the same as State residents for purposes of diversity jurisdiction since it had power (1) to order citizens of States to come to the District's own local courts in District-State citizen controversies and (2) power to set up District courts outside the District. Why then should it be denied the power to let those controversies be heard in the existing Article III federal courts.14 The three Justices who signed on to the main opinion said Congress had no power to extend the meaning of Article III so far as the definition of a State was concerned, but that Congress' power and duty under the District Clause to provide for the welfare of District residents included the power to provide adequate courts for their controversies with residents of States.

In choosing to confer jurisdiction on existing federal courts rather than creating new District courts outside of the District, Congress was legitimately exercising its sovereign authority and "in no matter should the courts pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."15 It is true that Jackson considered the additional grant of diversity jurisdiction to District residents "a constitutional issue affect[ing] only the mechanics of administering justice . . . not involv[ing] an extension or a

denial of any fundamental right or immunity which goes to make up our freedoms."16 But Jackson then proceeded to lay down a standard for permissible line drawing on Congress' power under the District Clause:

The considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states are not present here.

Just so, they are not present here. The grant of voting rights to District residents does not disturb the relations between the federal government and the States. The people in the District will eventually be counted in the census and House members apportioned on that total. Other States have always been subject to some change in their representation when new States are admitted and no State will suffer a loss of representation under the bill. The Congress, which exercises sovereign power over the District, is the same Congress elected by the people of the States themselves which will have to pass this legislation. In no way are these States' powers usurped. Fundamental freedoms are enhanced, not invaded.17

Tidewater's caution is relevant here: "Congress is reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution. . . . Such a law of Congress should be stricken down only on a clear showing that it transgresses constitutional limitations."18

In the end, I go back to my original comments. Make no mistake: we are on unchartered territory. Everyone, from the beginning of the Republic, has lamented the unfairness of refusing the vote to District residents now numbering more than half a million people. There is no legitimate reason for doing so. The goal of providing representation to these voters in the House is a universally accepted one (at least in theory); like Madison, many would say it is indispensable in a democratic Republic. The omission of the Founding Fathers to provide for it in the Constitution itself or in the legislation setting up the Seat of Government was likely inadvertent rather than deliberate.19 Congress is the legislative sovereign of the District; at the same time it is the sole source of all legislative power of the national government. If it decides under its current Article I, Section 2 composition (about which there can be no controversy) to confer a limited franchise on District residents as part of its duty to provide for their welfare and this exercise infringes no structural balance between the Union and the States or dilutes no civil rights of any U.S. citizens, I believe it is entitled to a reasonable presumption of constitutionality under the Federalist approach. Of course no one can guarantee how the Third Branch will rule; acknowledgedly there are conflicting signals in their past jurisprudence though no directly contrary precedent that I know of on this precise issue. In such a landscape, Congress is justified in concluding the balance tilts in favor of recognizing for D.C. residents the most basic right of all democratic societies, the right to vote for one's leaders.

Thank you.

1 During those hearings before the House Judiciary Committee in 1978, I stated the official position of the Administration that Statehood could not be attained for the District in the current century by unilateral action of Congress alone because of Article I, Section 8, Clause 17 and the 23rd Amendment. I said, "the most straightforward and direct route to full representation [was]

through a constitutional amendment treating the District as if it were a State" for purposes of electing House members and Senators. I also said that the word "State" in Article I, Section 2 could not "fairly be construed" to include the District under a theory of "nominal statehood" and if "nominal statehood" is not a viable possibility, then a constitutional amendment is necessary. I did not discuss the alternative of using the District Clause as the source of Congress' power to grant District representation in the House.

2 See, e.g., Federalist Papers, No. 39 (Madison): "If we resort for a criterion, to the different principles on which different forms of government are established, we may define republic to be . . . a government which derives all its powers directly or indirectly from the great body of people. . . . It is essential to such a government, that it be derived from the great body of society. . . . On confirming the Constitution planned by the Convention, with the standard here fixed, we perceive at once that . . . the House of Representatives . . . is elected immediately by the great body of the people . . . the House of Representatives will derive its powers from the people of America. . . ." Compare Term Limits Inc. v. Thornton, 514 U.S. 803 (1995) ("Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States."

3 See, e.g., Adams, at 38-39 (complaint alleges failure of President to apportion representatives to District and to allow District residents to vote in House and Senate elections and failure of Congress to provide the District with a state government violate citizen plaintiffs' rights to equal protection of laws and guarantee of republic form of government). Some plaintiffs also alleged violations of the due process and privileges and immunities clauses.

