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Democracy and Disenfranchisement in Washington, D.C.

*by Jamin B. Raskin and Cathleen Caron**

Many people in the United States and abroad may be surprised to learn that citizens of the District of Columbia, the so-called "federal district" that is the location of the U.S. federal government, do not enjoy the rights of representative government that other U.S. citizens take for granted. Recently, two legal actions, in two different fora, have addressed this issue in an attempt to secure for all U.S. citizens the rights and liberties guaranteed by the U.S. Constitution.

The U.S. Federal Court Case: *Alexander v. Daley*

On September 14, 1998, the District of Columbia's chief lawyer, Corporation Counsel John Ferren, and attorneys from the prominent Washington, D.C., law firm of Covington and Burling made history. After addressing a crowd of more than 100 people gathered outside the federal district courthouse in Washington, they entered the building and filed a lawsuit, *Alexander v. Daley*, on behalf of 55 named plaintiffs and more than 500,000 other disenfranchised U.S. citizens who live in Washington, D.C. Their complaint alleges that the denial of the D.C. community's right to be represented in the U.S. Congress violates the rights of Equal Protection, Due Process, a republican form of government, and the privileges and immunities of national citizenship—all critical democratic guarantees of the U.S. Constitution.

After two centuries of unintentional disenfranchisement, *Alexander v. Daley* provides fresh hope that Washingtonians can achieve equal citizenship in the city's third century. Most Americans simply do not know—and people outside of the United States are shocked to learn—that U.S. citizens who live in Washington, D.C., have no voting representation in the U.S. House of Representatives and Senate. Indeed, the United States is the only nation on earth that completely disenfranchises residents of its capital city in national legislative elections. Imagine France denying voting rights to the denizens of Paris, or Chile disenfranchising Santiago. It is hard to conceive of such a thing.

The anomaly of nearly 600,000 Washingtonians being taxed, drafted, and governed by—but not represented in—Congress is rooted in an ongoing misunderstanding of the decision by the U.S. Constitution's framers to grant Congress "exclusive legislation" over the federal district of Washington, D.C. This language appears in the "District Clause," found in Article 1 of the U.S. Constitution. The purpose of having such a district was to guarantee Congress military security and police powers over the site of its own operations—not to disenfranchise anyone.

Indeed, when Congress accepted gifts of land from the surrounding states of Maryland and Virginia in 1791 for the purposes of setting up the capital city, the residents of the new district continued to vote in federal elections in Maryland and Virginia for a decade. This history furnishes decisive early refutation of the idea that the District Clause somehow implies (much less compels) disenfranchisement of the local population. The system of District residents voting in federal elections from Maryland and Virginia only ended by virtue of legislative decisions by those states and had nothing to do with Constitutional necessity.

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But if residents of the District were perhaps *optional* voters in the early days of the Republic, their right to be represented today is clearly *mandatory*. The whole trajectory of U.S. history is toward universal suffrage, as U.S. citizens dismantled the franchise barriers of property, wealth, race, gender, and geography. Today, the Equal Protection principle of "one person-one vote" is the fundamental and ineradicable principle of U.S. constitutional democracy. If every *other* constitutional principle, from freedom of expression to Due Process, applies to the District of Columbia, and the U.S. Supreme Court already applied the Equal Protection clause to the District when it desegregated racially segregated schools in 1954, why does the Equal Protection principle of one person-one vote not apply?

The Supreme Court first articulated the doctrine of one person-one vote in the case of *Wesberry v. Sanders* in 1964. The Court struck down a Georgia state statute that malapportioned U.S. House of Representatives districts to such an extent that certain urban districts had up to three times as many voters within them as rural

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districts, and thus had three times their rightful influence. The double logic of this ruling was that representation in Congress is a right that belongs to *people*, not states, and the government may not use state boundaries to deny exactly equal representation to *all* citizens, regardless of where they live.

The denial of one person-one vote representation in Congress to Washingtonians is doubly pernicious because Congress acts as both a national and a state legislature for the District of Columbia. As the District's state legislature also, Congress must enfranchise the District's citizens. The Supreme Court held in 1963, in *Reynolds v. Sims*, that government may not weigh "the votes of citizens differently, by any method or means, merely because of where they happen to reside. . . ."

But if residents of the District were perhaps *optional* voters in the early days of the Republic, their right to be represented today is clearly *mandatory*.

Chief Justice Warren wrote:

"Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more or no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, *of all places as well as all races.*" (Emphasis added).

