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February 10, 2009

The Honorable Joseph Lieberman
Chair
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Ranking Member Collins:

Last month nearly two million Americans gathered in our nation's capital to witness the inaugural ceremony heralding the peaceful transition of our government's leadership--an affirmation and celebration of the strength of our representative democracy. Many of those attending the festivities were unaware that there is a large number of Americans, some of whom were standing among them, that do not enjoy the full benefits of our democracy. In a country that cherishes the principle of a government "of the people, by the people, and for the people," it seems inconceivable that American citizens residing in the capital do not have voting representation in the United States Congress. It is time to correct this injustice. The American Bar Association enthusiastically supports providing congressional voting representation to the residents of the District of Columbia and commends the Committee for moving expeditiously to approve legislation that takes an important step toward accomplishing this goal.

As you know, S. 160, the District of Columbia House Voting Rights Act of 2009, would establish the District of Columbia as a Congressional district for purposes of representation in the House of Representatives. It would provide one voting seat in the House for the District of Columbia and an additional House seat for the state that would have been next in line according to the last Census, the state of Utah. 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.

For over two hundred years, residents of our nation's capital have been disenfranchised. Residents of the District of Columbia pay taxes and are subject to the military draft and the laws of our nation. Yet they are not allowed to select voting members of Congress to represent their views in determining the formulation, implementation and enforcement of those laws. This violates a central premise of representative democracy and the ideal, voiced by Thomas Jefferson, that governments "derive their just powers from the consent of the governed."

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This not only is contrary to our own system of representative government, it also undermines our leadership in promoting the international rule of law and democratization. The United States is the world's only democratic nation that does not grant citizens of its capital voting representation in the national legislature. Our nation is devoting significant resources to promoting representative democracy abroad, and yet we have more than 500,000 American citizens residing in the District of Columbia who are not afforded that right at home. Depriving a sizeable segment of our own population of the fundamental right to voting representation undermines the U.S. message of equality under the law.

There has been an ongoing debate regarding the appropriate mechanism by which voting representation in Congress for the District of Columbia may be established. The American Bar Association concurs in the conclusion reached by numerous constitutional and legal experts that Congress has the authority to provide voting representation in the House of Representatives to residents of the District of Columbia under the "District Clause" of the Constitution (U.S. Const. art. I, § 8, cl.17). A brief summary of our position on this issue is attached.

Some have stated that this issue is a matter of politics; the ABA believes it is a matter of principle. Congress should use its constitutional authority to provide the citizens residing in our capital the fundamental right to voting representation in the House. It is within Congress' power to correct this longstanding inequity, and we urge you to work toward enactment of S. 160 or similar legislation as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

Congress' Constitutional Authority to Enact this Legislation under Article I, Section 8, Clause 17

There has been an ongoing debate regarding the appropriate mechanism by which voting representation in Congress for the District of Columbia may be established. The American Bar Association concurs in the conclusion reached by recognized many constitutional and legal experts, such as Professor Viet D. Dinh and Senator Orrin Hatch, 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 House Voting Rights Act would be an exercise of this constitutional authority conferred by the "District Clause." (See Dinh, Statement submitted to House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, January 27, 2009; Senator Orrin G. Hatch, No Right is More Precious in a Free Country: Allowing Americans in the District of Columbia to Participate in National Self-Government, 45 Harv. J. on Legis. 287-310 (2008)).

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 his statement to the House Judiciary Subcommittee on January 27, 2009, Professor Dinh 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 Statement, pp. 8, 18).

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 loss 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 its capital city the right to vote for members of the Legislature, it would be depriving those residents of the equal protection of the laws guaranteed by the Fourteenth Amendment. Similarly, Congress’ elimination of D.C. residents’ voting representation in the Congress by adopting 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 it to enact legislation to secure to D.C. residents the equal protection guaranteed by the Fifth Amendment, through adoption of the proposed District of Columbia 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 statement shows at length that “the terms of Article 1, Section 2 do not conflict with the authority of Congress in this area.” (Dinh Statement, pp. 9-19).

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 House Voting Rights Act.