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BEFORE THE UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
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Thank you, Mr. Chairman, for this invitation to testify.

Surely Washington does not need to make an elaborate case for democratic representation to America. It is the founding idea of the nation, inscribed in the Declaration of Independence by Thomas Jefferson, who wrote that governments "deriv[e] their just powers from the consent of the governed."

In the Revolutionary War, the rallying cry of "no taxation without representation" unified people of diverse politics. They all despised King George's arrogant disregard for the liberty and sovereignty of the Americans and his theory of "virtual representation," which held that the American colonists were already effectively represented by Members of Parliament chosen by people *just like them* in England.

Our whole political history has been a struggle to perfect the ideal of real democracy, to move a Republic of Christian white male property holders over the age of 21 ever closer to what President Lincoln, standing on the Gettysburg battlefield, called "government of the people, by the people, and for the people."

The Equal Protection command of "one person-one vote" is the modern constitutional expression of this imperative. It began as the slogan of Civil Rights workers challenging the reign of terror in the South. Robert Moses tells us that the cry of "one person, one vote" in 1960 gave "Mississippi sharecroppers and their allies" a principle of "common conceptual cohesion" that was picked up by the Justice Department and embraced by the Warren Court in the redistricting *cases. As* Justice Hugo Black wrote in *Wesberry v. Sanders* in 1964, "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right."

The logic of universal suffrage has since swept the world, from Poland to South Africa to Haiti to Chile. But it has not yet come here, to Washington, D.C., the nation's capital where nearly 600,000 loyal, taxpaying, draftable American citizens are disenfranchised and locked out of the body that doubles as their national and state legislature, the body that controls their budget, their taxes, their laws, their participation in wars, their tacit consent to Cabinet officials and Supreme Court appointments.

Washington's political status is unique. We have three kinds of entities in our constitutional structure: *states*, which are permanent units in the nation whose citizens experience both federal taxation and representation; *territories*, potentially transitory units in the nation whose citizens are neither taxed nor represented; and the *District of Columbia*, a permanent part of the country whose residents uniquely face the worst of both worlds: federal taxation without congressional representation. Congresswoman Norton is right to call America's attention to this anomaly.

Washington's disenfranchisement is unique again in the global context. It is the only nation's capital on earth whose citizens are locked out of their national legislature. All others have managed to reconcile security for the government with suffrage for the residents. It is hard to imagine the people of Paris not being represented in the French National Assembly or the people of Mexico City having no voice and vote in the Mexican legislature. The political domination over capital residents here is an unnecessary injury and escalating insult.

This failure of democracy can be traced back to June 21, 1783, when the Continental Congress was meeting in Philadelphia in the Pennsylvania state house. Outside, an unruly crowd of Revolutionary War veterans waiting to get paid for their service threatened to storm the building to confront Pennsylvania's Executive Council, which was meeting on the second floor. When the federal congressmen appealed to the Executive Council to summon the Pennsylvania Militia, the leaders refused. Madison called this incident "disgraceful" and during the constitutional debates a few years later, "the Philadelphia incident became a key exhibit in support of the need for exclusive federal jurisdiction over . . . the seat of

federal government."[1]

This was the genesis of the District Clause contained in Article I, Section 8, Clause 17, that grants Congress power "[t]o 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 purpose of the District Clause was to assure the police security and military defense of the federal district, not to disenfranchise a large population of American citizens yet to be identified in a capital city yet to be located. This would have been an utterly bizarre intention for the Framers who just fought a revolution to vindicate the principle of the consent of the governed.

Indeed, when the federal District was finally sited on the banks of the Potomac in 1791, with Congress accepting cessions of land from Maryland and Virginia, residents continued to vote in congressional elections in Maryland and Virginia for the first decade after cession, which is decisive contemporaneous refutation of the proposition that the purpose of the District Clause was to disenfranchise. There is no recorded challenge to this practice, and the first Congress clearly accepted it, which is a fact pregnant with constitutional meaning. The practice ended in 1801 with organization of a local government under the Organic Act when these District residents stopped paying taxes to Maryland and Virginia. But there were even members of the House of Representatives from both Maryland and Virginia whose permanent residences were within the boundaries of the District, both before and after 1800.

The D.C. Corporation Counsel brought a lawsuit in 1998, *Alexander v. Daley*, which pointed out this history of unintended political consequences and argued that the modern one person-one vote guarantee under Equal Protection makes disenfranchisement of Washingtonians unconstitutional today.

