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MEMORANDUM

September 12, 2006

To: Walter Smith
From: Richard P. Bress
Ali I. Ahmad

File no: 501340-0002

Copies to: Gary Epstein, Jim Rogers

Subject: Response to May 25, 2006 Congressional Research Memorandum Regarding
Constitutionality of District of Columbia Fair and Equal House Voting Rights Act
of 2006

I. Introduction

In response to your request, we have examined the concerns identified in the May 25, 2006 Congressional Research Service Memorandum (“CRS Memo”) regarding Congress’s ability and authority to provide the District of Columbia voting representation in the House of Representatives via simple legislation. The CRS Memo identifies three primary concerns. First, it questions whether Congress’s plenary authority to legislate for the District is broad enough to allow it to create a House Representative for the District. As detailed below, while the issue is not free from doubt, we believe the text of the District Clause, granting Congress the power to “exercise exclusive legislation in all cases whatsoever” regarding the District, and the case law interpreting that text provide a sufficient basis for legislation providing the District’s half million residents a meaningful, substantive voice in the House of Representatives.

Second, the CRS Memo questions whether granting the District voting representation in the House would open a Pandora’s Box of claims by residents of all of the various federal territories for their own Representatives. Again, we appreciate the CRS’s concern, but we are not persuaded that the slope is so slippery, either as a matter of law or pragmatic reality. The Constitution, the Congress and courts have consistently distinguished between the District and federal territories, recognizing that the District is a *sui generis* constitutional entity. District residents, moreover, are subject to the same federal tax and military service obligations as state residents, which do not apply to residents of the territories. We see no reason to conclude that passing the District of Columbia Fair and Equal House Voting Rights Act of 2006, House Resolution 5388 (“H.R. 5388”) would have *any* effect on federal territories or their residents.

Finally, the CRS Memo also suggests in passing that granting a House seat to the District might lead to District demands for other rights accorded the states, such as the right to elect Senators and Presidential Electors or the right to ratify amendments to the Constitution. But District residents, of course, already have representation in the Electoral College; unlike the right to congressional representation, the right to ratify constitutional amendments belongs to the states *qua* states, not to individual citizens; and the current lack of any political impetus for Senate representation renders that concern entirely speculative. In any case, whether Congress might at some later date choose to accord further rights to District residents is primarily a political question, not a legal one.

Ultimately, while the CRS Memo raises legitimate questions, it offers no rationale consistent with the fundamental nature of voting rights under our Constitution for denying the half million residents of the District full access to the legislative body that decides issues of national and, for the District, local importance. The paradox of denying full representation to citizens in the capital of the world's most powerful democracy is particularly difficult to justify and sustain as the country faces the necessary but daunting task of spreading its democratic ideals abroad. The citizens of the District deserve to be full partners in the American endeavor, and we see no reason, constitutional or otherwise, for Congress to delay granting the District a full-fledged Member of the House of Representatives.

II. Analysis

A. Congress Has the Constitutional Authority to Grant a House Seat to the District.

Art. I Sec. 8 Cl. 17 of the Constitution (the "District clause") grants Congress the authority to make all laws necessary and proper for the exercise of:

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, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

As aptly stated by Kenneth Starr in his testimony before Congress, the District clause is an extraordinarily broad grant of authority, "majestic in scope."¹ Congress's authority is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the 50 states.² Although no cases specifically address Congress's authority to provide the District voting representation in the House, existing case law confirms the plenary nature of Congress's authority to see to the welfare of the District and its residents. The CRS memo discusses portions of some of the

¹ Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004).

² *Id.* See also Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* (2004) (report submitted to House Committee on Government Reform) available at: <http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf>.

relevant opinions, but in our view its analysis is too narrow and affords Congress (and thus the District) less than its due under the Constitution.

As we have previously observed, the Supreme Court addressed an analogous situation in the related cases of *Hepburn v. Ellzey*³ and *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*⁴ In *Hepburn*, Chief Justice Marshall, writing for the Court, held that because the language of Article III, Section 2 of the Constitution affirmatively provides for diversity jurisdiction only “between citizens of different States,” citizens of the District lacked the same access to federal courts.⁵ However, the Chief Justice found it “extraordinary” that residents of the District should be denied access to federal courts that were open to aliens and residents in other states,⁶ and invited Congress to craft a solution, noting that the matter was “a subject for legislative, not judicial consideration.”⁷

Nearly 145 years later, Congress took Justice Marshall up on that invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. And in *Tidewater*, a plurality of the Supreme Court held that, while the District is not a “state” for Article III purposes, Congress could nonetheless provide the same diversity jurisdiction to District residents under its District Clause authority to make all legislation necessary for the welfare of the District.⁸ The two concurring Justices went even further, arguing that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III of the Constitution.⁹

In highlighting that *Tidewater* was a split decision, with conflicting plurality and concurring opinions, the CRS accurately notes the absence of a majority for either of their legal perspectives. But by parsing those opinions to conclude that *Tidewater* confirms that Congress lacked the authority to provide District residents diversity jurisdiction—the very opposite of the Court’s conclusion in that case—the CRS Memo misreads *Tidewater*. For present purposes, the fundamental import of *Tidewater* is that a majority of the Supreme Court found that Congress did have the authority to accomplish an outcome that mirrors the goal and effect of H.R. 5388, granting District residents a basic right long denied to them by exercising its plenary authority under the District clause.¹⁰ Thus, while there may remain doubt about the precise legal effect of

³ 6 U.S. 445 (1805).

