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STATEMENT OF
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HEARING ON H.R. 157, THE "DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2009

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

JANUARY 27, 2009

Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee, I am Wade Henderson, President and CEO of the Leadership Conference on Civil Rights (LCCR). I appreciate the opportunity to speak before you today regarding LCCR's strong support for providing voting rights to the District of Columbia, in general, and for H.R. 157, the "District of Columbia House Voting Rights Act of 2009" ("DC VRA"), in particular.

LCCR is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. LCCR consists of approximately 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. I am privileged to represent the civil and human rights community in submitting testimony for the record to the Committee – and I want to express my strong gratitude to you for today's hearing and also for your support over the years in the effort to give DC residents a meaningful voice in Congress.

In organizing legislative hearings such as this, I know that it is common to distinguish between expert witnesses, on one hand, and affected individuals, or what Congressional staffers sometimes refer to as "victims," for lack of a better term, on the other. Interestingly enough, I feel as though I can speak before you today as both kinds of witnesses. So with my twin roles in mind, I would like to proceed by discussing what I see as the two basic, fundamental questions that have brought us here today: first, why this issue? And second, why this approach?

Why this issue?

In answering the first question, I would like to begin on a personal level. As a lifelong civil rights advocate, I have always spoken out on Capitol Hill on behalf of my fellow Americans. And throughout the course of my career, I have seen changes that have made the nation a better, stronger place, one that is more aligned with its founding principles. We continue to break down

barriers to equality and opportunity for Americans from all walks of life, and now more than ever, especially in light of the profoundly historical and moving occurrence that the world witnessed here on Capitol Hill just last Tuesday, our government at all levels continues to more closely reflect the make-up of our great nation.

I have seen great progress in the District of Columbia as well. When I was born in the old Freedman's Hospital, on Howard University's campus, the city's hospitals were segregated along racial lines by law. That is no longer the case.

LeDroit Park, where I grew up and where I now own a home, was once an all-black neighborhood by law and by custom. Today, however, people of all races and from all around the world live in the area as my neighbors and friends. Gone, too, are the remnants of the system of *de jure* separate schooling that sent me to an all-black elementary school, despite the fact that I started grade school after the landmark ruling in *Brown v. Board of Education* had officially outlawed racial segregation.

Yet one thing still has yet to change for me as a lifelong resident of Washington: in spite of all of the progress we have seen, and in spite of all of my efforts to speak out on Capitol Hill on behalf of other Americans, I have never had anyone on Capitol Hill with a meaningful ability to speak out on my own behalf. For over 200 years, my hundreds of thousands of neighbors in this city and I have been mere spectators to our democracy. Even though we pay federal taxes, fight courageously in wars, and fulfill all of the other obligations of citizenship, we still have no voice when Congress makes decisions for the entire nation on matters as important as war and peace, taxes and spending, health care, education, immigration policy, or the environment.

And while we DC residents understand the unique nature of our city in the American constitutional system, and we recognize Congress' expansive powers in operating the seat of our federal government, we are not even given a single vote in decisions that affect DC residents and DC residents alone. Without as much as a single vote cast on behalf of DC residents, Congress decides which judges will hear purely local disputes under our city's laws, how it will spend local tax revenues, and even the words the city is allowed to print on the license plates of its residents' cars. Adding insult to injury, we were not even able to cast a single vote when Congress has decided, in recent years, to prevent our elected city officials from using our own tax dollars to advocate for a meaningful voice in our democracy.

It is enough to make people feel like dumping crates of tea into the Potomac River.

From a broader civil and human rights perspective, the continued disenfranchisement of DC residents before Congress continues to stand out as the most blatant violation of the most important civil right that Americans have: the right to vote. Without it, without the ability to hold our leaders accountable, all of our other rights are illusory.

Our nation has certainly made tremendous progress throughout history in expanding this right, including through the 15th, 19th, and 26th Amendments; and in the process, it has become more and more of a role model to the rest of the world. The Voting Rights Act of 1965 has long been the most effective law we have to enforce that right, and it has resulted in a Congress that

increasingly looks like the nation it represents. Its overwhelmingly bipartisan renewal in 2006, under the leadership of then-Chairman Sensenbrenner and then-Ranking Member Conyers, stands out as one of Congress' finest moments in many years.

In spite of this progress, however, one thing remains painfully clear: the right to vote is meaningless if you cannot put anyone into office. Until DC residents have a vote in Congress, they will not be much better off than African Americans in the South were prior to August 6, 1965, when President Johnson signed the Voting Rights Act into law – and until then, the efforts of the civil rights movement will remain incomplete.

Their situation will also undermine our nation's moral high ground in promoting democracy and respect for human rights in other parts of the world. Indeed, the international community has been taking notice. In December of 2003, for example, a body of the Organization of American States (OAS) declared the U.S. in violation of provisions of the American Declaration of the Rights and Duties of Man, a statement of human rights principles to which the U.S. subscribed in 1948.[1] In 2005, the Organization for Security and Cooperation in Europe, of which the U.S. is a member, also weighed in. It urged the United States to "adopt such legislation as may be necessary" to provide DC residents with equal voting rights.[2]

Extending voting rights to DC residents is one of the highest legislative priorities of the Leadership Conference on Civil Rights this year, and will remain so every year, until it is achieved.

