



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 23, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Assistant Attorney General John P. Elwood before the Committee on May 23, 2007, at a hearing entitled "Ending Taxation Without Representation: The Constitutionality of S. 1257." We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance.

The Office of Management and Budget advises us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
POST-HEARING QUESTIONS
FOR JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL**

**CONCERNING
“ENDING TAXATION WITHOUT REPRESENTATION: THE
CONSTITUTIONALITY OF S. 1257”
MAY 23, 2007**

- 1. According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation's transmission to the President?**

Answer:

Congress's power to “exercise exclusive legislation” over the District under the Enclave Clause of the Constitution, U.S. CONST., art. I, § 8, cl. 17, would not allow Congress to grant the described legislative revision authority to the D.C. City Council for the same reason that the Clause does not authorize Congress to grant District of Columbia residents voting congressional representation by simple legislation. In both instances, the asserted power directly conflicts with explicit constitutional provisions that specifically govern matters central to the constitutional scheme. The hypothetical authority described in the question would conflict with Article I, Section 7, which prescribes the constitutional procedures for the bicameral passage and presentment of legislation. In the same manner, S. 1257 conflicts with numerous specific provisions of the Constitution—among them Article I, Sections 2 and 4; Article II, Section 1; and Section 2 of the Fourteenth Amendment—prescribing the composition, qualifications, apportionment, and election of Members of the United States House of Representatives. But if the expansive theory of the Enclave Clause espoused by proponents of S. 1257 were accepted, permitting Congress to override the express constitutional provisions to further District interests, it could similarly be invoked to support the hypothetical law described in the question. Neither expansive application of the Enclave Clause could be accepted without undermining the foundations of our constitutional structure.

- 2. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the “forts, magazines, arsenals, dockyards, and other needful buildings” and the District?**

Answer:

Yes. Authoritative interpretations of the Enclave Clause confirm the understanding of that clause set forth in your question. The Supreme Court has recognized that the underlying purpose of the “exclusive Legislation” provision in the Clause was to assure that the Seat of Government and the other Federal enclaves would be insulated from the undue influence of any State. *See, e.g., Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 529, 539 (1885). Towards that end, Congress’s legislative authority over the District and the other enclaves encompasses the authority to apply Federal statutes of nationwide application to those areas, as well as the authority to exercise within them the police and regulatory powers which a State legislature or municipal government would have in legislating for State or local purposes. *See, e.g., Palmore v. United States*, 411 U.S. 389, 397 (1973); *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 108 (1953). But the Supreme Court has stressed time and again that the exercise of this authority may “not contravene any provision of the Constitution of the United States.” *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899); *Palmore*, 411 U.S. at 397; *Binns v. United States*, 196 U.S. 486, 491 (1904).

As your question suggests, the authority the Enclave Clause gives Congress over the District is the same authority it gives Congress over the other Federal enclaves. The Enclave Clause explicitly states that Congress has “like Authority” over the District of Columbia and the other Federal enclaves, and the Supreme Court has confirmed that “[t]he power of Congress over the federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia.” *Paul v. United States*, 371 U.S. 245, 263 (1963). It follows that if Congress could authorize congressional representation for the District under the Enclave Clause, it would have “like Authority” to do so for other enclaves such as military bases and Federal facilities. *See generally Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 256 (1956). In light of the meticulous care the Founders devoted during the Great Compromise to creating a system of congressional representation that was fair to both large and small States — and the centrality of that arrangement to the Constitution’s final acceptance and ratification — it is extraordinarily unlikely that the Framers would have adopted a provision granting Congress open-ended authority to create a potentially limitless number of additional voting representatives for Federal enclaves, the number, size, and nature of which were still unknown when the Constitution was adopted.

- 3. Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia retrocession era?**

Answer:

Because the question covers over 200 years of congressional history, we cannot state with certainty that such a provision has never been debated or introduced in some form. But based on available historical materials that we have reviewed, we have not identified any

