



## **Memorandum**

June 11, 2007

**TO:** Senate Judiciary Committee  
Attention: Jennifer Leathers

**FROM:** Kenneth R. Thomas  
Legislative Attorney  
American Law Division

**SUBJECT:** Post-Hearing Questions Regarding the Constitutionality of S.1257, The District of Columbia House Voting Rights Act of 2007

The memorandum is to respond to a series of questions posed by Senator Tom Coburn regarding the constitutionality of S.1257, The District of Columbia House Voting Rights Act of 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 D.C., the D.C. City Council would have the authority to revise legislative language before the legislation's transmission to the President?**

In general, for a congressional bill to become law, it must comply with the requirements of bicameralism and presentment, *i.e.*, the bill must have passed both houses and then be presented to the President for his approval.<sup>1</sup> Any significant variation from this process would appear likely to raise significant constitutional issues. For instance, in

---

<sup>1</sup> Article I, section 7, clause 2 requires Congress to submit "Every Bill" to the President, U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States"), while article I, section 7, clause 3 requires Congress to submit "Every Order, Resolution, or Vote" to the President. U.S. Const. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary . . . shall be presented to the President of the United States."). If the President vetoes the bill, Congress then has the option of overriding that veto. U.S. Const. art. I, § 7, cl. 2 (" . . . but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."

*Immigration and Naturalization Service v. Chadha*,<sup>2</sup> the Supreme Court held that a House veto of an order suspending deportation proceedings against Chadha was a legislative act and, as such, that it violated the Constitution's requirement that the Congress submit all legislation to the President for his approval.<sup>3</sup>

While a detailed analysis of the instant proposal is beyond the scope of this memorandum, it would appear likely that allowing the District of Columbia Council to amend legislation after passage by Congress, but before presentment to the president, would be inconsistent with the constitutional requirements of bicameralism and presentment. Consequently, the question arises as to whether such a process could be authorized by the provision of the Constitution that provides for the authority of Congress over the District of Columbia.

As was discussed extensively at the hearing, an argument has been made that the plenary authority that the Congress has over the District of Columbia under Article I, section 8, clause 17 – the District Clause – represents an independent source of legislative authority under which Congress can provide political powers to the District of Columbia that are not otherwise provided for in the Constitution.<sup>4</sup> And the case which has been most often cited for this proposition is the 1948 case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*<sup>5</sup>

The *Tidewater Transfer Co.* case dealt with whether a federal statute could grant District of Columbia residents the ability to sue in federal courts under diversity jurisdiction, despite the fact that the Constitution limits such jurisdiction to disputes "between citizens of different states."<sup>6</sup> The Court in *Tidewater Transfer Co.* upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.<sup>7</sup>

---

<sup>2</sup> 462 U.S. 919 (1982).

<sup>3</sup> *Chadha*, 462 U.S. at 954-58. The Court employed a two-step analysis in reaching this conclusion. First, the Court found that the language and history of the Constitution require Congress to present all legislative acts to the President. Second, the Court found that the legislative veto of the suspension order affected the rights of persons outside the legislature and was, therefore, a legislative act.

<sup>4</sup> See, e.g., 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* 12-13 (2004) (report submitted to the House Committee on Government Reform) available at [<http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf>]; *District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388*, 109th Cong., 2nd Sess. 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, *Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate* at 7-12 (February 3, 2003)(analysis prepared for Walter Smith, Executive Director of DC Appleseed Center for Law and Justice) available at [<http://www.dcvote.org/pdfs/Lathammemo02032003.pdf>].

<sup>5</sup> 337 U.S. 582 (1948).

<sup>6</sup> U.S. Const. art. III, § 2.

<sup>7</sup> See *Tidewater Transfer Co.*, 337 U.S. at 600 (plurality opinion of Jackson, J.).

As I noted at the hearing, the *Tidewater Transfer Co.* case did not have a majority opinion, but instead consisted of a three-judge plurality, a two-judge concurrence, and two two-judge dissents. Of these various opinions, only the three-judge plurality held that District of Columbia residents could seek diversity jurisdiction based on Congress's exercising power under the District Clause, while the three other opinions rejected this holding. However, even the plurality emphasized the relative insignificance of allowing diversity cases to be heard in federal courts outside the District instead of limiting them to the geographical confines of the District. Justice Jackson, who wrote the opinion, noted that the issue did not affect "the mechanics of administering justice," involve the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms"; nor did the legislation "substantially disturb the balance between the Union and its component states."<sup>8</sup>

The positions of the various Justices in the *Tidewater Transfer Co.* case on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to inform the question of whether the District of Columbia Council could amend legislation after passage by Congress but before presentation to the President. As six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause, it is likely that these six Justices would also have rejected the suggestion that Congress has the power to allow the District of Columbia to amend legislation under the hypothetical proposal.

Even the three-judge plurality might have distinguished the instant hypothetical from the legislation that was at issue in *Tidewater Transfer Co.* As discussed previously, the plurality opinion took pains to note the limited impact of its holding — that parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a lawsuit. And, as noted, the plurality specifically limited the scope of its decision to legislation that neither involved an "extension or a denial of any fundamental right" nor substantially disturbed "the balance between the Union and its component states."<sup>9</sup>

**2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest that 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?**

The location of the District Clause within the Federal Enclave Clause is consistent with the suggestion that Congress was given custodial, administrative and operational authority over both the District of Columbia and federal enclaves. This power would also appear to provide the authority for the federal government to establish local governing authority, and in addition to provide for limited political representation in the Congress. Further, as noted previously, this power appears to have been the basis for a plurality of the Supreme Court to expand Article III jurisdiction to allow for District of Columbia citizens to bring federal diversity suits.

