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Hearing on the District of Columbia House Voting Rights Act of 2007

U.S. House of Representatives
Committee on the Judiciary

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Distinguished members of the Committee: Thank you for giving me the opportunity to speak with you this morning about the pending District of Columbia House Voting Rights Act of 2007. I will address Congress's authority to pass legislation providing voting representation to residents of the District. I will also address the constitutionality of a proposal under which the additional state Representative provided by the Act would be elected at large.

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Under Article I, Section 8, Clause 17 of the Constitution, known as the "District Clause," Congress has the authority to "exercise exclusive Legislation in all Cases, whatsoever, over" the District of Columbia. History and Supreme Court precedent suggest that this plenary power includes the ability to provide residents of the District voting representation in the House of Representatives.

Two related Supreme Court cases confirm the breadth of Congress's authority under the "District Clause." In the first, *Hepburn v. Ellzey*, Chief Justice Marshall construed Article III, Section 2 of the U.S. Constitution—which provides diversity jurisdiction in suits "between citizens of different States"—to exclude citizens of the District of Columbia. The Court found it "extraordinary," however, that residents of the District should be denied the same access to federal courts that is provided to aliens and state residents, and it invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."

Nearly 145 years later, Congress accepted that invitation, and enacted legislation that explicitly granted District residents access to federal courts on diversity grounds. That

legislation was upheld by the Supreme Court in 1949 in a case called *National Mutual Insurance Company v. Tidewater Transfer Company*. A plurality of the Court led by Justice Jackson held that Congress could for this purpose treat District residents as though they were state residents pursuant to its authority under the District Clause. The two concurring justices would have gone even further; they argued that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III.

Tidewater strongly supports Congress's authority to provide the District a House Representative via simple legislation. As the plurality explained, because Congress unquestionably had the greater power to provide District residents diversity-based jurisdiction in special Article I courts, it surely could accomplish the more limited result of granting District residents diversity-based access to existing Article III courts. Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may, by simple legislation, take the more modest step of providing citizens of the District with a voice in the House of Representatives.

Indeed, Congress has granted voting representation to citizens not actually living in a state on at least two other occasions. In *Evans v. Cornman*, the Supreme Court held that residents of federal enclaves within states—such as NIH—have a constitutional right to congressional representation. And through the Overseas Voting Act, Congress has provided Americans living abroad the right to vote in federal elections as though they were present in their last place of residence in the United States. There is no reason to suppose that Congress has less ability to provide voting representation to the residents of the Nation's capital.

There is certainly no reason to believe that, by providing voting representation to state residents, the Framers affirmatively intended to deny the vote to residents of the Nation's capital. This is particularly so since all citizens of the Nation lived in a state at the time the Constitution was ratified, including those who lived in the parts of Maryland and Virginia that later became the District. As the plurality noted in *Tidewater*, the District was little more than a "contemplated entity" when the Constitution was ratified, and "[t]here is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia." But the District now has nearly 600,000 people—greater than the population of all of the thirteen original states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens.

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As you are aware, the D.C. Voting Rights Act would increase the size of the House by two members: One would go to the District and the other to the state next entitled to an additional Representative. It has been proposed that the Act would direct the entitled state to elect its additional Representative at large, rather than by creating an additional single-member district. Congress plainly has the authority to create such an at-large seat. I understand, however, that questions have been raised about whether such a provision would violate the "one person, one vote" principle. In my view, it would not.

The Constitution requires that, as nearly as is practicable, one person's vote in a congressional election must be worth as much as another's. An apportionment plan may run

afoul of this "one person, one vote" principle when congressional districts *within a state* contain different numbers of residents, diluting the voting power of residents in the more populous districts. The proposed at-large election of an additional Representative would not trigger that concern, because it would not dilute the relative value of any person's vote in that state.

Suppose, for example, that Utah is the state entitled to the additional seat. Utah currently has three congressional districts. If Utah were to hold an at-large election for a new fourth seat, all Utah voters would have the right to cast a vote in their existing district *and* in the state-wide election for the fourth seat. So a resident of District 1 would still have the same proportionate representation as a resident of District 2 or District 3.

It should not matter for constitutional purposes that residents in Utah would get to vote for two representatives, while residents of other states with single-member districts would vote for only one. What matters for purposes of proportionate representation is the weight of each person's vote, not the number of times they pull the lever in the voting booth. The proposed at-large election would not give residents of Utah more or less voting power than the residents of other states with single-member districts.

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In sum, Congress has the authority to enact the D.C. Voting Rights bill, with or without the at-large provision. Indeed, it is legislation that the Framers would have expected and embraced as fulfilling their democratic vision for the Nation.