By a 2-1 vote, the 3-judge panel rejected the argument and found continuing permission for disenfranchisement in the constitutional structure of exclusively state-based representation in Congress. Nonetheless, the majority observed that there is "a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation."[2] It also remarked that none of the parties, including the Justice Department, "contests the justice of the plaintiffs' cause."[3] Yet, the judges in the majority finally accepted the Defendants' argument that the court was powerless to order a change and any relief "must come through the political process."[4]

So the ball is now in your court. This could mean three things. First, statehood, which is not on the table today. Second, it might mean a statute conferring full voting rights and congressional representation on D.C. residents: a kind of Voting Rights Act for Washington, which is how I understand H.R. 1193.

Would it be constitutional? To my mind, yes. Congress treats the District explicitly as though it were a state for at least 537 statutory purposes I counted in my *Harvard Civil Rights-Civil Liberties Law Review* article (which I submit for the record),[5] from federal taxation to military conscription to highway funds and education funds to national motor voter registration and so on. Congress and the Supreme Court have treated District residents as residents of a state for *constitutional* purposes as well, from the Full Faith and Credit Clause to diversity jurisdiction under Article III to the trial by jury provisions. So why can't Congress treat the District as though it were a state for the fundamental constitutional purpose of democratic representation?

Certain scholars would invite us to believe that the District Clause gives Congress power to do anything it wants to people in the District *except* give them voting rights in Congress. Article I and the Seventeenth Amendment must be read, they say, to confine all voting in congressional elections to citizens voting in states or through states (such as overseas citizens).

But this straitjacket approach undermines the idea of the Constitution as the charter of democratic sovereignty for "we, the people." This seminal phrase should include all of us and certainly *did* include all inhabitants of the lands that

would become the District when the Constitution was written. As Justice Kennedy wrote in *U.S. Term Limits v. Thornton* (1995), "The Congress of the United States. . .is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of the representatives of *the people*."[6] This echoes Chief Justice John Marshall's statement in *McCulloch v. Maryland* (1819) that, "The government of the union . . . is, emphatically, and truly, a government of the people . . . . Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[7]

Thus, I have no problem in saying that Judge Louis Oberdorfer, the senior and dissenting judge on the three-judge panel in *Alexander v. Daley*, was right. Not only can Congress directly use its ample powers over the District to fully enfranchise the American people living in the District, but it must do so. I am submitting with my statement a thoughtful and intricate defense of the constitutionality of enfranchisement by statute written by two fine lawyers, Walter Smith and Elise Dietrich, who were co-counsel with the D.C. Corporation Counsel and myself in *Alexander v. Daley*.

I understand that there are those, like Professor Kurland, who are attacking a D.C. Voting Rights Act as unconstitutional. Voting rights advocates should indeed be sober about the fact that his constitutional views are more prevalent today on the Supreme Court. Senator Lieberman, you certainly do not need any tutorials about the distinctive judicial activism that has emerged recently to control elections and voting rights. But, even looking at the broader canvass, a narrow majority on this Court in the past few years has struck down, in whole or in part, the Gun-Free School Zones Act,[1] the Violence Against Women Act,[2] the Religious Freedom Restoration Act,[3] the Brady Handgun Violence Prevention Act,[4] the Fair Labor Standards Act,[5] the Low-Level Radioactive Waste Policy Act,[6] the Age Discrimination in Employment Act,[7] the Endangered Species Act,[8] and Title I of the Americans With Disabilities Act,[9] to name just a few.

How much faith should we have that the Court's majority would accept a D.C. Voting Rights Act as constitutional? I don't know. But all that you need to be certain of as legislators is that you, like Thomas Jefferson, see the Constitution's legitimacy as resting on the consent of the governed and that you are convinced that Congress' powers over the District must be sufficient to effectuate not just the burdens but the basic rights of democratic citizenship.

But there is, finally, the possibility of a constitutional amendment that would explicitly treat the District as though it were a state for purposes of representation. A D.C. Voting Rights *Amendment* would, by definition, be constitutional. However, it would require a two-thirds vote in both houses of Congress and ratification by three-fourths of the states. As an Amendment it would be safe from judicial attack and would be far more durable than a statute, which can be more easily repealed. I recall what happened to Congresswoman Norton's right to vote in the Committee of the Whole, which she won through brilliant parliamentary persuasion only to see the whole thing swept away when the House changed hands and the rule was repealed.