Why this approach?

Mr. Chairman, I must admit that when former Representative Tom Davis (R-VA) first proposed pairing a first-ever vote in the House for the District of Columbia with an additional House seat for Utah, a state that was shortchanged in the last reapportionment of Congressional seats in 2001, I was skeptical. While I greatly appreciated Rep. Davis' creative effort, I testified before his committee in 2004 about two concerns that I had with his approach.

First, his bill would have required a mid-decade redrawing of Utah's federal legislative districts, a move that I believed raised constitutional concerns and that could set a dangerous precedent for diluting the votes of racial and ethnic minorities. Second, unlike the "No Taxation Without Representation Act" that Delegate Eleanor Holmes Norton (D-DC) had sponsored in previous years, I was concerned about the fact that the DC VRA would only provide DC residents with a vote in the House, stopping short of providing the full representation that DC deserves.

A few things have changed, however. For one, in 2006, the Supreme Court settled the issue of whether mid-decade redistricting is constitutional, by upholding the 2003 redrawing of Texas' congressional map in *League of United Latin American Citizens v. Perry*.[3] In addition, as the

[1] Inter-American Commission on Human Rights, *Statehood Solidarity Committee/United States*, Report No. 98/03, Case 11.204 (Dec. 29, 2003).
[2] OSCE Parliamentary Authority, Washington, *DC Declaration and Resolutions Adopted at the Fourteenth Annual Session*, July 1-5, 2005.
[3] 126 S. Ct. 2594 (2006).

District of Columbia House Voting Rights Act picked up momentum in the 109th and 110th Congresses, the Governor and the legislature of Utah showed extraordinary care in proposing Congressional districts that would avoid the kinds of problems that had made me and LCCR so skeptical of mid-decade redistricting in the first place.

I am also less troubled than I was before about the fact that the DC VRA only provides DC with representation in the House. To be sure, LCCR still strongly supports the full representation for District of Columbia residents in both the House and the Senate. At the same time, I have been pleasantly surprised at the attention that the debate over the DC VRA has brought to not only the issue of DC disenfranchisement but also to the more recent unfair dilution of the votes of Utah citizens, and at the number of new – and in some cases unexpected – allies we have recruited along the way. While any political compromise involves the risk that it will reduce the momentum for future progress, I have grown more optimistic that the enactment of this legislation will mark the beginning of the debate, rather than the end.

At the same time, I recognize that the bill is still not without its critics, and I would like to address some of the other concerns that have been raised about it. During the last debate over the DC VRA on the House floor in 2007, I must say I was profoundly disappointed in the objections that several Members raised. For example, one member referred to the bill as a "cynical political exercise,"[4] while another labeled it "a raw power grab by the new Democrat majority."[5]

To anyone who would resort to such harsh rhetoric in criticizing the approach taken by the DC VRA, I would simply ask: what is your alternative, and what have you been doing to turn it into law? Sadly, only a very small number of Members who have opposed the DC VRA would be able to provide a credible answer to that question. Some opponents have called for returning most of DC to the state of Maryland, a legitimate but complicated option that I will discuss below.[6] Yet when opponents were given two separate opportunities to offer alternative language that would give DC residents the representation they deserve, through the "motion to recommit" procedure, retrocession never came up.

Putting aside the more reckless arguments that have been made against the DC VRA, other opponents have argued that while DC residents deserve Congressional representation, Congress does not have the power to treat DC as a "state" for the purpose of giving it that representation. While I anticipate that Professor Dinh will respond to this argument more thoroughly, I would like to respond with two brief points.

First, when the District of Columbia was first envisioned, it was primarily created in order to keep any one state from controlling and possibly harming the seat of the federal government. The creation of a "no man's land," where the most important civil right we have in a democratic

[4] Rep. Pete Sessions (R-TX), Congressional Record, 110th Cong., 1st Session at H3569 (Apr. 19, 2007).
[5] Rep. Patrick McHenry (R-NC), Congressional Record, 100th Cong., 1st Session at H3574 (Apr. 19, 2007).
[6] Former Rep. Ralph Regula (R-OH), to his credit, proposed retrocession for a number of years. Only a very small number of his colleagues, however, have supported his efforts. In April 2007, three days before the House last attempted to bring the DC VRA to a vote on final passage, Rep. Louie Gohmert (R-TX) introduced a similar counter-proposal. Rep. Dana Rohrabacher (R-CA) has also offered a constructive – albeit highly-complicated – alternative to retrocession.

system would simply not apply, was not necessary to this end. While there was some debate over the issue of whether residents of the new district would be represented in Congress, and while those opposed to initially granting DC representation certainly prevailed with the passage of the Organic Act of 1801, the decision at the time involved an important trade-off that no longer applies: long before such developments as the telephone, air travel, and the Internet made it far easier for citizens across the nation to communicate with their legislators, the very small population that resided in the District in 1801 did enjoy greater access to Congress than other citizens had, even in the absence of actual voting representation.[7] Over the past two centuries, however, particularly after the abolition of slavery, the size and the relative influence of the native DC population has changed so drastically that the assumptions made in 1801 simply no longer apply.

