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MEMORANDUM

January 28, 2005

To: Walter Smith
From: Rick Bress
Jonathan Su
File no: 501340-0002
Copies to: Gary Epstein, Jim Rogers
Subject: Analysis Regarding Possible D.C. Voting Legislation by Representative Thomas M. Davis III (R-Va.)

I. ISSUE

In 2004, Rep. Thomas M. Davis III (R-Va.) proposed legislation that would add two seats to the U.S. House of Representatives (“the House”), with one seat going to the District of Columbia, and one seat going to the State next in line for representation in the House according to the 2000 census (Utah). The proposed legislation would have increased the membership of the House to 437 seats until the apportionment process after the 2010 census, whereupon the House membership would revert to 435 seats.

You asked us to research: (1) whether Congress, in providing Utah a temporary, additional seat in the House, may direct Utah to adopt and maintain a particular four-Congressional-district plan (the plan created by the Utah legislature in 2001¹) until the 2010 census and subsequent reapportionment and redistricting process; and (2) whether Congress may instead direct that the new seat be elected “at large” by the entire state until the 2010 census and subsequent reapportionment and redistricting process.

For the reasons stated below, we conclude that Congress has the authority to enact either alternative and that there are historical precedents for Congress doing so.

¹ The Utah legislature had drawn the four-district plan in the event that Utah prevailed in lawsuits contending that Utah should have been awarded the House seat given to North Carolina because the Census Bureau’s method of calculating population violated the Constitution. Utah lost those lawsuits, however, and thus reverted to the three-district plan also adopted by its legislature.

II. ANALYSIS

A. The Constitution vests in Congress broad authority to regulate national elections.

The Constitution provides that “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. Const. art. I, § 2, cl. 1. The Constitution then states: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” *Id.* at art. I, § 4, cl. 1.

The Supreme Court, in interpreting these provisions, has concluded that the Constitution gives Congress broad authority to regulate national elections. In *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970), Justice Black wrote: “In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed advisable to do so.” Justice Black explained further:

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to *grant to Congress the power to lay out or alter the boundaries of the congressional districts* Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts

Mitchell, 400 U.S. at 121-22 (emphasis supplied).

The Court articulated a similar principle in *Ex parte Siebold*, 100 U.S. 371, 383-84 (1879), when it held that “the power of Congress over [the election of senators and representatives] is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.”

In 2004, the Supreme Court noted Congress’s authority to regulate elections when the Court addressed a case involving gerrymandering. In *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1775 (2004), the Court observed that Congress has the authority to “make or alter” districts for federal elections. As Justice Scalia wrote in his plurality opinion, “[i]t is significant that the Framers provided a remedy for [gerrymandering] in the Constitution. Article 1, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, *permitted Congress to ‘make or alter’ those districts if it wished.*” *Id.* (quoting U.S. Const. art. I, § 4) (emphasis supplied).

B. Congress has the authority to direct Utah to adopt the four-district plan.

Based on the broad authority that the Constitution vests in Congress to regulate national elections, it is our view that Congress has the authority to direct Utah to adopt the four-district plan that was approved by the Utah legislature in 2001. In directing Utah to adopt a specific districting plan, Congress would be, in effect, temporarily drawing Utah's Congressional districts – even though it would be based on a plan Utah itself drew.

There is, in addition, historical precedent for such a Congressional action. In the Oklahoma Enabling Act, Congress admitted Oklahoma into the Union, allocated Oklahoma five representatives to the House, and drew the boundaries of the five districts from which those representatives were to be elected:

That until the next general census, or until otherwise provided by law, the said State of Oklahoma shall be entitled to five Representatives in the House of Representatives of the United States, to be elected from the following-described districts, the boundaries of which shall remain the same until the next general census:

That district numbered one shall comprise the counties of Grant, Kay, Garfield, Noble, Pawnee, Kingfisher, Logan, Payne, Lincoln, and the territory comprising the Osage and Kansas Indian reservations.

That district numbered two shall comprise the counties of Oklahoma, Canadian, Blaine, Caddo, Custer, Dewey, Day, Woods, Woodward, and Beaver.

