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SECTIONS
DISTRICT OF COLUMBIA BAR



TO: Board of Governors
Section Chairpersons
(Designated to Receive Public Statements)

FROM: Carol Ann Cunningham *CAC*

DATE: January 29, 1993

SUBJECT: EMERGENCY PUBLIC STATEMENT regarding an Amicus Participation in support of Eleanor Holmes Norton and the House of Representative Rule Permitting her (and the other nonvoting delegates) to Cast Votes in the Committee of the Whole

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D.C. Bar Executive Director

Carol Ann Cunningham
Sections Manager

**48-hour expedited consideration no later than 12:00 noon
on Tuesday, February 2, 1993 requested**

Enclosed please find for your immediate review a summary of a public statement that several sections have expressed an interest in cosponsoring, as a result of a memorandum earlier this week from Immediate Past President of the Bar James Robertson. Copies of the full text will be provided upon request. If you wish to have this matter placed on the next Board of Governors' agenda on February 16, please call me by 12:00 noon on Tuesday, February 2, 1993. I can be reached at (202) 331-4364.

The brief must be filed by close of business on February 2 and several sections are still seeking final approval of their Steering Committee members on the draft brief at this time. To comply with the timing of the Bar's emergency public statement process, however, I am circulating this summary to you now in anticipation of the imminent approval of multiple sections.

Please note that according to the Guidelines regarding public statements (pp. 41-50) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc w/full public statement text:
Jamie S. Gorelick
Mark H. Tuohy, III
Celia A. Roady
Barbara J. Kraft
Katherine A. Mazzaferri

January 26, 1993

I. Interest of Amici

- A. In seeing that we and the people and community we represent have the greatest voice possible in the House of Representatives within constitutional limitations; and
- B. Interest as lawyers and students of the law to see that the fundamental principles of representative government are fully realized.

II. Background

- A. Article 1, Sections 1 and 2 of the Constitution prescribe that legislative power shall be exercised by a Congress consisting of a House and Senate and that the House shall be composed of Members, elected from the states.
- B. Section 5 provides that "[e]ach House may determine the Rules of its Proceedings." Over the past 204 years the House has enacted a variety of rules designed to streamline its business while never impairing the ability of Members -- and Members only -- to have the final decisive vote on legislation sent to the Senate or to the President, i.e. to vote in the forum that exercises "legislative power." Under those rules, delegates have been permitted, *inter alia* to serve and vote on committees, to engage in floor debate, and even to introduce legislation.
- C. House Rule XII was amended on January 5, 1993 to allow delegates from the District of Columbia, Guam, the Virgin Islands and American Samoa and the Resident Commissioner from Puerto Rico to vote in the Committee of the Whole, which before Rule XII comprised all Members.
- D. The Committee of the Whole votes on pending legislation, but it sends no legislation to the Senate or President. Before that step, the House must reconstitute itself as the Full House, and a vote must be taken there.

III. Delegate Voting in the Committee of the Whole is Constitutional

- A. "Legislative power" is exercised by Congress as a whole, not by its individual members.

- B. Nothing in the amended Rule impairs the fundamental ability of Members to vote in the forum that exercises legislative power -- that is, the Full House. Rule XII therefore a constitutional exercise of the rulemaking power provided by Article 1, Section 5.
- IV. The amendment by the House of Rule XII did not require approval by the Senate or signature by the President
- A. Historically, all rights, duties and privileges of delegates in the House of Representatives, including voting on committees, have been defined through resolution or point of order.
 - B. The amendment of Rule XII does not have the "purpose [or] effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." It is not, therefore, legislation that requires bicameralism and presentment.
- V. The Court lacks jurisdiction of or should refrain from deciding the case
- A. There is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Baker v. Carr, 369 U.S. 196 (1962). The case thus presents a political question. Nixon v. U.S. 61 U.S.L.W. 4069, 1993 U.S. Lexis 834 (January 13, 1993).
 - B. It is improper for a court to resolve a dispute among House Members over House procedures, and the Court should exercise its discretion to withhold equitable relief. Riegler v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983).
 - C. No legislation has yet been passed that would have failed of passage without the delegate vote. Plaintiffs cannot point to an instance in which their vote or right of representation has been diluted. There is accordingly no case or controversy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT H. MICHEL, et al.,

Plaintiffs,

v.

DONNALD K. ANDERSON, et al.,

Defendants.

Civil Action No.
93-0039 (HHG)

MEMORANDUM OF AMICI CURIAE IN SUPPORT OF
DEFENDANT ELEANOR HOLMES NORTON'S OPPOSITION TO
PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

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