specific legislation which seeks to grant voting representation in the House of Representatives to the District of Columbia without provision for statehood before the predecessors of S. 1257 that were introduced during the 109th Congress. And in particular, we are unaware of such a legislative proposal being introduced during the key periods in District history outlined in your question (during the ratification of the Constitution, the debates over the Organic Act and the establishment of the District, and the Nineteenth Century retrocession debates). Authoritative discussions of the history of District representation proposals do not identify such legislation. A Department of Justice report from 1987 stated that “[f]rom time to time it has been suggested that the District be granted, by simple legislation, a voting member in the House of Representatives,” Office of Legal Policy, U.S. Department of Justice, *Report to the Attorney General on the Question of Statehood for the District of Columbia* 12 (1987). But that reference may be to proposals to have the District join the Union as a State, and in any event, the Report does not cite any examples of such a bill actually being introduced or debated in Congress. *Id.* (The Report concluded that such representation for District residents could only be obtained through a constitutional amendment or statehood. *Id.* at 16.) Although hearings on constitutional amendments for District representation in 1977 took note of an academic theory (referred to as “nominal statehood”) advocating that the term “State” as used in Art. I, § 2 of the Constitution be interpreted to include the District, the constitutional viability of that theory was rejected in the Justice Department’s testimony and there is no indication that the theory was embodied in a legislative proposal. *See* Proposed Constitutional Amendments to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 95th Cong. 128, 131 (1977) (statement of Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice). The most analogous significant legislative proposals of which we are aware were bills such as the New Columbia Admission Act (last introduced as H.R. 51, 104th Cong., 1st Sess. (1995); essentially the same bill was introduced in the 103d Congress in 1993), which unsuccessfully sought to grant the District statehood, with full representation in the House and Senate. But those bills, unlike S. 1257, tied congressional representation to District statehood.

Significantly, the early post-ratification debates in Congress and elsewhere appeared to accept that such representation would require a constitutional amendment. In one early debate, Representative Dennis of Maryland said of D.C. residents that “[f]rom their contiguity to, and residence among the members of the General Government, they knew, that though they might not be represented in the national body, their voice would be heard. But if it should be necessary, the Constitution *might be so altered as to give them a delegate to the General Legislature* when their numbers should become sufficient.” 10 Annals of Cong. 991, 998-99 (1801) (emphasis added). Other participants in the same debate did not dispute Representative Dennis’s assertion that a constitutional amendment would be necessary and indeed confirmed it. *See, e.g., id.* at 996 (remarks of Rep. Bird) (noting that the “men who framed the Constitutional provision . . . peculiarly set apart this as a District under the national safeguard and Government” such that “the people could not be represented in the General Government”); *see also* 12 Annals of Cong. 487 (1803) (statement of Rep. Smilie) (“Under our exercise of exclusive jurisdiction, the citizens here are deprived of all political rights, *nor can we confer them.*”) (emphasis added). Authoritative commentators at the time reached the same conclusion. For example, Augustus

Woodward, a prominent lawyer in the District who favored such representation (and whom President Jefferson later appointed to a judgeship), wrote that to ensure that residents of the District “who are governed by the laws ought to participate in the formation of them” “will require an amendment to the Constitution of the United States.” *Considerations on the Territory of Columbia* 5-6 (1801) (quoted in *Adams v. Clinton*, 90 F. Supp.2d 35, 53 (D.D.C.), *aff’d*, 531 U.S. 941 (2000)).

Further authoritative evidence of the Framers’ understanding that the Constitution did not authorize congressional representation for the District is provided by Alexander Hamilton’s proposal of an amendment to authorize just such representation at the New York Ratifying Convention. Hamilton’s proposed amendment to Art. I, sec. 8, cl. 17 would have authorized Congress to provide for a District representative in the House when its population reached an appropriate level, clearly reflecting his understanding that the Constitution as drafted did not authorize such representation. But the proposed amendment was rejected. *See 5 The Papers of Alexander Hamilton* 189-90 (Harold C. Syrett ed., 1962).

- 4. Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to ‘states,’ why would the Federal Enclave Clause be able to shape the meaning of the House Composition Clause under rules of statutory construction?**

Answer:

We believe that ordinary rules of construction strongly support the opposite conclusion. *See generally Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (stating that the Constitution is interpreted using “those general principles which usually govern in the construction of fundamental or other laws”). The House Composition Clause states:

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 (emphasis added). Numerous other constitutional provisions likewise explicitly limit to States the ability to choose representatives. *Id.* art. I, § 2, cls.1-4; *id.* art. I, § 4; *id.* art. II, § 1, cl. 2; *id.* amend. XIV, § 2; *id.* amend XXIII, § 1. The Enclave Clause, in contrast, does not reference the composition or membership of the House or to the qualifications or election of its Members.

Under the rules of construction that the Supreme Court commonly applies to constitutional provisions, there is no basis for concluding that the Enclave Clause could override the explicit and unambiguous provisions of the Composition Clause, as well as the other express provisions in the Constitution, that limit congressional representation to the States. The many appearances of the term “State” throughout Article I to fix the composition of the Congress and

the apportionment, qualifications, and election of representatives all clearly refer to the sovereign States that joined together to form the United States. Thus, Chief Justice Marshall concluded during the early days of the Republic that “the word State is used in the constitution as designating a member of the union.” *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805). “Clear and unambiguous constitutional language is itself the best expression of the framers’ intent.” 2A Norman J. Singer, *Statutes and Statutory Construction* § 45.11 (6th Ed. 2000).