That district numbered three shall (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations, and the Indian reservations lying northeast of the Cherokee Nation, within said State.

That district numbered four shall comprise all that territory now constituting the Choctaw Nation, that part of recording district numbered twelve which is in the Cherokee and Creek nations, that part of recording district numbered twenty-five which is in the Chickasaw Nation, and the territory comprising recording districts numbered sixteen, twenty-one, twenty-two, and twenty-six, in the Indian Territory.

That district numbered five shall comprise the counties of Greer, Roger Mills, Kiowa, Washita, Comanche, Cleveland, and Pottawatomie, and the territory comprising recording districts

numbered seventeen, eighteen, nineteen, and twenty, in the Chickasaw Nation, Indian Territory.

Oklahoma Enabling Act, Pub. L. No. 59-234, § 6, 34 Stat. 267, 271-72 (1906) (attached to this memorandum as Exhibit A). In this instance, Congress itself drew Oklahoma's five congressional districts. The Oklahoma Enabling Act is analogous to a Congressional action that would direct Utah to adopt the four-district plan, as already approved by the Utah legislature.

C. Congress has the authority to direct Utah to adopt an “at large” Congressional district for a new House seat, effective until the next census.

The second proposed alternative for the Davis legislation would direct Utah to temporarily elect its new House seat in an “at large” capacity until the next census and subsequent reapportionment. For the same reasons that we have already concluded Congress has the authority to direct Utah to adopt a particular four-Congressional-district plan, we are confident that Congress would also have the authority to permit Utah to retain its current three-Congressional-district plan and temporarily require an “at large” election for the fourth seat. In either event, Congress could rely on its broad authority to regulate national elections (as discussed in Section II.A of this memorandum).

Although there is no direct precedent for such an action, under current federal law—2 U.S.C. § 2a(c)—Congress has already directed the States to use “at large” voting in certain circumstances:

Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner . . . if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State

To be sure, another federal statute—2 U.S.C. § 2c—requires that Congressional districts be single-member districts:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a (a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative

In *Branch v. Smith*, the Supreme Court noted the apparent conflict between these statutes. 538 U.S. 254, 267-78 (2003) (“The tension between these two provisions is apparent: Section 2c requires States entitled to more than one Representative to elect their Representatives

from single-member districts, rather than from multimember districts or the State at large. Section 2a(c), however, requires multimember districts or at-large elections in certain situations.”) The Court resolved the conflict by holding that Section 2a(c) is inapplicable “*unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to Section 2c.” *Branch*, 538 U.S. 274.

For present purposes, for two reasons there is no conflict between the two provisions. First, as already noted, Congress has already in certain circumstances directed the use of “at large” voting for a State’s additional seat, and the Supreme Court expressed no reservations about Congress’s authority to do so when interpreting the statute. Congress’s determination in Section 2c generally to forbid the States from adopting “at large” voting in no way questions Congress’ underlying Constitutional authority to authorize such districts in special circumstances where Congress finds it appropriate.

Second, we think it unlikely that the single-member district requirement of Section 2c would apply to the proposed Davis legislation. Whereas Section 2c addresses the election of House members resulting from an apportionment, in this case the addition of a House seat to Utah would occur by statute. Section 2c begins with the clause “In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative *under an apportionment* made pursuant to the provisions of section 2a(a) of this title” 2 U.S.C. § 2a(c) (emphasis added). To prevent any confusion on this point, however, we would suggest use of a specific carve-out of Section 2c in any legislation directing the use of “at large” voting

In sum, we conclude that, under the broad authority to regulate national elections granted to Congress by the Constitution, Congress may direct Utah to elect a new House member “at large” until the next census and subsequent redistricting.

III. CONCLUSION

Based on the plain language of the Constitution as interpreted by the Supreme Court, we are confident that either of the two districting alternatives for the proposed Davis legislation are permissible exercises of Congressional authority. Though Congress has used this power sparingly, it has in the past taken similar steps. The proposed districting alternatives for the Davis legislation would be similarly limited exercises of Congressional authority, effective only until the next census and reapportionment. Both alternatives fall comfortably within existing Congressional precedent.

Please let us know if you have any further questions.