Now, Congresswoman Norton is a professor of constitutional law who has done everything in her power to advance political democracy for Washingtonians within the existing constitutional structure. Her perseverance and creativity are astounding. I think she understands that the moment may come when current restrictive understandings of the Constitution become an obstacle to democracy and the constitutional amending strategy that was tried in 1978 may have to be revived. That moment has not necessarily arrived yet, and there may indeed be the political will in Congress to pass the statute. The point she brings before America today is that, ultimately, what counts most is not the means but the end--full voting rights and representation for everyone in Washington, which is the birthright of all American citizens, including are her constituents.

When the 1978 Amendment passed Congress by two-thirds in each chamber, a strong bipartisan political consensus formed behind the justice of the cause. Senator Robert Dole said that, "The absence of voting representation for the District in Congress is an anomaly which the Senate can no longer sanction." Senator Strom Thurmond said, and I quote, "We are advocating one man, one vote. We are advocating democratic processes int his country. We have more than 700,000 people in the District of Columbia who do not have voting representation. I think it is nothing but right that we allow these people that representation. We are advocating democratic processes all over the world. We are holding ourselves up as the exemplary Nation that others may emulate in ideas of democracy. How can we do that when three-quarters of a million people are not allowed to have voting representation in the capital city of this Nation?"

The Amendment failed in the states last time when only 16 ratified it. Such a strategy should not be undertaken again unless there is the serious political will on the part of Congress not only to pass the Amendment but to take the cause directly to the state legislatures, which may be tempted to view the amendment in partisan, sectional or racial terms rather than as an historic democratic imperative.

We are obviously in a time of war and national security crisis, but times like these actually have a strong relationship to broadening the circle of democracy. The Revolutionary War established democratic process. The War of 1812 led to the dismantling of the property qualification. The Civil War gave us the 15th Amendment and black voting in Reconstruction. World War I led to the 19th Amendment and woman suffrage. The Vietnam War led to the 26th amendment and 18-year old voting. Times of heightened patriotism are times when people seek democratic expansion and inclusion.

The terrorism of September 11 and the resulting military mobilization have obviously had a profound effect on the capital city and have, in one sense, vindicated the wisdom of the Founders. Congress obviously needs to guarantee the security of the capital city. But the Framers' failure to foresee the democratic deficit that would develop in the nation's capital must now be corrected. And they would want us to do it. For as Thomas Jefferson, who detested the "sanctimonious reverence" some men had for whatever the Founders did, himself put it, "we should avail ourselves of our reason and experience to correct the crude essays of our first and inexperienced councils."

Our whole development as a political nation makes full representation for the people of Washington both necessary and inevitable. Whether by act or amendment, now is the time to do it.

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[1] Whit Cobb, Democracy in Search of Utopia: The History, Law and Politics of Relocating the National Capital, 99 Dick. L. Rev. 530-31 (1995).

[2] *Alexander v. Daley*, 90 F. Supp 2d 35, 72 (D.D.C. 2000).

[3] *Id*. at 37.

[4] *Id*.

[5] Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harvard CRCL 39, 92, n.271 (1999).

[6] 514 U.S. 779, 821 (1995)(emphasis added).

[7] 17 U.S. (4 wheat.) 316, 404-05 (1819).

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1. *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (striking the law down as exceeding Congress' Commerce Clause powers).

2. *See* United States v. Morrison, 529 U.S. 598, 609 (2000) (invalidating the law in part as exceeding Congress' Commerce Clause powers).

3. *See* City of Boerne v. Flores, 521 U.S. 507, 532-33 (1997) (striking down the law as exceeding Congress' enforcement powers under the Fourteenth Amendment).

4. *See* Printz v. United States, 521 U.S. 898, 933-34 (1997) (holding unconstitutional the law as an impermissible commandeering of state officials for a federal program).

5. *See* Alden v. Maine, 527 U.S. 706, 758-759 (1999) (invalidating as an abrogation of state sovereign immunity Fair Labor Standards Act provision authorizing private actions against states in state courts).

6. *See* New York v United States, 505 U.S. 144, 169-70 (1992) (finding unconstitutional in part a law requiring states to regulate waste according to Congress' instructions).

7. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72-3 (2000) (holding that the ADEA cannot strip immunity away from the states).

8. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (finding that the environmental groups did not have sufficient standing).

9. *See* Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 372-73 (2001) (holding that the legislative history of the ADA did not show a pattern of discrimination towards the disabled, thus no obligation of the states 11th Amendment immunity from suits from money damages under Title I was supported).