TESTIMONY OF
U.S. REPRESENTATIVE LOUIE GOHMERT (TX-01)

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
10:00 A.M. in 2141 Rayburn House Office Building

Hearing on: H.R. 157, the "District of Columbia House Voting Rights Act if 2009"

Thank you, Chairman Nadler.

It is contrary to our nation's democratic traditions to levy federal income taxes on Washington, D.C. residents while denying them full representation in the U.S. Congress. It is incumbent upon Congress to address this matter in a way that is in compliance with our Constitution.

The District of Columbia House Voting Rights Act of 2007 is an unconstitutional attempt to give D.C. a full house member. It does not fully address the problem, as it does not provide for Senate representation. A broad reading of Article I, Section 8, Clause 17 of the U.S. Constitution is not sufficient to overcome the plain meaning of Article I, Section 2's requirement that House members come from states. There are proper methods to address the unfairness of Washington, D.C.'s taxation without representation but the bill under consideration by the committee today is not one of those methods. I have great respect for the gentlelady from D.C., Del. Eleanor Holmes Norton, but her effort to legislatively create an end-run around the expressed words of the Constitution is a clear claim that all those who fought to create a constitutional amendment in the late 1970s lied or were completely wrong to assert that it could not be done without a constitutional amendment. There are ways that can correct the improper taxation without representation which I can and would support, but a legislative effort at a constitutional amendment is not one of them.

As you are aware, Ms. Holmes Norton's District of Columbia House Voting Rights Act permanently increases the size of the House to 437 members[1], gives the District of Columbia a full House member[2], and gives an at-large member to Utah.

II. The Provision Granting a Member to DC is Unconstitutional

A. The Basics of D.C.'s Status

The proponents of the Holmes Norton bill stretch the reading of the D.C. clause in Article I, Section 8, Clause 17 in an attempt to overcome the plain meaning of Article I, Section 2 – which says that Members come from States.

[1] H.R. 157 § 3(a).
[2] *Id.* at § 2.

Article I, Section 2, Clause 1 states in part:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states

Article I, Section 8, Clause 17 states in part:

> The Congress shall have power to … exercise exclusive legislation in all cases whatsoever, over such 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

The voting bill even states that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional District…."[3] One of the "other provisions" that the voting bill is trying to overcome is Article I Section 2.

It is well established that the word "states" in Article I, Section 2 does not refer to D.C.[4] Chief Justice John Marshall made this point in *Hepburn v. Ellzey*[5] when he wrote that the term "state" plainly does not include D.C. for representation purposes, and used this finding as a baseline when deciding that D.C. residents cannot establish diversity of citizenship jurisdiction because they do not come from states.[6]

A review of the framer's debates reveals that the founders did not consider D.C. a state, nor did they contemplate that those living in the federal district would have full representation in Congress. Alexander Hamilton offered an amendment to the Constitution during the New York ratification to provide full congressional representation to D.C., but the convention rejected the amendment on July 22, 1788.[7] Thomas Tredwell stated at the same convention that the plan for D.C. "departs from every principle of freedom" because it did not give residents full representation in Congress.[8] These actions show that the Constitution, as it currently stands, does not provide D.C. with full congressional representation. The Constitution must be amended or the status of D.C. must be changed for the District to have full voting members of Congress.

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[3] *Id.* at § 2(a).

[4] *See* Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections). Most legal commentators agree that D.C. is not a state. *See, e.g.*, Viet Dinh and Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives 9 (2004) (Dinh and Charnes are well-known proponents of D.C. voting rights.).

[5] 6 U.S. (2 Cranch) 445 (1805).

[6] *Id.* at 452.

[7] 5 THE PAPERS OF ALEXANDER HAMILTON, at 189-90 (Harold C. Syrett and Jacob E. Cooke, eds. 1962).

[8] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), reprinted in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

B. Tidewater

In *National Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co.*[9], the U.S. Supreme Court did not squarely address Congress's power to grant full voting members by statute under the D.C. clause[10], but it provided guidance that is helpful to analyzing the constitutionality of H.R. 157. In *Tidewater*, a three-judge plurality overruled part of Justice Marshall's *Hepburn* opinion and found that D.C. residents can provide the basis for federal diversity jurisdiction. The plurality took pains to emphasize that diversity jurisdiction for D.C. residents is not a significant constitutional issue, stating that the case did not involve extending a fundamental right.[11]

Tidewater's significance lies in the fact that seven Justices agreed with Chief Justice Marshall that D.C. is not a state under the Constitution[12], and six Justices rejected the plurality's creative reading of the D.C. clause as it pertained to granting diversity jurisdiction.[13] It is highly unlikely that these six Justices would have held that the D.C. clause granted Congress the power to provide full Members to D.C. by statute after holding that the clause did not even provide diversity jurisdiction. It is possible that even the three-Justice plurality would reject the voting bill's interpretation of the D.C. clause given that it limited *Tidewater* to cases not involving the extension of a fundamental right. The *Hepburn* and *Tidewater* cases firmly establish the principle that Article I, Section 2 cannot be easily evaded by an expansive reading of the D.C. clause.

