



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

STATEMENT

of the

AMERICAN BAR ASSOCIATION

submitted to the

**SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

on the subject of

**H.R. 5388, THE DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE
VOTING RIGHTS ACT**

September 14, 2006

The American Bar Association appreciates the opportunity to submit this statement in support of legislation to provide voting representation in the House of Representatives to the citizens of the District of Columbia.

With more than 413,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society.

Understanding that the success of any democracy depends in large part on the integrity of its electoral process and its governing bodies, the ABA has a long history of involvement with issues related to ensuring the free and fair exercise of the fundamental voting rights guaranteed by our Constitution. In pursuit of this goal, the ABA has adopted policies and undertaken efforts in areas such as election reform, voter participation, voting rights, and campaign financing. In 1999, the ABA adopted a resolution supporting the principle that citizens of the District of Columbia should no longer be denied the fundamental right belonging to other American citizens to elect voting members of the Congress that governs them.

H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act, would establish the District of Columbia as a Congressional district for purposes of representation in the House of Representatives. This bill is a product of years of cooperative effort and carefully considered compromise to ensure that the goal of giving D.C. residents their right to voting representation in the House is accomplished by a mechanism fully consistent with our Constitution and is implemented in a manner that does not disadvantage any citizen or state. H.R. 5388 has broad, bipartisan support, as evidenced by 40 co-sponsors representing both sides of the aisle and its approval by the House Government Reform Committee by a bipartisan vote of 29-4 on May 18, 2006. Most importantly, as recent polls have shown, a majority of Americans throughout the country support congressional voting rights for D.C. residents. The ABA, which supports full voting representation in the House and the Senate for the District of Columbia, believes that H.R. 5388 will achieve an important part of that goal.

As we have previously stated in a June 16, 2006 letter to House Judiciary Committee members, the American Bar Association concurs in the conclusion reached both by the House Government Reform Committee's consultants, Professor Viet D. Dinh and his co-author Adam H. Charnes, and by the former Solicitor General of the United States, Kenneth W. Starr: that Congress has the constitutional authority to provide voting representation in the House of Representatives to residents of the District of Columbia. Such authority is granted by the "District Clause" of the Constitution, Article I, Section 8, Clause 17, which confers upon the Congress the power "To exercise exclusive Legislation in all Cases whatsoever, over such District. . . ." Enactment of the proposed District of Columbia Fair and Equal House Voting Rights Act would be an exercise of this constitutional authority conferred by the "District Clause." (See Dinh and Charnes, Memorandum submitted to Committee on Government Reform, November 2004, entitled "The

Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives”; testimony of the Hon. Kenneth W. Starr before the House Government Reform Committee, June 23, 2004).

The same constitutional authority was exercised by the very first Congress, in 1790, when Congress accepted the cession by Maryland and Virginia of the ten-mile-square area constituting the District and provided by statute that its residents would continue to enjoy the same legal rights - - including rights to vote in federal and state elections - - which they had possessed under Maryland and Virginia laws prior to acceptance by Congress of the cession (Act of July 16, 1790, chapter 28, section 1, 1 Stat. 130). Under this federal legislation, residents of the District were able to vote, from 1790 through 1800, for members of the United States House of Representatives (and for members of the Maryland and Virginia Legislatures, which then elected United States Senators).

Voting representation in Congress for District residents ceased in 1801, when the District of Columbia became the Seat of Government, and Congress enacted the Organic Act of 1801, which provided for governance of the nation's capital but which contained no provision for District residents to vote in elections for the Congress that had the "exclusive" power to enact the laws which would govern them. Since the 1801 Organic Act also had the effect of terminating District residents' right to vote in any elections held in Maryland and Virginia, they were left disenfranchised from voting for Members of Congress.

In a memorandum submitted to the Government Reform Committee in 2004, Professor Dinh and Mr. Charnes rightly described this loss of national voting rights as a "historical accident" in which "Congress by omission withdrew the grant of voting rights to District residents." (See Dinh and Charnes Memorandum, pp. 8, 19).

