American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

August 9-10, 1999

Weinberg, Robert L., the District of Columbia Bar (Report No. 115)

RESOLVED, That the American Bar Association supports the principle that citizens of the District of Columbia shall no longer be denied the fundamental right belonging to other American citizens to vote for voting members of the Congress which governs them.
Alone among the capital cities of the world’s democracies, our nation’s capital has no representation for the city’s residents in the national legislature. Unlike the citizens of the fifty States, the citizens of the District of Columbia (which was formerly a part of the State of Maryland) have no voting representation in the United States Congress.

These unrepresented citizens of D.C. are, however, subject to all the national laws enacted by our governing Congress, and the obligations of national citizenship, which those laws impose: military service, taxation, and myriad others. In addition, citizens of D.C. are subject to and governed by numerous acts of Congress of a local nature, applicable only to D.C. and codified in the D.C. Code, which are enacted pursuant to Congress’ power under Article I, section 8, clause 17 of the Constitution “To exercise exclusive Legislation in all Cases whatsoever, over such District . . .”

The proposed Resolution would put the ABA on record in favor of ending the denial to D.C. citizens of the fundamental right to be represented by voting members of the Congress. Presently D.C. is allowed only a non-voting delegate.

The Resolution arises out of an informal meeting during the course of the “ABA Day in Washington” events earlier this month (May 1999). President Phil Anderson, Executive Director Bob Stein, and the undersigned member of the House of Delegates, had the opportunity, in the course of an informal discussion with the Honorable Eleanor Holmes Norton, the non-voting delegate from D.C. in the U.S. House of Representatives who had been invited by the President to the ABA event, to speak with her about the lawsuit on D.C. citizens’ voting rights which is pending before a three-judge United States District Court in the District of Columbia. This suit, Alexander, et al v. Daley, et al, and the constitutional arguments raised therein for enfranchising D.C. citizens, are summarized more fully in the concluding section of this Report.

The Alexander suit was filed by the Corporation Counsel of the District of Columbia and pro bono counsel from Covington and Burling, seeking a declaratory judgment that D.C. citizens have a constitutional right to participate in Congressional elections. The case was argued on April 19, 1999, before a three judge district court presided over, as it happens, by a former member of the ABA House of Delegates, United States District Judge Louis F. Oberdorfer, who is also a past president of the District of Columbia Bar. It is very likely that, whatever may be the decision of the district court, the case will be brought before the United States Supreme Court in a direct appeal taken by parties who do not prevail below.

In the “ABA Day in Washington” meeting with Delegate Norton, mentioned above, the possibility was discussed of an amicus brief being filed in the Supreme Court by the ABA, in support of D.C. citizens’ asserted rights to voting representation in the Congress which governs them – if the ABA has adopted a policy supporting that right. This Resolution is submitted to enable the ABA to adopt that policy. Under our bylaws, the Board of Governors has to approve
any amicus brief before it can be filed on behalf of the ABA, in order to ensure its high professional quality and suitability for filing; but the Resolution assists this process by making clear the wish of the House that the Association's position be made known to the Supreme Court at an appropriate juncture.

While the ABA has adopted numerous policy positions in support of protecting the fundamental right of citizens to elect their governments, in the U.S. and abroad, and in support of increasing voter participation in the U.S., the ABA does not as yet have a specific policy on ending the disenfranchisement of citizens of the District of Columbia. Adoption of such a policy is timely, if not overdue, now. As Senator Bob Dole stated more than 20 years ago, in urging adoption of a constitutional amendment to provide D.C. with voting representation in both Houses of Congress:

"The absence of voting representation for the District in Congress is an anomaly which the Senate can no longer sanction. It is an unjustifiable gap in our scheme of representative government . . . . It seems clear that the framers of the Constitution did not intend to disenfranchise a significant number of Americans by establishing a Federal District. I believe that the framers would have found the current situation offensive to their notions of fairness and participatory government." (124 Cong. Rec. 27254-55).