III. The Provision Granting a Member to Utah is Unconstitutional

A. At-Large Members

The voting bill creates another position in the House that would be filled by Utah, but on an at-large basis through the 112th Congress, meaning all residents in the state's three congressional districts would vote for a fourth member.[14] The Utah provision explicitly exempts itself[15] from a 1967 law that requires that each citizen only vote for one House member.[16] The 1967 law is read in tandem with an apparently contradictory 1941 law[17] that provides for at-large representation when a state does not redraw its districts after a reapportionment grants it another member.[18] The Supreme Court in *Branch v. Smith* held that reading the two laws together establishes that single-member districts must be drawn whenever possible.[19]

B. One Person, One Vote

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[9] 337 U.S. 582 (1949).
[10] No court has squarely addressed this issue.
[11] *Id.* at 585.
[12] *Id.* at 587; *Id.* at 645 (Vinson, J., dissenting); *Id.* at 646 (Frankfurter, J., dissenting).
[13] *Id.* at 604-06 (Rutledge, J., concurring); *Id.* at 628-31 (Vinson, J., dissenting); *Id.* at 646-55 (Frankfurter, J., dissenting).
[14] H.R. 157, § 3(c)(3)(A).
[15] *Id.*
[16] 2 U.S.C. § 2c.
[17] 2 U.S.C. § 2a.
[18] *Branch v. Smith*, 538 U.S. 254, 266-71 (2003).
[19] *Id.*

The U.S. Supreme Court clearly defined the one person, one vote rule in *Wesberry* when it held that a Georgia apportionment law violated Article I, Section 2 by drawing districts that contained two to three times as many residents as other districts in the state.[20] The Court stated that "the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[21] This means that, to the extent possible, congressional districts must contain the same number of citizens.

The fact that the Utah provision has to exempt itself from a law requiring single-member districts whenever possible gives cause to question the legal foundation of the voting bill. The fact that the new seat remains at large through the 112th Congress probably makes the bill unconstitutional under the one person, one vote principle discussed above. No court has ruled that at-large districts violate Article I, Section 2 per se, but reading *Wesberry* along with the '41 and '67 at-large laws could reasonably lead to a conclusion that allowing citizens of a state to vote for two House members over two Congresses is unconstitutional.

If H.R. 1433 became law, Utah would not need four years to draw a fourth district. The kind of emergency contemplated by the '41 law that necessitates an at-large seat would pass, and Utah voters would each be voting for two House members for no reason at all. Their vote would be worth more than a vote in a state without an at-large member, and would be in violation of the one person, one vote rule found in Article I, Section 2.

In fact, the Utah legislature approved a new four-seat Congressional map in December 2006 in response to concerns about creating an at-large seat that kept a similar version of the voting bill from being reported out of the House Judiciary Committee in the 109th Congress.[22] The creation of an at-large district is entirely unnecessary, and unconstitutional.

IV. Other Solutions

If the District of Columbia House Voting Rights Act of 2009 became law, it would still leave DC residents without representation in the U.S. Senate. Indeed, the idea of granting two Senators to a 69-square-mile city with less than 600,000 residents would inevitably delay many efforts to address this matter, including any attempt to provide Senate representation in the same manner as Ms. Holmes Norton's bill. Further, H.R. 157 will inevitably be challenged in court, calling into question the validity of any narrowly-passed legislation that a Washington, D.C. member votes on and leaving Washington, D.C. residents in a continued state of flux over their status. Lastly, passage of the voting bill would set numerous bad precedents, including that Congress can add or remove D.C. members at will, and can do the same for territories such as American Samoa, which has only 58,000 residents, most of whom are not American citizens.[23]

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[20] 376 U.S. 1, 7 (1964).
[21] *Id.* at 7-8.
[22] Alan Choate, *Push begins for 4th Utah district*, DAILY HERALD, March 12, 2007.
[23] *See* CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, at 17.

The clearest option is to amend the Constitution to provide D.C. with representation, as was done when Presidential electors were granted to D.C.[24] A Democrat-controlled Congress **in 1978** attempted to do this very thing, and **the House Judiciary Committee reported the bill and wisely stated that this action required a constitutional amendment, because "statutory action alone will not suffice**."[25]

V. Conclusion

The District of Columbia House Voting Rights Act of 2007 is an unconstitutional attempt to give D.C. a full house member. It does not fully address the problem, as it does not provide for Senate representation. A broad reading of the D.C. clause is not sufficient to overcome the plain meaning of Article I, Section 2's requirement that House members come from states. There are proper methods to address the unfairness of Washington, D.C.'s taxation without representation but the bill under consideration by the committee today is not one of those methods.

[24] *See* U.S. CONST. AMEND. XXIII.
[25] H. REP. NO. 95-886 (95th Cong., 2d Sess.) at 4.