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MEMORANDUM

December 6, 2005

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

I. ISSUE

This memo supplements our January 28, 2005 memo to you in which we analyzed legislation proposed in 2004 by Rep. Thomas M. Davis, III (R-Va.) that would add two seats to the U.S. House of Representatives (the "House"), one going to the District of Columbia and one going to the State of Utah. In that memo we concluded that, in providing Utah an additional seat in the House pending the 2010 census and subsequent reapportionment, Congress could: (1) direct Utah to adopt and maintain the four-Congressional-district plan its legislature created in 2001; or (2) direct that the new seat be elected "at large" by the entire state.

You have since asked us to research whether the second alternative (i.e., the "at large" districting plan) would violate the "one person, one vote" principle articulated by the Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964). For the reasons set forth below, we conclude that the "at large" districting plan would not violate the "one person, one vote" principle.

II. ANALYSIS

In *Sanders*, the Court held that "the command of Article I, Section 2 [of the Constitution], that Representatives be chosen 'by the People of the Several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Sanders*, 376 U.S. at 7-8. Striking down a Georgia apportionment statute that created a congressional district that had two-to-three times as many residents as Georgia's nine other congressional districts, the Court explained that

[a] single Congressman represents from two to three times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment

statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

Id. at 7. The Court further counseled that an apportionment plan triggers “one person, one vote” concerns when congressional districts within a state contain different numbers of residents, diluting the voting power of residents in the district with more residents.¹

Applying those principles, we do not believe that the proposed temporary “at large” district in Utah would violate the “one person, one vote” requirement, because each Utah voter would be eligible both to vote for a candidate in her district *and* for a candidate in the “at large” district. Although the proposed state-wide “at large” district would necessarily contain more residents than the other districts, the establishment of that “at large” district would create no constitutional dilution concerns: Each person’s vote in the “at large” district would have equal influence, and the opportunity to cast that vote would not alter in any way the value of that person’s vote in her own smaller district. Any comparison between the voting power of residents in the smaller districts and the “at large” district would be obviated by the fact that all Utah residents would be eligible to vote in their own districts and the “at large” district. As a result, all Utah residents’ votes would have equal weight.

You have also asked, however, whether the proposed “at large” district could be challenged on “one person, one vote” grounds because the plan might be construed as giving each Utah resident two representatives, whereas residents of other states each have one representative. We believe such a challenge would be without merit for two reasons. First, although the Supreme Court has left open the possibility that the “one person, one vote” principle could be applied to the apportionment process, the Court has held that Congress is entitled to substantial deference in its apportionment decisions. *Dep’t of Commerce v. Montana*, 503 U.S. 442, 464 (1992). In *Montana*, the Court explained that

[t]he constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders. Article I, 8, cl. 18, expressly authorizes Congress to enact legislation that “shall be necessary and proper” to carry out its delegated responsibilities. Its apparently good faith choice of a method of apportionment of Representatives among the several States “according to their respective Numbers” commands

¹ See also *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State”); *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (“For 40 years, we have recognized that lines dividing a State into voting districts must produce divisions with equal populations: one person, one vote. Otherwise, a vote in a less populous district than others carries more clout.”) (Souter, J., dissenting) (internal citation omitted).

far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.

Id. In a later case, the Court revisited its decision in *Montana* and noted that “the Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the standard imposed by *Wesberry*.” *Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996). Accordingly, the one person one vote principle is essentially inapplicable to interstate voting comparisons.

Second, and in any case, even on an interstate comparison basis the “one person, one vote” principle is served by the proposed addition of an at-large seat in Utah. A simplified example will show why. Take two hypothetical states that have sufficient population for four representatives. One state has four “at large” voting representatives while the other divides its representatives and voters into four districts. The “at large” voter in the first state does not have any more clout than the single-district voter in the second state; she just has 1/4 of an interest in four representatives instead of a whole interest in one. The same is true of Utah voters after addition of the proposed “at large” voting district for that state. Compared to the situation where a comparable state is divided into four districts, under the proposed plan the voters in Utah’s three districts would each have proportionately less say in the election of the representative from their own district (because the district would be more populous) but would gain a fractional interest in the state’s at-large representative. Under either scenario, each voter’s total clout remains the same. And because that is true both within the state of Utah and compared to other states, the proposed at-large seat does not violate the principle of one person, one vote.

Please let us know if you have any further questions.