

TESTIMONY OF THE HON. KENNETH W. STARR

**BEFORE THE HOUSE GOVERNMENT REFORM
COMMITTEE**

2154 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, D.C.

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I am pleased to testify on the very important issue and to discuss congressional authority to govern the District of Columbia more generally. Following immediately in the wake of the District's establishment as the Seat of our National Government in 1800,¹ Congress began working to enfranchise the capital city's residents. Previous efforts – which have included bills to retrocede the District to Maryland, bills calling for the District's residents to vote in Maryland's House and Senate contests, and bills deeming the District to be a “State” for purposes of federal elections – have been thwarted by constitutional and political barriers. While I will leave for others discussion of the political considerations presented by the particulars of the D.C. Fairness Act, I commend Chairman Davis for seeking to address – and surmount – the legal and constitutional obstacles that have hobbled congressional efforts to solve the continuing problem of District disenfranchisement.

I. CONGRESS ENJOYS PLENARY POWER OVER THE DISTRICT OF COLUMBIA.

Legislation to enfranchise the District's residents is authorized by the Seat of Government Clause, Art. I, § 8, Cl. 17, which provides: “The Congress shall have power ... to exercise exclusive legislation in all cases whatsoever” over the District of Columbia. This

¹. See “An act establishing the temporary and permanent seat of the Government of the United States,” 1 Stat. 130 (July 16, 1790). The 1790 Act identified the first Monday of December 1800 (December 1) as the date for the transfer of the seat of the federal government from its current home (then Philadelphia) to its new permanent home in the District of Columbia.

sweeping language gives Congress “extraordinary and plenary” power over our nation’s capitol city.²

To understand the scope and importance of the Seat of Government Clause, it is important first to understand its historical foundations. There is general agreement that the Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation.³ Congress called upon the government of Pennsylvania to provide protection, but the Commonwealth refused, Congress was forced to adjourn, quietly leave the city, and

². *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984) (Scalia, J.). *See also id.* at 140-141 (the Seat of Government Clause, Art. I, § 8, Cl. 17, “enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in the various states.”) (footnote omitted).

³. *See, e.g.*, KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.* 30-34 (1991); JUDITH BEST, *NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA* 14-15 (1984) (“The proximate cause of the provision for a federal district was the Philadelphia Mutiny of 21 June 1783.”); STEPHEN MARKMAN, *STATEHOOD FOR THE DISTRICT OF COLUMBIA* 47 (1988) (“Unquestionably, this incident made a deep impression on the members [of the Continental Congress].”); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 *HARV. J. ON LEGISLATION* 167, 171 (1975) (“That the memory of the mutiny scare . . . motivated the drafting and acceptance of the ‘exclusive legislation’ clause was clearly demonstrated in the subsequent ratification debates.”). *THE FEDERALIST*, No. 43 at 289 (Jacob E. Cooke ed., 1961); JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION* §§ 12-13 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capitol was necessary. “Without it,” Madison wrote, “not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.” *THE FEDERALIST* NO. 43, *supra*, at 289; *see also* 4 *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 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 *THE FOUNDERS’ CONSTITUTION* 225 (Philip B. Kurland & Ralph Lerner eds., 1987) (“Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.”) (North Carolina ratifying convention, remarks of Mr. Iredell).

reconvene at Princeton.⁴ In the wake of this dramatic event, the Framers took drastic measures – through the Seat of Government Clause – to ensure “that the federal government be independent of the states,”⁵ and to ensure that the District would be beholden exclusively to the federal government for any and all purposes, big and small.⁶

Congress’s powers over the District are not limited to simply those powers that a State legislature might have over a State.⁷ As emphasized by the federal courts on numerous occasions, the Seat of Government Clause is majestic in its scope. In the words of the Supreme Court, “[t]he object of the grant of exclusive legislation over the [D]istrict was, therefore, national in the highest sense. . . . In the same article which granted the powers of exclusive legislation . . . are conferred all the other great powers which make the nation.”⁸ And my predecessors on the D.C. Circuit Court of Appeals once held that Congress can “provide for the

⁴. MARKMAN, *supra* note 3, at 46-47; Raven-Hansen, *supra* note 3, at 169.

⁵. MARKMAN, *supra* note 3, at 48.

⁶. *See, e.g.*, THE FEDERALIST No. 43, at 272 (Madison) (Clinton Rossiter ed. 1961) (remarking on the “indispensable necessity of complete authority at the seat of government” since without it, “the public authority might be insulted and [the federal government’s] proceedings interrupted with impunity”); Raven-Hansen, *supra* note 3, at 169-72 (citing statements from the ratification debates).

⁷. *See* *Palmore v. United States*, 411 U.S. 389, 397-398 (1973) (“Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress ‘may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.’ *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District. It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.”).

⁸. *O’Donoghue v. United States*, 289 U.S. 516, 539-40 (1933). Presumably, these “great powers” include the power to admit States to the Union and the power to regulate elections.

general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end.”⁹

II. THE CONSTITUTION IS SILENT ABOUT VOTING RIGHTS FOR THE DISTRICT’S RESIDENTS.

While the Framers clearly intended to give Congress plenary authority over the District, what is far less clear is what they intended with respect to representation of the area. The question of representation does not appear to have seriously arisen until the federal government took up residence in the District in 1800, well after the Constitution had been drafted and ratified.¹⁰

In the face of the Constitution’s silence, some ardent textualists (and indeed some courts) have insisted that Article I effectively disenfranchises the District’s residents in congressional elections. For example, the United States District Court for the District of Columbia has held that D.C.’s residents cannot be treated like residents of the 50 States for purposes of electing members to the House of Representatives,¹¹ and the House may not unilaterally amend its Rules to give the District’s Delegate the right to vote in the Committee of the Whole.¹²

But legislation to enfranchise the District’s residents presents an entirely and altogether different set of issues. While the Constitution may not affirmatively grant the District’s residents

⁹. *Neild v. District of Columbia*, 110 F.2d 246, 250-51 (D.C. Cir. 1940).