⁴ 337 U.S. 582 (1949).

⁵ *Hepburn*, 6 U.S. at 453.

⁶ *Id.*

⁷ *Id.*

⁸ See *Tidewater*, 337 U.S. at 592 (District clause grants Congress power over the District that is “plenary in every respect”); *Id.* at 601-02 (“Congress ‘possesses full and unlimited jurisdiction to provide for the general welfare’ of District citizens ‘by any and every act of legislation which it may deem conducive to that end....’”) (quoting *Nield v. Dist. of Columbia*, 110 F.2d 246, 250 (D.C. Cir. 1940)).

⁹ *Id.* at 604-06.

¹⁰ Indeed, the Supreme Court has repeatedly held that Constitutional provisions addressing “the several States” are equally applicable to the District. See, e.g., *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (District is a state for purposes of full faith and credit clause despite language stating that “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”); *Stoutenburgh v. Hennick*, 129 U.S.

Tidewater, its opinions strongly suggest that the same majority would have affirmed Congress's power to grant the District the right to voting representation in the House.

The CRS Memo also misreads the portion of the plurality opinion in *Tidewater* describing the limits of the Court's deference to Congress. Though the plurality noted that *Tidewater* did not "involve" fundamental rights, it explained in the next paragraph that its formal limit, that is, the point where it could not grant deference even if Congress acted under the District clause, would be where "congressional enactments... *invade* fundamental freedoms or *substantially* disturb the balance between the Union and its component states."¹¹ H.R. 5388 triggers neither of those concerns. Granting the District voting representation in the House would involve an expansion, not an invasion, of fundamental rights, and the addition of a single additional seat by the consent of the House and Senate would not at all disturb the relationship between the states and the federal government.

Indeed, the *Tidewater* plurality's reasoning speaks powerfully to Congress's authority to grant the District a House Representative via simple legislation. The plurality explained that, because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, it surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.¹² Similarly, Congress's authority to grant the District full rights of statehood by simple legislation argues powerfully for its ability to take the lesser step of providing the District House Representation. The CRS Memo does not address this portion of *Tidewater*.¹³

Adams v. Clinton,¹⁴ on which the CRS Memo relies, is not to the contrary, and indeed may better be read to *support* Congress's plenary authority to legislate voting representation for the District. In *Adams* the court of appeals rejected a suit by District residents who claimed that the Constitution *required* that the District be treated as a state for purposes of representation in

141 (1889) (Congress can regulate commerce across District's borders even though the commerce clause refers to commerce "among the several States"); *Loughborough v. Blake*, 18 U.S. 317 (1820) (upholding Congressional imposition of federal taxes on District notwithstanding fact that U.S. Const. Art. I, Sec. 2, Cl. 3 states that "Representatives and direct taxes shall be apportioned among the several states which may be included within this union....").

¹¹ *Tidewater*, 337 U.S. at 585-86 (emphasis added).

¹² *Id.* at 597-99.

¹³ The CRS Memo is also mistaken in its discussion of and reliance upon *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994). In *Michel*, the court affirmed Congress's authority to modify its internal rules to grant territorial and District delegates voting rights in the Committee of the Whole. *Id.* at 632. In interpreting *Michel* to reject the potential for full voting representation, the CRS Memo relies principally on dicta that contradicts the substantive holding of *Tidewater* and the courts' long history of granting Congress substantial deference over the scope of its plenary authority to legislate in matters concerning the District. Relevant here is Justice Marshall's wise admonition that "[dicta] expressions ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Tidewater*, 337 U.S. at 604 n. 26 (quoting *Cohens v. Commonwealth of Virginia*, 6 Wheat. 264, 399 (1821)). In any case, the question presented here and in *Tidewater* was not presented in *Michel*: whether Congress has authority under the District Clause to grant District residents rights that the Constitution already grants to State residents.

¹⁴ 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd* 531 U.S. 940 (2000).

the House and Senate.¹⁵ The *Adams* court concluded that judicial action could not grant the District Congressional representation. In a passage strikingly similar to that in *Hepburn*, however, the *Adams* court invited the plaintiffs to seek Congressional representation through “other venues,” suggesting (like *Hepburn*) that Congress could provide the right legislatively.¹⁶ Moreover, the *Adams* court expressly noted that counsel for the House of Representatives asserted in the litigation that “only congressional legislation or constitutional amendment can remedy plaintiffs’” exclusion from the franchise.”¹⁷

The CRS Memo also discusses whether and to what extent the Framers may actually have intended to deprive the District of House representation, noting that the *Adams* court observed that some commentators had raised the issue prior to ratification of the Constitution. However, those isolated examples of concern about the District’s future representation do not remotely amount to proof that the Framers who fought a war over political representation intended to deny that right to residents of the capital city. As noted in *Tidewater*, when the Constitution was ratified the District was little more than a “contemplated entity” 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....”¹⁸ But the District now has a population of over a half million people—greater than the population of all of the thirteen original states and that of three current states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens. Congress has ample authority under the District Clause to do so.