There are several constitutional bases which support the fundamental right to voting representation in Congress for D.C. citizens. These include: (1) the privileges of national citizenship recognized in the privileges and immunities clause of the Fourteenth Amendment; (2) the Fifth Amendment guarantee of due process of law; (3) the guarantee of equal protection of the laws, which has been held to be part of Fifth Amendment due process. Supporting legal authorities are briefly summarized in the following section of this report.

Alexander et al. v. Daley was filed in federal court in the District of Columbia on September 14, 1998, on behalf of the District of Columbia and 55 of its individual citizens. The individual plaintiffs are a cross section of District residents drawn from all wards and sectors of the city, headed by lead plaintiff Clifford Alexander, a former Secretary of the Army and Chairman of the E.E.O.C. The defendants are the Secretary of Commerce, who is responsible for transmitting an apportionment of seats in the House of Representatives to the President; the Clerk, Sergeant at Arms, and Chief Administrative Officer of the House of Representatives, whose duties include compiling the roll of the House and admitting Representatives to the House Chamber; and the Secretary and Sergeant at Arms of the Senate, whose duties include compiling the roll of the Senate and admitting Senators to the Senate Chamber. The individual plaintiffs in the suit are represented pro hac vice by Covington & Burling, and the District of Columbia is represented by its Corporation Counsel. (Robert Wick of Covington & Burling has assisted in the preparation of this summary description of Plaintiffs' constitutional claims.)

Plaintiffs filed a motion for summary judgment seeking an order compelling the Secretary of Commerce to include citizens of the District in the process of apportioning seats in the House of Representatives, and a declaratory judgment that District citizens have a right to participate in the selection of a Representative and two Senators. (If the declaratory judgment is granted, it would be left to Congress to determine how the right to representation would be implemented, much as State legislatures are usually left to implement court rulings in redistricting cases. Only if Congress failed to do so would the district court be called upon to fashion an appropriate remedy.) A group of constitutional law professors including representatives from Harvard, California, NYU, Georgetown, the University of North Carolina, the University of Texas, and George Washington law schools, filed an amicus brief in support of plaintiffs' motion. Oral argument on the summary judgment motion and cross-motions by defendants to dismiss the complaint was heard on April 19, 1999 by a three judge district court consisting of District Judges Louis F. Oberdorfer and Colleen Kollar-Kotelly, and Circuit Judge Merrick Garland of the D.C. Circuit. As of the writing of this report, decision is pending.

The plaintiffs argue that the court should by its ruling vindicate for District citizens the constitutional ideal of government by the "consent of the Governed" set forth in the Declaration of Independence. Over the last two hundred years, plaintiffs contend, the principle that all American citizens are entitled to a voice and a vote in their national government has emerged as a cornerstone of American democracy and a fundamental tenet of our Constitution. Although relatively few Americans were entitled to vote when the Constitution was adopted in 1788, virtually all restrictions on the franchise have since been eliminated, including those based on race, sex, wealth, property ownership, education, marital status, and place of residence. In the Supreme Court's landmark decisions in Wesberry v. Sanders, 376 U.S. 1 (1964), and Reynolds v. Sims, 377 U.S. 533 (1964), the Court struck down malapportioned state and federal electoral districts as a violation of the constitutional requirement of "one person, one vote." Plaintiffs argue that the disenfranchisement of District citizens in Congressional elections is the last great exception to the "one person, one vote" requirement, and that restoring the franchise to these citizens would put the capstone on two centuries of constitutional progress towards the ideal of universal adult suffrage in the United States.
Privileges and Immunities Clause