4 The paragraph following Article I, Section 2 declares that "no person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." If the first paragraph is found not to be an obstacle to congressional action, accommodation of the second paragraph would follow, the same is true of Article I, Section 2 (apportionment of members among States on population basis). This section was amended by the 14th Amendment.

5 Of course Congress has already legislated to permit the participation of a nonvoting delegate elected from the District in deliberations in the House (apart from the House sitting as Committee of the Whole) (2 U.S.C.A. § 25a) (1994)). These deliberations are an intrinsic part of the deliberative process envisioned by the Constitution. See, e.g., Article I, Section 6 (Speech and Debate of Members protected from arrest or questioning).

6 This power is circumscribed only by the requirement that no new States be admitted without the consent of the Legislatures of the States involved. I note as well that the Adams case, supra, decided only that Congress was not required to make the District a State, not that it was not constitutionally authorized to do so. While District residents obtained the right to vote in Presidential elections through the 23rd Amendment ratified in 1961 this historical fact does not affect Congress' constitutional power to provide representative status for the District. Noteworthy as well is the fact that the 12th Amendment preserves a role for states qua states in the electoral process for Presidents that is not present in House elections--which are based solely on numbers of people in the congressional districts.7 But note Congress retained in Article I, Section 4 the

power to "make or alter" regulations on the time and manner of holding congressional elections and the place as to Representatives only.

8 The OCVA requires States to allow voting for federal and state offices in their last state of domicile as a "reasonable extension of the bona fide residence concept." H.R. Rep. No. 94-699, art. 7.

9 The Adams majority opinion, supra, reasoned that the Supreme Court in Evans v. Cornman, 398 U.S. 419 (1970) reached this result only because there was no attempt by Congress to exercise its exclusive and plenary power over the enclave so that the State continued to regulate the laws of the enclave residents in important ways. If that reasoning is valid, the counterproposition would be strange indeed--the more intrusive the Congress' role in their lives, the less power citizens in the enclaves would have over the choice of its members.

10 See, e.g., Justice Jackson's dissent in Terminiello v. Chicago ("there is danger that, if the Court does not temper its doctrinal logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact") (337 U.S. 1137 (1949)). If Congress cannot address the District's disenfranchisement we are left in the anomalous situation where a Massachusetts resident can move to Zimbabwe and retain the right to vote in federal elections but the same citizen cannot retain that right if she moves to the District even though the District has ultimate power over her public welfare and Massachusetts has little or none.

11 42 U.S.C. 1983 (1979), amendment following District of Columbia v. Carter, 409 U.S. 419 (1973).

12 Loughborough v. Blake, 18 U.S. (5 Wheat) 317 (1820).

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

14 Justices Murphy and Rutledge, concurring in the result, would have held the District to be a State under the diversity clause of Article III, Section 2. Four Justices dissented from the result.

15 In 1804, Chief Justice Marshall had authored an opinion saying that a District resident was not a citizen of a State within the meaning of Article III diversity jurisdiction. Hepburn & Dundas v. Ellzey, 2 (Cranch) 445 (1804).

16 337 U.S. 584. Justice Jackson did not refer to the lively debate that preceded constitutional ratification centering about the grant of diversity jurisdiction in Article III and the vigorous objections of some State citizens to being pulled away from their local jurists into a foreign forum. See, e.g., Federalist Paper No. 80 (Hamilton) "On the Bounds and Jurisdiction of the Federal Courts."

17 This bill in no way presages power to add other nonstate-affiliated entities to the ranks of those who may vote for House representatives. The situation of D.C. residents is unique in that Congress, under the Constitution, is designated the ultimate head of their local government. If they cannot vote for congressional representatives they are doubly disenfranchised from voting

for national and for local leaders. This is the equivalent to a State resident being denied the right to vote for State leaders as well as national leaders.

18 337 U.S. 603-04.

19 I will not rehash here the extensive history of comments made about District residents' voting rights before and after the adoption of the Constitution by leaders such as Madison, Hamilton and others. There is grist for several mills in those comments. All agree that after the cessations of land by Maryland and Virginia in 1790 and prior to Congress' establishment of the District as the Seat of Government in 1800, citizens in the ceded land continued to vote for a decade in their original States pursuant to the congressionally-enacted terms of the cessation. After 1800 they did not. It is difficult to conclude that if Congress in the 1800 legislation establishing the Seat of Government had provided for District residents voting in congressional elections, as many thought they would, it would have been denounced as violative of that Constitution. As for relying on the ceding State to take care of their former residents in the cessation documents, as others thought they would, it also seems clear that the States could only do that for their own former residents, not for all other newcomers from other States who emigrated to the District. The ball had to be in Congress' court to provide for this suffrage. For varying interpretations of this history, see majority and dissenting opinions in Adams v. Clinton, supra.