Because the intention to limit congressional representation to the States is clear and unambiguous from the language of Article I, Section 2, and because the Enclave Clause is silent on the matter, the plain language of the Constitution resolves the question. But even if it were necessary to resort to rules of construction to reconcile the Composition Clause with the Enclave Clause with respect to eligibility for representation in Congress, it is clear that the former would control. Under ordinary principles of construction, more specific language “should control more general language when there is a conflict between the two.” *Nat’l Cable & Telecomm. Assoc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) (discussing statutory construction); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) (“Because the Fourth Amendment provides an explicit textual source of protection” its provisions prevail over “the more generalized notion” of substantive due process). There is no question that the House Composition Clause and related provisions detailing the composition, apportionment, and qualifications for membership in the House constitute the most specific provisions discussing representation. The Enclave Clause, in contrast, provides for the general governance of the Seat of Government and other Federal enclaves.

5. The *Banner* case has received little attention in previous hearings on similar legislation. Please comment on what precedential value this case should have on the constitutionality of S. 1257.

Answer:

The issue in *Banner* was whether a congressionally enacted law prohibiting the District’s imposition of a commuter tax on non-District residents violated principles of equal protection by discriminating against District residents (who lack voting representation in Congress) and in favor of the residents of the States (who enjoy such representation). The court rejected the District’s argument that, because of their lack of representation in Congress, District residents stood in a disadvantaged relationship with respect to Congress as, for example, the residents of New York stand in relation to the legislature of New Jersey. After examining the representational status of District residents under the Constitution, the court stated:

This argument misses the special character of the District under the Constitution. Congress is not a foreign sovereign government in relation to the District, as the New Jersey legislature is to New York; Congress *is* the District’s government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality.

428 F.3d at 309. The court went on to explain that, in challenging Congress's allegedly discriminatory preference for its role as a national legislature rather than its role as a local legislature for the District, the plaintiffs were actually challenging the very plan of the Constitution: "But in this, their dispute lies with the plan of the Constitution and the judgment of its Framers. The evident purpose of granting Congress authority over the District was to provide the federal government a place where it would not be harassed or neglected by local interests [citing Federalist No. 43]." *Id.* The court concluded its equal protection analysis as follows:

It is beyond question that the Constitution grants Congress exclusive authority to govern the District, *but does not provide for District representation in Congress*. That *constitutional plan* does not require heightened scrutiny of congressional enactments affecting the District.

Id. at 312 (emphasis added). The *Banner* court's determination that the "constitutional plan" "does not provide for District representation in Congress" was thus a critical element to its conclusion. While it is probably more accurate to characterize that determination as a critical legal premise rather than a "holding," it is nonetheless an unambiguous legal conclusion reached after thorough consideration that carries substantial authoritative force. It is also reinforced by other authoritative judicial statements cited in Deputy Assistant Attorney General Elwood's testimony, most notably by *Adams v. Clinton*, 90 F.Supp.2d 35, 46-47 (D.D.C.), *aff'd*, 531 U.S. 940, 941 (2000), in which a three-judge Federal court — in a judgment summarily affirmed by the Supreme Court — concluded that "the Constitution does not contemplate that the District may serve as a state for purposes of congressional representation."

We emphasize, however, that the court's statement in *Banner* merely provides supplemental support for the unambiguous text of the governing constitutional provisions, as well as 200 years of consistent practice reflecting the long-held understanding that voting representation in Congress is limited to the States.

- 6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?**

Answer:

The arguments supporting the assertion that Congress can by simple legislation afford residents of the District of Columbia voting representation in the House of Representatives equally support creating representation in the Senate by the same mechanism. Proponents of S. 1257 have repeatedly claimed that the Enclave Clause authority they invoke is "plenary," which suggests that it would empower Congress to provide representation in the Senate as well as in the House. A possible argument for limiting this claimed authority solely to providing House representation might be that the

House represents “the *people* of the several States,” whereas the Members of the Senate originally represented the States themselves, and thus the Senate provisions more clearly foreclose representation for the District. But that distinction does not withstand analysis, because the governing provisions do not authorize House representation for “people” in the generic sense, but for “the People of the *Several States*.”

The Enclave Clause theory invoked in support of S. 1257 could also be applied to support legislation giving the District an indeterminate number of House seats instead of merely one. If the Enclave Clause enables Congress to disregard constitutional provisions limiting representation to residents of “States,” it is difficult to see why it would not likewise allow it to disregard provisions requiring the apportionment of House members “among the several States according to their respective numbers.” U.S. CONST., Art. I, § 2, cl. 4; *id.* Amend. XIV, § 2. And indeed, S. 1257 fixes the District’s representation at one member without reapportionment, no matter how large or small its population becomes.