Written Testimony of Representative Jason Chaffetz (UT-03),
Before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties,
In opposition to H.R. 157, the "District of Columbia House Voting Rights Act of 2009"
27 January 2009

Introduction

Chairman Watt, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, I want first to thank you for the opportunity to testify today concerning an issue that clearly and significantly impacts not only the good people of the Third District of Utah, but our nation as a whole.

I want to make clear from the outset that I, like all of you, want to see every voting citizen of these great United States receive equal representation in government. The people of Washington, D.C., no less than the people of Utah or any other state, deserve to have a voice.

But we must ensure that in our eagerness to provide equal representation and equal protection of the laws that we uphold and respect the principles our nation's founders enshrined in the Constitution. With all due respect to my colleagues and others who support this bill, my primary concern with the DC Voting Rights Act is that it is unconstitutional. And if we cannot resolve the issue of constitutionality, no amount of discussion about "taxation without representation" or how long Utah has deserved a fourth seat would permit us to move forward with this bill.

Perhaps what I should say is that I believe there are other proposals, such as the bill offered by my distinguished colleague from Texas, which provide the District's residents the voting rights they deserve and which we seek to respect, but without the concerns of constitutional conflicts.

I am concerned that this bill is not only unconstitutional, but is generally bad public policy. It sets a dangerous precedent. It creates uncertainties about the future of the District's voting representation. And while it gives the District's citizens a proportionately greater voice in the House than other Congressional districts, it gives them a diluted right to representation overall.

H.R. 157 Is Unconstitutional

Washington, D.C., is not a State of the United States of America, but a specially-created Federal District. This is made clear in the Twenty-third Amendment to the Constitution, which refers to the number of electors the District would be entitled to have "if it were a State." This is not a matter of playing semantic games, but an instance where real consequences are attached to the term we use. The question, then, is whether the District can constitutionally be treated like a State for purposes of representation in the House. The Supreme Court recently affirmed the decision of a federal district court here in D.C., which stated "We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives."

The interpretation required by this bill's proponents asks too much of the plain language of the "District Clause" of the Constitution, found in Article I, Section 8, clause 17, which describes Congress' power to legislate in matters regarding Washington, D.C. This clause gives Congress the power to "exercise exclusive Legislation in all Cases" over the District. "Exclusive legislation," it seems to me, refers to this specially-created federal District being free from governance of the legislature of the state from which the land was ceded. This rationale is supported by comments made by the Constitution's primary author, James Madison, in Federalist Paper No. 43. Otherwise the supremacy of the federal government would be in question, if the state in which the District sat could contend for power to govern it.

I do not believe, as the proponents of H.R. 157 suggest, that the Constitution's Framers intended to give plenary power to Congress to give the District voting representatives in the House. A proposed amendment by Alexander Hamilton at the Constitutional Convention in New York would have given the District representation in Congress when its population grew sufficiently, but that amendment was rejected. In light of the specific and deliberate provisions the Founders provided for choosing members of Congress, and the rejection of Hamilton's amendment, I cannot accept that the Founders intended to give Congress power to amend that Constitutional process by a mere statute, and neglected to specify that belief. By this logic, there is no prohibition in the Constitution preventing H.R. 157 from giving the District two Senators, multiple representatives, or amending other provisions of the Constitution that refer to citizens of the District. If this is appropriate, why are we not providing the District with two Senators and other privileges normally reserved to States? If it is not, as I assert, then how can we provide even one voting Representative?

Another provision of H.R. 157 that raises constitutional concerns is the designation of an "at-large" seat for the State of Utah. Under this bill each citizen of Utah will be represented by both their geographically designated representative as well as the at-large representative. While the allocation of an at-large representative to Utah may not present a "one person, one vote" problem in the traditional *intrastate* context, the at-large seat would likely result in a "one person, one vote" problem in the *interstate* context. In essence, the at-large seat results in Utah residents having disproportionately more representation in the House than citizens of other states.

The Supreme Court acknowledged that Congress receives "far more deference [in apportionment] than a state districting decision." However, the Court also made it clear that Congressional alterations of the apportionment formula "remain open to challenge . . . at any time." Accordingly, I agree with Senator Hatch, who recently stated that an at-large seat proposal of this nature is unconstitutional, and that he would not support it.

H.R. 157 is Bad Public Policy

Even setting aside the Constitutional concerns, this bill is bad public policy. First, it sets a dangerous precedent. If Congress has the power to seat voting Members for the District, is there any prohibition to prevent granting the District two, five, or even ten members? Will a future Congress take back those seats if the Members do not vote with the majority? Because one Congress cannot bind future Congresses, we are setting up ongoing contention, in which citizens of the District first receive and then have taken from them their voting representatives. We can do better than this.

Second, H.R. 157 not only results in District residents being represented at a lesser level than they deserve, as I will discuss shortly, but perversely results in the District being represented at a higher level than other congressional districts. This bill would not abolish the position of Delegate for the District of Columbia. As a result, District residents would be represented by both member of Congress who could vote in committee and on the House floor, and a delegate who could vote in committee. Consequently, District residents would get more representation in congressional committees than other American citizens.

Last, because this issue is so divided among constitutional law scholars we have every reason to believe H.R. 157 will be contested in the federal courts, and that every level of the federal courts is likely to strike down this legislation. But that process will likely take years, and at the end District residents will be exactly where they are now in their quest for Congressional representation – frustratedly waiting. This legislation, and the rights of the citizens it impacts, is far too important to consign to this unsatisfactory and deferred resolution.

H.R. 157 Gives the District's Citizens a Diluted Right to Representation

Taxation without representation is fundamentally flawed. The question should be how we can respect District residents' rights of representation without sacrificing constitutional principles.

Should H.R. 157 pass, District citizens will find themselves with one representative in the House, no representation in the Senate, and likely with years of uncertainty regarding whether their representation will be declared unconstitutional and taken away. Some might argue that granting the District representation in the Senate ameliorates these concerns, but doing so only compounds the constitutional problems discussed above.

To ensure that the District's citizens receive their full rights of representation, while upholding the Constitution, we should consider plans that would allow District residents to vote with Maryland in federal elections, as they did before the rights we now seek to restore were taken. District residents will thus end up with full representation in both the House and Senate, and will not have to worry that years down the road their representation might be taken away by the Courts.

Conclusion

In conclusion, I fully support the voting rights of the good people of Washington, D.C. However, H.R. 157 is not the long-term solution that citizens of the District deserve. They deserve to enjoy full representation in Congress, as do the people of the several states. We can achieve this goal, while at the same time remaining true to the Constitution. This bill is neither constitutional nor the best of the proposed legislative solutions to the problem. A plan that would allow District residents to vote with Maryland in federal elections is constitutional, sound public policy, and avoids the problems implicated by H.R. 157. As I have said before, this is the far better course of action for District residents, Utah residents, and the Constitution. I urge this committee to carefully consider these things. We should do this in the right way now, and not be so caught up in our desire to ensure that District residents have a voice that we abandon constitutional principles that make that voice meaningful.