Drawing on U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), and Tawney v. New Jersey, 211 U.S. 78 (1908), plaintiffs argue that the right to vote for national officers is a "privilege" of national citizenship protected by the privileges or immunities clause of the fourteenth amendment. The privileges or immunities clause protects those rights that inheres in a citizen's direct relationship with the national government. See U.S. Term Limits, 514 U.S. at 841, 845 (Kennedy, J., concurring). Foremost among these rights of "national" citizenship, plaintiffs say, is "the right to vote for national officers." Tawney, 211 U.S. at 97; see also U.S. Term Limits, 514 U.S. at 638-45. Earlier this year, in a decision widely noted as giving new life to the Fourteenth Amendment's privileges and immunities clause, the Supreme Court emphasized that "the protection afforded to the citizen by the Citizenship Clause of the [fourteenth] amendment is a limitation on the powers of the National Government as well as the states." Saenz v. Roe, 1999 WL 303743, *10 (May 17, 1999) (striking down restriction on welfare benefits available to new arrivals in California as a violation of the privileges of national citizenship).

Due process and equal protection

The due process clause protects those substantive rights that are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Citing the Supreme Court's famous pronouncement that "other rights, even the most basic, are rendered illusory if the right to vote is undermined," Wesberry, 376 U.S. at 17-18, plaintiffs argue that no right is more essential to "ordered liberty" than the right of citizens to elect those who will govern them. Plaintiffs further assert that the disenfranchisement of District citizens violates the equal protection principle of "one person, one vote." Reynolds, 377 U.S. at 598. The disenfranchisement of District citizens, plaintiffs say, makes it "more difficult for District citizens than for all others to seek aid" from their national government, and therefore effects "a denial of equal protection of the laws in the most literal sense." Romer v. Evans, 517 U.S. 620, 633 (1996). The due process clause of the Fifth Amendment includes the guarantee of equal protection. Bailey v. Smyth, 347 U.S. 497 (1954).

Respectfully submitted,

Robert L. Weinberg
District of Columbia Bar delegate
and on behalf of the Bar Association
of the District of Columbia

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1. **Brief summary of recommendation**
   Adoption of an ABA policy that citizens of the District of Columbia should not be denied the fundamental right to vote for members of the Congress that governs them. At present, D.C. residents elect only a non-voting delegate to the House of Representatives, while residents of all 50 States of course elect voting Representatives and Senators.

2. **Approval by submitting entity**
   Approved by delegate submitting the Resolution on May 25, 1999.
   Approved by unanimous vote of the Board of Directors of the Bar Association of the District of Columbia at its monthly meeting on May 26, 1999.

3. **Previously submitted to House of Delegates?**
   No.

4. **What existing Association policies are relevant to this recommendation?**
   The ABA has adopted numerous policies supporting the right of citizens to vote, on an equal basis, in the election of their governing bodies. (See, e.g., the "Green Book" at pages 222-224.) The recommended policy is consistent with these previously adopted policies.

5. **Explain what urgency exists requiring action at this meeting.**
   It is likely that the pending *Alexander v. Daley* case will be decided by the three judge United States District Court fairly close to the time of the Annual Meeting, and that one or more non-prevailing parties will file a direct appeal to the United States Supreme Court from the three judge District Court’s decision. Preparation of an amicus brief for the Supreme Court stage of the litigation if authorized, would probably need to be undertaken prior to the 2000 Midyear Meeting.

6. **Cost to the Association**
   The adoption of the policy is cost free. The preparation of an amicus brief, if authorized, should be by *pro bono* counsel, without significant cost to the ABA.

7. **Conflicts of interest**
   None

8. **Referrals during May-June 1999**
   A copy of the recommendation will be referred to the President of the ABA, the Chair of the House of Delegates, the Executive Director of the ABA, the Section of Individual Rights and Responsibilities, the District of Columbia Bar, the Standing Committee on Election Law, the Standing Committee on Amicus Curiae Briefs.

9. **Contact Person (prior to meeting)**
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10. **Contact person/presenter (at the Annual Meeting)**
   Same as no. 9. Contact at Atlanta Hyatt Regency Hotel.