DC APPLESEED
C E N T E R
1111 Fourteenth Street, NW
Suite 510
Washington, DC 20005
Phone 202.289.8007
Fax 202.289.8009
www.dcappleseed.org

TESTIMONY OF WALTER SMITH, EXECUTIVE DIRECTOR
DC APPLSEED CENTER FOR LAW AND JUSTICE

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE,
AND THE DISTRICT OF COLUMBIA

Rayburn House Office Building Room 2154
November 18, 2009

"Greater Autonomy for the Nation's Capital"

Good morning Chairman Lynch and members of the Subcommittee. I am Walter Smith, Executive Director of the DC Appleseed Center for Law and Justice. DC Appleseed is a nonprofit public interest organization that addresses important issues facing residents of the National Capital Area. It is an honor to have the opportunity to present testimony on H.R. 960, the "District of Columbia Budget Autonomy Act of 2009," and H.R. 1045, the "District of Columbia Legislative Autonomy Act of 2009."

These two bills, along with the DC Voting Rights Act now pending in Congress, represent a critical step toward the advancement of democracy and self-government for the residents of the Nation's Capital. While my testimony will focus primarily on legislative autonomy, the constitutional and legislative principles involved apply to both bills. I will leave it to my distinguished colleagues to discuss the budget autonomy proposal in more detail.

There are two main points I would like to make about the bills which are the subject of today's hearing. First, these bills, both of which constitute amendments to D.C.'s Home Rule Act, are consistent with and advance a key provision of that Act – to relieve Congress of the burden of day to day decision making on purely local matters "to

the greatest extent possible." It accomplishes this purpose in the legislative autonomy bill by eliminating a cumbersome, wasteful, and now outdated review process which intrudes on congressional resources and unnecessarily delays the implementation of local laws. Second, the proposals before you today are consistent with and advance the intent of the Framers of the Constitution regarding the government of the District of Columbia – that purely local matters should be decided by the local District government.

I. The Proposed Amendments Are in Accord With Congress' Stated Intent in Passing the District of Columbia Home Rule Act.

The stated purpose of the Home Rule Act is to "grant to the inhabitants of the District of Columbia powers of local self-government...and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters."[1] This grant is limited, however, by the retention of "ultimate legislative authority over the nation's capital" to Congress.[2]

To that end, when it passed the Home Rule Act in 1973, Congress included several provisions to ensure its continued authority over the District. One provision, Section 601, will remain unchanged by these proposed amendments. In that section, Congress expressly retained the power to override any decision made by the locally-elected Council of the District of Columbia:

> Notwithstanding any other provision of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this chapter, including legislation to amend or repeal any law in force in

---

[1] The District of Columbia Home Rule Act, Sec.102, approved December 24, 1973 (87 Stat. 774), *now codified at* D.C. Code § 1-201.02(a) (2007).
[2] *Id.*

> the District prior to or after enactment of this chapter and any act passed by the Council.[3]

The bill does, however, reform a second provision of the Home Rule Act which contains an outdated procedural mechanism for reviewing legislation enacted by the Council of the District of Columbia. Section 602 requires a 30- or 60-day lay-over and review period for local legislation before it can take effect.[4] Congress also created a procedure under Section 602 whereby local legislation may be overturned during this layover through resolutions of disapproval, which must be approved by majorities in both the House of Representatives and the Senate, and signed by the President. Although the lay-over period appears to have been intended as an added safeguard for Congressional prerogatives, in practice it has proven to be unnecessarily burdensome and an inefficient oversight tool. In fact, it has been nearly 20 years since Congress last employed Section 602 to nullify local legislation, and has done so a total of only three times during the entire 35 years of Home Rule.[5]

In practice, Congress now exercises its legislative authority over the District, not through the lay-over and review period of Section 602, but through the ordinary legislative process. That authority, which is expressly provided for in the Home Rule Act

---

[3] Home Rule Act, Sec. 601, *now codified at* D.C. Code § 1-206.01 (2007).
[4] *Id.*, Sec. 602, *now codified at* D.C. Code § 1-206.02(c)(1-2).
[5] Congress has utilized its authority under Section 602(c) of the Home Rule Act to nullify the following acts of the Council of the District of Columbia:

(1) The Location of Chanceries Act of 1979, D.C. Act 3-120, adopted on final reading by the Council October 9, 1979, signed by the Mayor November 9, 1979 (26 DCR 2188). Disapproval was effective December 20, 1979.

(2) The District of Columbia Sexual Assault Reform Act of 1981, D.C. Act 4-69, adopted on final reading by the Council July 14, 1981, signed by the Mayor July 2, 1981 (28 DCR 3409). Disapproval was effective October 1, 1981.

(3) The Schedule of Heights Amendment Act of 1990, Act 8-329, adopted on final reading by the Council December 18, 1990, signed by the Mayor December 27, 1990 (38 DCR 369). The disapproval was effective on March 21, 1991.

and is constitutionally based, will not be diminished with this Amendment. In fact, this authority will be made more efficient and more consistent with the goal of relieving Congress of the burden of excess, day-to-day oversight of purely local matters. Here is why.