Noting that "history has seen a continuing expansion of the scope of the right of suffrage in this country," he continued:

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Of course, the government's answer to this is that, even if the Equal Protection clause generally applies to the District, the right to vote does not extend to citizens who have freely chosen to live in a federal jurisdiction like the District of Columbia. On this theory, a citizen's right to vote and be represented depends on his or her choosing to belong to—and reside on the actual land of—a *state*.

But the Supreme Court already rejected this argument, and the residents of literally thousands of federal enclaves have been given a constitutional right to participate in federal elections. In *Evans v. Cornman*, the Supreme Court in 1970 struck down the state of Maryland's disenfranchisement of U.S. citizens living on the grounds of the National Institutes of Health (NIH), a federal enclave in Maryland close to the District of Columbia. The NIH campus was built on land donated to Congress by Maryland in 1953.

Maryland argued that NIH residents had no right to vote in federal or state elections because they (like D.C. residents) were governed as a federal jurisdiction, according to the provisions of Article I, section 8, clause 17 of the U.S. Constitution. In its entirety, this clause gives Congress power to:

"[E]xercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings. . . ."

Indeed, because Congress is their federal and state legislature, District residents have *more* of an interest in congressional deliberations than the people of the 50 states.

The Court did not agree, however, that the federal character of the NIH enclave destroyed Maryland's obligation to grant citizens living there the constitutional right to vote and be represented. By disenfranchising people living on NIH grounds, Maryland was breaking "the citizen's link to his laws and government," the connection that "is protective of all fundamental rights and privileges." Under *Evans*, therefore, District residents have a presumptive interest in being able to vote for members of Congress and also to run as candidates for Congress. Impediments to their right to vote trigger a test of "strict scrutiny" by courts examining such enactments, meaning that disenfranchisement can only be sustained if the government has a compelling interest in it.

Yet, there is no such compelling interest. D.C. residents are U.S. citizens who have a general stake in every significant national decision by Congress, from declarations of war and U.S. Supreme Court nominations to impeachment proceedings, and a specific interest in every piece of legislation regarding the District, from private school vouchers to abortions in public hospitals. Indeed, because Congress is their federal and state legislature, District residents have *more* of an interest in congressional deliberations than the people of the 50 states. Nor does Congress need to lock out Washingtonians in order to run an efficient capital city. For it is clear that nations all over the world are able to function smoothly even when capital residents are equally represented in their national legislature.

The D.C. Corporation Counsel's efforts won an odd rebuke from Congress, which is one of the defendants in the case. Congress passed an appropriations amendment after the District filed its case stating that no D.C. official may expend any funds assisting "a petition drive" or "a civil action" to vindicate voting rights in the city. The plaintiffs see this move as a clearly unconstitutional interference with the First Amendment rights to speak and petition government for a redress of grievances. D.C. Corporation Counsel Ferren has asked the court to permit him to remain in the case on the grounds that this congressional gag order is unconstitutional. At any rate, having failed to achieve statehood when it was raised in the House of Representatives in 1993 or through the constitutional amendment that was attempted in 1978, District residents are hoping that this litigation will ultimately break the impasse over democracy and disenfranchisement in the U.S. capital.

District of Columbia Voting Rights: The International Perspective

Many of the problems that D.C. voters are challenging in U.S. federal court have also been raised before the Organization of American States (OAS) Inter-American Commission on Human Rights (the Commission), in a petition filed by the Washington College of Law International Human Rights Clinic in 1993 on behalf of the Statehood Solidarity Committee. The petitioners contend that District residents reside in a colonial arrangement in

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whose rights it had violated. It placed this responsibility on Argentina despite the government's argument that it was Mendoza authorities, not federal agents, who had perpetrated the disappearances. The Court responded that the federal government of Argentina had obliged itself to protect the rights guaranteed in the Convention when it became a State Party and, therefore, was estopped from shifting responsibility to a regional governmental unit. The Court ordered Argentina to pay the equivalent of U.S. $111,000 to Adolfo Garrido's family and U.S. $64,000 to Raúl Baigorria's family, and to pay the equivalent of U.S. $45,500 to the families for court and attorney costs. In addition, the Court obliged Argentina to investigate the disappearances and prosecute the parties responsible for the crimes.

Caso Paniagua Morales and Others (Guatemala)

Facts: The Commission presented this case to the Court on January 19, 1995. The Commission asked the Court to determine whether Guatemalan state agents violated the human rights of 11 alleged victims by arresting, arbitrarily detaining, and subjecting them to inhumane treatment and torture between 1987 and 1988. Six of the victims were killed. In the majority of the cases, witnesses observed the victims being arrested or kidnapped by state agents and forced into light colored "panel"-style trucks. Most of the victims who were killed died from similar injuries involving knife wounds to the throat and body.