Second, while Article 1, Section 2 of the Constitution does indeed provide that House members shall be chosen "by the people of the several States," there is room for disagreement over how narrowly or broadly the word "state" should be interpreted. In a number of other contexts, the use of the term "state" in the Constitution has been interpreted to include the District of Columbia. While there were competing justifications given, a majority of the Supreme Court in 1949 ruled, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[8] that the District could be treated as a state for the purpose of federal diversity jurisdiction. Few people if any would argue that the right to a "speedy and public trial" under the Sixth Amendment, or the Equal Protection clause, does not apply in the District of Columbia, even though their text refers to the actions of a "state."

Given these examples, and given the principles on which the then-recent American Revolution had been based, it is certainly plausible – at the very least – that our Founding Fathers would have wanted Congress to have maximum leeway in preventing the evil of "taxation without representation" from ever being imposed on citizens again. In fact, given the current size and relative political weakness of the DC population today, they most likely would be horrified that Congress had not addressed it a long time ago.

Because some opponents of the DC VRA remain unconvinced that Congress has the authority to provide DC representation in the House, I fully expect that they will begin mounting a constitutional challenge before the ink from President Obama's signature pen has had a chance to dry. While I have certainly had my differences of opinion with a number of rulings by the Roberts Court, I for one do not shy away from such a challenge. Indeed, I believe that it would be appropriate for judicial review to occur on an expedited basis,[9] to remove all doubt about the

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[7] *See, e.g.*, remarks of Rep. Huger in 1803: "Gentlemen, in looking at the inconvenience attached to the people of the Territory, do not sufficiently regard the superior convenience they possess. Though the citizens may not possess full political rights, they have a greater influence upon the measure of the Government than any equal number of citizens in any other part of the Union." Annals of Congress 489 (Feb. 1803).

[8] 337 U.S. 582 (1949).

[9] I believe that 28 U.S.C. 2284 would already provide for expedited judicial review of the DC VRA. Some opponents have argued, however, that 28 U.S.C. 2284 is not directly applicable to a case in which voting representation is allocated to the District of Columbia, and that Congress should expressly provide jurisdiction for expedited review. While I believe it is unnecessary, Congress could adopt language similar to what was offered as a "motion to recommit" during the April 19, 2007 House debate on H.R. 1905, the 110th Congress' version of the DC VRA.

bill's constitutionality as quickly as possible. I also believe that while the existence of constitutional standing under Article III must ultimately be determined by the courts, Congress could appropriately indicate in the bill that it wished Members to have standing to mount a challenge to it.

Finally, I would like to discuss two alternatives that DC VRA opponents have frequently raised in past debates over this legislation. While both of them have their merits, and both certainly represent good-faith contributions to the broader debate over DC representation, they are also accompanied by serious practical and legal hurdles that would need to be addressed before LCCR could support either approach.

One alternative is to amend the Constitution to provide DC with Congressional representation. LCCR would certainly support an effort to amend the Constitution, if it is ultimately deemed necessary. However, our nation has an extensive legal and political tradition of amending the Constitution, our nation's most precious document, only as a last resort when other efforts to address the problem at hand have been tried and have failed. With regard to DC representation, and in light of the fact that the Supreme Court has yet to rule definitively on Congress' authority to provide representation, I do not believe we are at that point yet.

Retrocession, or returning most of what is currently the District of Columbia to its former home in Maryland, is another option that has been under discussion for a number of years. The federal government would retain a small and essentially uninhabited area of DC as a "National Capital Service Area," and current DC residents would be given full voting rights as new citizens of Maryland.

It is also a legitimate topic of discussion, and because Congress returned another portion of the original District of Columbia to Virginia in 1846, there is also clear legislative precedent for such an approach. At the same time, however, retrocession would require the consent of Maryland, and achieving the political consensus necessary to return the District to Maryland could be all but impossible – and I am inherently wary of the notion that the most important civil right possessed by more than half a million Americans should depend on the permission of state government. Furthermore, the political and economic consequences of the move would be dramatic and far-reaching for the populations of both DC and Maryland. It also could not be undertaken through legislation alone: Congress and the states would still need to amend the Constitution in order to repeal the 23rd Amendment. Given the drastic nature of the approach, I believe that retrocession is premature, and it would require extensive further study.

Ultimately, I believe the DC VRA is the best approach for Congress to take on behalf of the residents of both DC and Utah. It presents a politically neutral approach, it has a solid chance of surviving constitutional scrutiny, and unlike the above two options, it can be passed and signed into law this year. The residents of both DC and Utah have already waited far too long.

This concludes my prepared remarks. Again, I want to thank you for the opportunity to speak before your committee today. I look forward to answering any questions you may have.