Every act approved by the DC Council is transmitted to at least 11 different officials and committees in Congress, including the Speaker of the House, President of the Senate, the chairs and ranking members of appropriate committees and subcommittees, as well as to DC's Delegate to Congress, Eleanor Holmes Norton.[6] During the most recent Council period (2007-2008), a total of 394 legislative acts were passed, yielding over 4,300 transmittals to Congress.[7] From January of 1975, when the Council first exercised its legislative authority under the Home Rule Act, through June of 2009, the Council has transmitted for Congressional review approximately 4,400 (4,367) acts, resulting in over separate 48,000 transmittals to Congress.[8]

While the Home Rule Act was intended to relieve the Congress of the day-to-day burdens of local governance in the District, Section 602 instead adds to that burden. The lay-over period obliges congressional staffers to review tens of thousands local ordinances passed by the DC Council. In practice, these transmittals are no longer used by Congress to exercise its review authority. As mentioned earlier, Congress has used the Section 602 procedure only three times to overturn local laws, and has not done so in nearly 20 years.[9]

---

[6] Brian K. Flowers, General Counsel, Council of the District of Columbia, testimony before the DC Council Special Committee on Statehood and Self-determination, June 1, 2009 at 12.
[7] *Id.*, Exhibit 2.
[8] *Id.*, at 10-11.
[9] See *supra* note 5.

Eliminating the lay-over procedures would not only be less burdensome to Congress, but it would also contribute to the expediency and efficiency of District government. The 30 or 60 day lay-over periods are not calendar days, but legislative days when at least one chamber of Congress is in session.[10] It generally takes approximately 3 months until a law passed by the DC Council can take effect.[11] Often, the wait is much longer. When the Congress adjourns sine die, all District acts that have not completed review must be resubmitted in the next Congress, and the count begins anew. As a result, the lay-over period in practice needlessly delays the effectiveness of District laws.

Moreover, while permanent legislation is pending congressional review, the Council will often pass emergency legislation, which remains in effect for 90 days; or temporary legislation, which is effective for 225 days. The Council frequently passes multiple measures help fill the gap when Congress is in recess or adjourned. In fact, according to the General Counsel for the Council of the District of Columbia, "between 50 and 65 percent of the legislative measures (act and resolutions) the Council adopts could be eliminated if there (were) no Congressional review requirement."[12] It appears that neither the Home Rule Act nor the District Clause of the Constitution were intended to produced such an unreasonable result. It is time, therefore, to eliminate this wasteful procedure.

II. The Proposed Amendments to the District of Columbia Home Rule Act Are in Accord With the Intent of the Framers of the Constitution

---

[10] D.C. Code § 1-206.02(c)(1).
[11] See Flowers, *supra* note 6, at 7.
[12] *Id.*, at 5.

Eliminating this procedure is not only consistent with the Home Rule Act; it is also consistent with the Framers' intent. The District Clause of the Constitution establishes an independent district for the seat of federal government and states that "Congress shall have power...to exercise exclusive Legislation in all Cases whatsoever, over such District...as may...become the Seat of the Government of the United States..."[13] The Framers proposed a district over which it would have "exclusive" legislative authority out of a concern for the ability of the federal government to protect federal interests without having to depend upon the power or cooperation of a host state. Significantly, however, in reserving this "exclusive" authority to Congress, the Framers did *not* intend to bar Congress from delegating its authority over *local matters* to a municipal government. In fact, they anticipated such a delegation, expected it to be accomplished by Congress, and the courts have fully supported the ability of Congress to do so.

To understand this key point, it is important to explain the genesis of the Capital's creation and the development of the District Clause. Both sprang from an incident that occurred during the meeting of the Continental Congress in Philadelphia in 1783.[14] A group of disgruntled veterans, seeking back pay for service in the Revolutionary War, gathered in front of the building where Congress was meeting. The Members of Congress felt threatened by the group, which spoke "offensive words" and waved their muskets about.[15] The Pennsylvania state government refused to intervene, forcing Congress to flee to New Jersey. This incident was fresh on the minds of the delegates to

---

[13] U.S. CONST. art. I, § 8, cl.17.
[14] *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (2000), *aff'd*, 531 U.S. 941 (2000).
[15] Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 169 (1974 – 1975) [hereinafter Raven-Hansen].

the Constitutional Convention four years later, when the establishment of an independent capital district for the seat of federal government was proposed.

As a result, the discussion in the Constitutional Convention regarding the establishment and location of the federal capital revolved around the ability to protect the federal government and to bar any possibility of favoritism resulting from the location of the federal capital within a particular state.[16] The delegates wanted exclusive federal control over the capital in order to avoid any difficulties of enforcement that might arise as the result of concurrent jurisdiction with the states. As a result, a clause establishing an independent federal district granting exclusive legislative power to Congress was introduced and passed with little debate, becoming the District Clause of the Constitution.[17]

In the debates preceding ratification by each of the states, committee members clarified the intent of Congress in approving the Clause. In North Carolina, in answer to a question about the extent of congressional powers over the district, Representative Iredell reminded listeners of the incident in Philadelphia, "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."[18] In Virginia, James Madison asked, "How

---

[16] JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, (Gaillard Hund & James Brown Scott, eds. 1920) (statement of Col. James Mason of Virginia) (stressing the importance of independence from state interference in order to avoid jurisdictional disputes and the addition of "a provincial tincture to … national deliberations").