---

<sup>8</sup> Id. at 585-586.

<sup>9</sup> Id. at 585.

The Constitution is, however, a document of both powers and limitations. Thus, the question of whether this power could be used to provide for a vote in the House of Representatives for the District of Columbia needs to be considered in the context of the House Representation Clause. As the House Representation Clause appears to limit the provision of House representation to the states, the question is whether the District Clause is a sufficient authority to overcome this apparent conflict. As previously indicated, relevant Supreme Court case law would indicate that the District Clause does not provide a separate constitutional authority to provide for House representation.

**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 of other federal enclaves, especially in the post-Ratification, post-Organic Act era, or post-Virginia Retrocession era?**

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through constitutional amendment to give District residents voting representation in Congress, but not granting statehood; retrocession of the District of Columbia to Maryland; semi-retrocession, i.e., allowing qualified District residents to vote in Maryland in federal elections for the Maryland congressional delegation to the House and Senate; statehood for the District of Columbia; and other statutory means such as virtual-statehood, i.e., designating the District a state for the purpose of voting representation.<sup>10</sup>

S. 1257 does not appear to fit into any of the above categories of legislation providing for Representation for the District of Columbia in Congress. Other than bills in recent Congresses, there do not appear to have been significant similar efforts to statutorily grant House Representation to the District or other federal enclaves.

**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?**

Please see answer number 2.

**5. In Mr. John Elwood’s (representing the U.S. Department of Justice Office of Legal Counsel) written testimony, he cites to *Banner v. U.S.*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows:**

**‘In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: “[t]he Constitution denies District residents voting representation in Congress . . . Congress is the District 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.” *Id.* at 309. The court added: “[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress.” *Id.* at 312.’**

---

<sup>10</sup> CRS Report No. RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by Eugene Boyd.

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

*Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam) involved a challenge to the federal prohibition on the District of Columbia government imposing a personal income tax on those who worked in the District but resided elsewhere (the commuter tax). The challenge was made on the grounds that the restriction violated the Equal Protection Clause and the Uniformity Clause of the Constitution.<sup>11</sup> The court held that, because Congress had been given exclusive legislative authority over the District and the residents did not constitute a suspect class, that such distinction only required the establishment of a rational governmental purpose, a test that was met here. The Court also found that because a state could constitutionally enact a similar restriction, that Congress's authority to control local taxes was consistent with the Uniformity Clause.

As part of the discussion of Equal Protection, the court addressed the issue of Congress's authority over the District, pointing out that the House Representation Clause of the Constitution does not provide for congressional representation in the House for the District of Columbia. As I noted in my testimony, the question of whether the House Representation Clause includes representation for the District of Columbia does not seem to be open to significant dispute. Not only have the federal courts consistently found that voting representation for purposes of the House Representation clause is limited to "states,"<sup>12</sup> but most scholarly commentators agree,<sup>13</sup> including proponents of the instant legislation.<sup>14</sup> In general, it appears that proponents of the instant proposal rely principally on an expansive interpretation of the District Clause, not of the House Representation Clause.

---

<sup>11</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>12</sup> *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805) (holding in *dicta* that the plain meaning of "state" in the House Representation Clause does not include the District of Columbia); *Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (stating in *dicta* that "residents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."); *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in *dicta* that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government."); *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* *Alexander v. Mineta*, 531 U.S. 940 (2000) (failure to provide congressional representation for the District of Columbia did not violate the Equal Protection Clause); *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

<sup>13</sup> See, e.g., Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands*, U. HAW. L. REV. 445, 512 (1992); But see Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

<sup>14</sup> See, e.g., Viet Dinh and Adam H. Charnes, *supra* note 7, at 9.

**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?**

Following the logic that establishment of a House representative for the District of Columbia could be implemented despite the textual limits of the House Representation Clause, then it would seem that such a proposal could be implemented in a manner that also contravenes the requirement that Members of the House be apportioned among the states based on the number of persons in those states.<sup>15</sup> In fact, the current proposal establishes the number of House Representatives for the District of Columbia at one, regardless of the population of the District. Again, following this logic, it would appear to follow that the number of House Representatives could be set at a higher numbers.

It can also be noted that the question of whether the District of Columbia and its citizens should be treated as a state for purposes of the Constitution has generally included a consideration of whether the issue at hand involved individual rights of the District of Columbia residents or whether it involved the relationship of the District government to the national political structure. In general, the courts have been reluctant to find that the District of Columbia should be considered a state when the issue involves reorganizing the relationship between the federal government and the states.<sup>16</sup>

In order for the courts to find that the instant proposal was constitutional, it would seem necessary for the courts to reconsider the jurisprudence distinguishing issues turning on individual rights versus those affecting the relationship of the states and the federal government. If the courts did so, however, it is difficult to see how House representation would be distinguished from other possible changes to how the federal government operates. Thus, a holding that the District could be treated as a state for purposes of House representation would arguably also support a finding that the District could be treated as a state for the parts of the Constitution that deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize the District of Columbia to have Senators, Presidential Electors, and perhaps even the power to ratify Amendments to the Constitution.<sup>17</sup>

---

<sup>15</sup> U.S. Const., 14<sup>th</sup> Amendment, § 2.

<sup>16</sup> *See, e.g.,* National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1948) (plurality opinion limited the scope of its decision to legislation that did not substantially disturb "the balance between the Union and its component states.")

<sup>17</sup> U.S. CONST. Art. V.