It falls to this Congress to restore the voting rights lost by a previous Congress' omission more than 200 years ago. Not only is there a moral obligation for Congress to restore such rights, there is also a constitutional obligation for Congress to ensure the right of D.C. residents to the equal protection of the laws, as that concept has come to be understood in modern times, long after the deprivation of D.C. voting rights through the Organic Act of 1801.

The Bill of Rights, ratified in 1791, includes the Fifth Amendment guarantee against deprivation of "due process of law." But not until the D.C. school desegregation case of Bolling v. Sharpe, 347 U.S. 497, decided in 1954 as a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), was the Fifth Amendment "due process" clause held to apply to federal legislation the same guarantee of "equal protection of the laws" which the Fourteenth Amendment had adopted as to the States. Bolling invalidated (under the due process clause of the Fifth Amendment) the Congressional legislation which had imposed segregation upon the D.C. public schools, just as Brown v. Board of Education invalidated (under the equal protection clause of the Fourteenth Amendment) the State legislation which had imposed segregation upon the public schools in numerous states. Subsequent Supreme Court decisions have made clear that the guarantees of equal protection in the Fifth and Fourteenth Amendments are co-extensive. Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) ("The Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection

claims under the Fourteenth Amendment”); Buckley v. Valeo, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment”). Under Fourteenth Amendment standards, if a State legislature were to deny to residents of the state’s capital city the right to vote for members of the Legislature, it would be depriving those residents of the equal protection of the laws which is guaranteed to them by the Fourteenth Amendment. Similarly, Congress’ elimination of D.C. residents’ voting representation in the Congress by its adoption of the Organic Act of 1801, may be seen in retrospect as having deprived D.C. residents of the equal protection of the laws guaranteed to them by the Fifth Amendment due process clause.

Congress is expressly empowered by Section 5 of the Fourteenth Amendment to enact legislation enforcing equal protection guarantees of the Fourteenth Amendment. Congress’ plenary Power under the District Clause of Article I, Section 8, should likewise empower this Congress to enact legislation to secure to D.C. residents the equal protection of the laws guaranteed by the Fifth Amendment, by adopting the proposed District of Columbia Fair and Equal House Voting Rights Act.

Some opponents of the bill might contend that the plenary power of Congress to enact such legislation under Article I, Section 8, Clause 17, is limited by the provision of Article I, Section 2, Clause 1, that House members be chosen “by the People of the several States.” Professor Dinh’s and Charnes’ memorandum to the Government Reform Committee shows at length that “the terms of Article 1, Section 2 do not conflict with the authority of Congress in this area.” (Dinh and Charnes Memorandum, p. 5, n. 16, pp. 10-19).

We would only add that, even if there were such an arguable conflict between interpretations of Article I, Section 2 and the District Clause of Article I, Section 8, the equal protection guarantee of the Fifth Amendment’s due process clause would require that such a conflict be resolved by construing the District Clause to authorize enactment of a statute which ends the denial to District residents of equal protection in regard to voting representation in the House. As part of the Bill of Rights, ratified in 1791, the Fifth Amendment due process guarantee post-dates the adoption of Article I of the Constitution in 1787, and would therefore supersede any conflicting provision or interpretation derived from Article I. To avoid the constitutional issue that would be presented by an interpretation of Article I that conflicted with a provision of the Bill of Rights, the provisions of Article I, Section 2, should not be construed to limit the plenary power conferred upon Congress by Article I, Section 8, Clause 17, to adopt the District of Columbia Fair and Equal House Voting Rights Act.

As Representative Davis has stated, “The Courts have never struck down a Congressional exercise of the District Clause, and there is no reason to think they would act differently in this case. It is now a matter of political will.” It is time for Congress to exercise its will and its constitutional authority to correct this longstanding inequity.