¹⁰. See Raven-Hansen, *supra* note 3, at 172.

¹¹. *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C.) (holding “exclusion [of D.C. residents from voting in Congressional elections] was the consequence of the completion of the cession transaction – which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress’ exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. See U.S. Const. art. I, § 8, cl. 17.”), *aff’d*, 531 U.S. 941 (2000), *reh’g denied*, 531 U.S. 1045 (2000), *appeal dismissed*, 2001 U.S. App. LEXIS 25877 (D.C. Cir. Oct. 18, 2001), *cert. denied*, 537 U.S. 812 (2002).

¹². *Michel v. Anderson*, 817 F. Supp. 126, 141 (D.D.C. 1993), *aff’d*, 14 F.3d 623 (D.C. Cir. 1994).

the right to vote in congressional elections, the Constitution *does* affirmatively grant Congress plenary power to govern the District’s affairs. Accordingly, the judiciary has rightly shown great deference where Congress announces its considered judgment that the District should be considered as a “State” for a specific legislative purposes.¹³ For example, Congress may exercise its power to regulate commerce across the District’s borders, even though the Commerce Clause¹⁴ only referred to commerce “among the several states.”¹⁵ And Congress may bind the District with a duly ratified treaty, which allows French citizens to inherit property in the “States of the Union.”¹⁶

III. THE SUPREME COURT HAS AFFIRMED CONGRESS’S PLENARY POWER TO EXTEND “STATES” RIGHTS TO D.C. RESIDENTS WHERE THE CONSTITUTION IS SILENT.

In *Hepburn & Dundas v. Ellzey*,¹⁷ the Supreme Court considered whether the District’s citizens could bring suits in federal court under the Constitution’s Diversity Clause,¹⁸ which confers power on the federal courts to hear suits “between Citizens of different States.” Absent

¹³. *Adams* does *not* compel a different result. In *Adams*, the court held the District’s voters could not vote in Maryland’s congressional elections, basing its decision, in large part, on the fact that “Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District.” 90 F. Supp. 2d at 64. The Fairness Act, in sharp contrast, would express Congress’s incontrovertible intention to enfranchise the District’s voters.

¹⁴. U.S. Const. Art. I, § 8, Cl. 3.

¹⁵. *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

¹⁶. *De Geofroy v. Riggs*, 133 U.S. 258, 268-69 (1890) (while “state” might not ordinarily include an “organized municipality” such as the District, “[t]he term is used in general jurisprudence . . . as denoting organized political societies with an established government. Within this definition the District of Columbia . . . is as much a State as any of those political communities which compose the United States.”).

¹⁷. 6 U.S. 445 (1805).

¹⁸. Art. III, § 2, Cl.1.

a congressional pronouncement to the contrary,¹⁹ the Court concluded that the constitutional reference to “States” did not include the District.²⁰

In 1948, however, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts.²¹ In 1949, the Supreme Court’s *Tidewater* decision upheld that statute as an appropriate exercise of Congress’ power under the Seat of Government Clause, even though the Diversity Clause refers *only* to cases “between Citizens of different States.”²² The *Tidewater* holding confirms what is now the law: the Constitution’s use of the term “State” in Article III cannot mean “and not of the District of Columbia.” Identical logic supports legislation to enfranchise the District’s voters: the use of the word “State” in Article I cannot bar Congress from exercising its plenary authority to extend the franchise to the District’s residents.

IV. FUNDAMENTAL PRINCIPLES OF REPRESENTATIVE DEMOCRACY SUPPORT CONGRESS’ DETERMINATION TO EXTEND THE FRANCHISE TO DISTRICT OF COLUMBIA RESIDENTS.

As the Supreme Court has repeatedly insisted, interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded.²³ Absent any persuasive evidence that the Framers’ intent in using the

¹⁹. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where “the suit is between the citizen of the State where the suit is brought, and a citizen of another State.” 1 Stat. 73, 78. It was unclear whether Congress intended for the Judiciary Act to apply to the District’s residents.

²⁰. *Hepburn*, 6 U.S. at 452-53.

²¹. See 62 Stat. 869, codified at 28 U.S.C. § 1332(d).

²². *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

²³. See *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (noting that “[a] fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them’”) (citation omitted); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 819-823 (1995) (adding that “an aspect of sovereignty is the right of the people to vote for whom they wish”).

term “State” was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a foundational cornerstone in the Constitution’s structure; the denial of representation was one of the provocations that generated the Declaration of Independence and the War that implemented it. Article I creates the republican form of the national government, and Article IV guarantees that form to its *people*,²⁴ regardless of whether they reside in a District or a State.

²⁴ The right to vote arises out of the “relationship between the people of the Nation and their National Government, with which the States may not interfere.” *Term Limits*, 514 U.S. at 845 (Kennedy, J., concurring); *see also id.* at 844 (“The federal right to vote . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.”); *id.* at 805 (noting that “while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,” in fact it “was a new right, arising from the Constitution itself”) (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); 514 U.S. at 820-21 (noting “that the right to choose representatives belongs not to the States, but to the people”).