Decision: On March 8, 1998, the Court released its decision. The Court determined that Guatemala violated the right to liberty (Article 7) of eight of the victims, the right to life (Article 4) of five victims, the right to personal integrity (Article 5.1) and freedom from torture and inhumane treatment (Article 5.2) of seven victims, the right to a fair trial (Article 8.1) of six victims, and the right to judicial protection (Article 25) of five victims. It directed Guatemala to initiate a genuine and effective investigation into the cases in order to discover and punish the persons responsible, and held that Guatemala is obliged to pay reparations to the victims and their families. The Court approved the establishment of proceedings for determining an appropriate amount of reparations. ⊕

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violation of fundamental human rights that are established in several international instruments.

The principal argument is that District residents are denied the rights to equality and to full participation in their government in violation of the American Declaration of the Rights and Duties of Man (American Declaration). The United States is bound under this document by virtue of its OAS membership. Article 20 of the American Declaration states in part that "every person . . . is entitled to participate in the government of his country, directly or through his representatives . . ." District residents are denied this basic right because they lack congressional representatives who are empowered to vote. Without a vote, District residents are unable to influence congressional decisions and procedures that directly affect the District, and they lack the legislative representation needed to influence laws passed by Congress that govern their daily lives. For example, Congress appropriates money each year to finance District of Columbia operations, and, lacking congressional representation, District residents are unable to influence either the amount or allocation of these funds.

In addition, the petitioners argue that Articles 1 and 2 of the American Declaration are violated. Washingtonians' rights to life and liberty, codified in Article 1, are vulnerable to decisions made by Congress because of its ability to promulgate legislation that directly affects the District. In relation to Article 2, the right to equality before the law, the petitioners contend that District residents are treated unequally because they do not enjoy the right to a meaningful vote like other U.S. citizens.

The petitioners also argue that the United States violates several articles of the International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976 and which the United States ratified in 1992. ICCPR Article 25 reiterates well-recognized voting principles comparable to those established in the American Declaration, namely, the right to partake in public affairs through elected representatives and the requirement that suffrage be universal and equal. The petitioners assert that D.C. citizens' suffrage is not equal to that of other U.S. citizens, and is therefore in violation of Article 25, because they are not able to use their vote to directly influence national politics. Moreover, the record indicates that Congress has enacted laws that, in some cases, directly counter the will of District residents. The petitioners also cite the Universal Declaration of Human Rights (UDHR) to bolster this argument. Now widely regarded as customary international law, the UDHR establishes in Article 21 a similar provision concerning voting rights and participation.

Furthermore, the petitioners contend a violation of the ICCPR's Article 1 right to self-determination. Because the fundamental nature of the right to self-determination is that it must exist for all people, the petitioners interpret D.C. citizens' inability to participate in national government affairs as a violation of this bedrock principle. Specifically, Congress has repeatedly denied the will of District residents in matters pertaining to the control of local governmental affairs and Washingtonians' ability to participate in national politics.

Another alleged violation of the ICCPR is found in Article 2, which guarantees that the rights embodied in the ICCPR shall be applied in an equal manner without distinction. It is uncontested that District residents are U.S. citizens. As such, they are burdened by obligations that they share with all other U.S. citizens, such as the requirement to pay federal taxes. Conversely, however, they should also enjoy the full gambit of freedoms established by the U.S. Constitution. Despite the duties that Washingtonians must carry out as U.S. citizens, D.C. residents are denied the full enjoyment of their rights due to their disenfranchisement, based on the simple fact that they reside within Constitutionally mandated boundaries, as explained in the previous section. This distinction based solely on residency, asserts the petitioners, is a violation of Article 2.

Finally, the petitioners discuss the various unsuccessful strategies that District residents have employed to remedy their disenfranchisement through domestic procedures, including judicial challenges and lobbying Congress to pass a voting rights act. The brief predates the filing of *Alexander v. Daley* and thus does not refer to it. A final decision on the claim's admissibility and merits remains pending before the Commission.

Conclusion

One of the most quixotic features in this ongoing debate is that District residents allege violations of the very principle that the United States champions around the globe: democracy. The irony is inescapable. Through the efforts of advocates in cases before the federal courts and the Inter-American Commission, District residents may one day enjoy the full spectrum of rights, as well as duties, that their fellow U.S. citizens take for granted. ⊕

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