[17] Raven-Hansen, at 171.

[18] JONATHON ELLIOT, ELLIOT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 219-220 (1901) [hereinafter Elliott].

could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power?"[19]

Madison later wrote in his Federalist No. 43, in regard to this grant of exclusive power, that "[w]ithout it, not only the public authority might be insulted and its proceedings 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."[20] Thus, the overwhelming concern of the Framers of the District Clause, in granting the power to "exercise exclusive Legislation" to Congress, was to protect federal interests at the seat of government, *not to task Congress with the micromanagement of local affairs.* In fact, there is no evidence that the Framers intended to limit the ability of Congress to delegate local decision-making authority over matters of local concern.

Moreover, although the Framers were primarily concerned with the relationship of the capital District to outside interests in shaping the District Clause, they expressly recognized the need for the delegation of authority over local matters to local residents. In his Federalist No. 43, Madison recognized that residents of the District "will find sufficient inducements of interest to become willing parties of the cession [of land from the states to the District]...[because, among other reasons], a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them...."[21]

---

[19] Elliot, at 433.
[20] THE FEDERALIST NO. 43, at 209 (James Madison) (Terrence Ball, ed. 2003) [hereinafter Madison].
[21] Madison, at 210.

Furthermore, the courts have endorsed the power of Congress to delegate authority to the District government and have specifically interpreted the language used by the Framers as supporting this delegatory power. In *District of Columbia v. Thompson*, 346 U.S. 100 (1953), a case concerning the validity of District anti-discrimination statutes, the Supreme Court held that "there is no constitutional barrier to the delegation by Congress to the District of Columbia of *full legislative power*, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted."[22] The D.C. Circuit Court held in *La Forest v. Board of Comm'rs of D.C.*, 92 F. 2d 547 (D.C. Cir. 1937), that the extent to which Congress chooses to delegate authority to the District is a matter for Congress to determine.[23]

In addition, courts have confirmed the Framers' intent as earlier explained, *rather than creating a limitation on the authority of Congress to delegate,* the constitutional requirement of "executive Legislation" simply meant to prevent concurrent authority over the District by ceding states. In overruling a lower court's finding that the use of the word "exclusive" in the District clause prevented delegation of general legislative authority by Congress, the Supreme Court held in *Thompson* that "it is clear from the history of the provision that the word 'exclusive' was employed to eliminate any

---

[22] *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, at 109 (1953)(emphasis added).
[23] *La Forest v. Board of Comm'rs of Dist. of Columbia*, 92 F.2d 547, 550 (D.C. Cir. 1937) ("Congress as to the District of Columbia has express power to exercise exclusive legislation in all cases whatsoever, thus possessing the combined powers of a general and a state government in all cases where legislation is possible. When and how it shall delegate or distribute authority to make detailed regulations under the police power are questions which Congress may determine for itself."); *See also Maryland & District of Columbia Rifle & Pistol Ass'n v. Washington*, 442 F.2d 123 (D.C. Cir. 1971) (holding, at 130, that "Congressional enactments prevail over local regulations in conflict with them, of course, and Congress may at any time withdraw authority previously delegated to the District, and any regulations dependent on the delegation then lapse. But, just as clearly, Congress may indulge the District in the exercise of regulatory powers, enabling it to provide for its needs as deemed necessary or desirable.").

possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states" and that such delegation was therefore constitutional.[24] This view of the District Clause has been confirmed by numerous subsequent court opinions.[25]

III. Conclusion

In light of the intent of the Framers of the District Clause and of Congress in passing the Home Rule Act, and also in light of the recent record of District government, this is an appropriate moment to extend greater self-government to the District of Columbia.

It is therefore my hope that you will recognize this fact and support the proposed amendments, reducing the burden that mandatory review places on both Congress and the District leadership. This decision to extend greater flexibility in self-government would bring the residents of the District of Columbia closer to the ideal imagined by the Framers of the Constitution and by the members of Congress who created the Home Rule Act. Finally, it seems especially appropriate to take these steps toward local democracy at a moment when the Congress is moving toward passing a bill giving District residents a voting representative in this body.

---

[24] *Thompson*, 346 U.S. at 109.

[25] See *Gary v. U.S.*, 499 A.2d 815 (D.D.C. 1985) (eliminating the One House of Congress veto provision of the Home Rule Act); U.S. v. Sato, 704 F. Supp. 816, (N.D. Ill.1989) (supporting the right of Congress to tax outside the District); *Synar v. U.S.* 626 F. Supp. 1375, (D.D.C. 1986) (supporting the constitutionality of the delegation of Congressional Authority under the Balanced Budget and Emergency Deficit Control Act of 1985).