B. Granting the District a House Representative Would Not Affect the Territories.

The CRS Memo also questions whether granting a House Representative to the District would lead inevitably to full-fledged Representatives for territories such as Puerto Rico and American Samoa. We do not believe the slope is that slippery. As a constitutional and historical matter, territories occupy a fundamentally different position in the overall schema of American Federalism, and have long enjoyed disparate rights and privileges.

To begin with, Congress’s authority over the territories stems from a separate portion of the Constitution, Art. IV, Sec. 3, Cl. 2, which empowers Congress to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States....” Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers’ use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.¹⁹ The Supreme

¹⁵ *Id.* at 47.

¹⁶ *Id.* at 72.

¹⁷ *Id.* at 40.

¹⁸ *Tidewater*, 337 U.S. at 587. *See also* Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. Legis. 167, 172 (1975) (noting that “[t]he question of the representation of the District received little express attention during the course of drafting [the District clause], or in subsequent ratification debates....”).

¹⁹ *See* Samuel B. Johnson, The District of Columbia and the Republican Form of Government Guarantee, 37 How. L.J. 333, 349-50 (1994) (“The Territories Clause is minimally relevant to the District. The existence of a separate

Court has recognized as much, specifically noting that, “[u]nlike either the States or Territories, the District is truly *sui generis* in our governmental structure.”²⁰ Accordingly, the case law we have discussed supporting Congress’s power to provide District residents congressional voting representation cannot uncritically be applied to support the same argument for the territories.

As a practical matter, moreover, Congress has never felt obliged to provide District and territorial residents identical rights and responsibilities. In particular, unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. Further, while birth in the District accords a person the same right to automatic U.S. citizenship that attaches to birth in the 50 states, those born in some territories are allotted only U.S. *nationality*, requiring only basic fealty to the United States, and not U.S. citizenship.²¹ Moreover, unlike the Territories, the District was part of the original 13 states and until the Capital was established in 1801, residents of what is now the District did enjoy full voting representation in the Congress.

Finally, unlike residents of the District, territorial residents do not vote in U.S. Presidential elections. Although we do not believe a constitutional amendment is necessary to secure voting representation for the District in the House, the enactment of the 23rd Amendment demonstrates the several states’ clear and unequivocal agreement that they share a historical and cultural identity with residents of the District, which occupies a unique position in the federal system. This is plainly a tradition the states do not share with the territories. Congress’s plenary authority to take broad action for the District’s welfare, including and up to granting it a seat in the House of Representatives, is part of this shared tradition.

Taken together, these differences between the territories and the District render highly unlikely the CRS Memo’s suggestion that granting voting rights to District residents would lead, as a legal or policy matter, to granting similar privileges to U.S. territories.

C. Congressional Grant of a House Representative Would Not Lead Congress to Grant the District Other Fundamental Rights That Inhere In Statehood.

As a final point, the CRS Memo offers in passing a few other “slippery slope” arguments, suggesting that legislative creation of a House Representative for the District is analogous to providing the District the ability to elect Presidential Electors and Senators, or even the power to

District Clause strongly suggests that the District is not among the territories covered by the Territories Clause. Moreover, courts generally have agreed that the Territories Clause does not apply to the District.” (citing *O’Donoghue v. United States*, 289 U.S. 516, 543 -51 (1939) and *Dist. of Columbia v. Murphy*, 314 U.S. 441, 452 (1941)). Cf. *Dist. of Columbia v. Carter*, 409 U.S. 418, 430-31 (1973) (comparing Congress’s exercise of power over the District and territories, noting federal control of territories was “virtually impossible” and had little practical effect.).

²⁰ *Carter*, 409 U.S. at 432.

²¹ See 8 U.S.C. §§ 1102(a)(29) and 1408 (those born in the “outlying territories” of American Samoa and Swain Island are eligible for U.S. nationality but not U.S. citizenship).

ratify constitutional amendments. Understandably, the CRS does not dwell on these concerns. Regardless of whether Congress could have provided the District representation in the Electoral College, District residents already have that representation by virtue of the 23rd Amendment. Any impetus to providing the District the power to ratify amendments would face grave constitutional hurdles, as that is a power of the states *qua* states, not a right of their individual citizens.²² And the question whether Congress might ever choose to afford District residents representation in the Senate is an entirely speculative one. It is furthermore a political not a legal question. In our view, these are red herring that do not at all undermine Congress's authority to create a House Representative for District residents.

Conclusion

As the Supreme Court has cogently stated, because "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live, . . . [o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."²³ Although we appreciate the concerns expressed in the CRS Memo, and agree that the issues it addresses are not free from doubt, we see in the Memo no legal, policy or moral argument suggesting that the Congress should not act to rectify the abridgment of this fundamental right.

²² See U.S. Const. Art. V.

²³ *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).