

VOTING RIGHTS AND DISENFRANCHISEMENT

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I. SUMMARY STATEMENT

Felony disenfranchisement laws, as well as the denial of voting rights to residents of the District of Columbia, result in the denial of voting rights to over 4 million people in the United States. Over half of those excluded from voting on these grounds are people of color. This number does not even include the individuals denied the right to vote because they are homeless, the majority of whom are people of color. The denial of the right to participate in democratic governance and to be represented through the electoral process disproportionately impacts people of color in violation of CERD, and raises a strong presumption that racial and ethnic discrimination is a strong motivating factor in the denial of this basic right.

“An estimated 3.9 million Americans, or one in fifty adults, have lost the right to vote as a result of a felony conviction. Felon disenfranchisement is significant not only because of the number of citizens it affects, but also because of its disproportionate impact on the voting power of racial minorities.” Thirteen percent, or 1.4 million, of the nation's male African American population of voting age have already been disenfranchised as a result of this policy.

An additional 423,710 people (317,782 of whom are people of color) are denied the right to vote because they are residents of the District of Columbia. For over 200 years, the United States government has continuously denied citizens of Washington, D.C. the right to equal participation in their own national legislature through duly elected representatives. The District of Columbia is the only political jurisdiction in the continental United States that is denied Congressional representation, and D.C. residents are the only U.S. taxpaying citizens who do not enjoy equal suffrage in their national legislature. Moreover, D.C. residents also are denied the right to full self-government— a fundamental right possessed by all other American citizens. Significantly, the District's population is 67% African American and 8% Latino.

These denials of voting rights represent violations of the nondiscrimination, equal protection and political participation provisions of CERD under Articles 2 and 5.

II. RELEVANT CONVENTION PROVISIONS

Article 2 [s]tate Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms....” Article 1 of the Convention stipulates that "the term 'racial discrimination' shall mean any distinction, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Article 5 "[i]n compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(c) Political rights, in particular the rights to participate in elections– to vote and to stand for election– on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service."

III. CERD VIOLATIONS

A. Criminal Disenfranchisement

The Federal Government has limited control over an individual's right to vote. It is the States that actually register voters, and it is this registration process that gives the States control over who is allowed to vote. Most state disenfranchisement laws provide that conviction for any crime that is punishable by imprisonment is a basis for losing the right to vote. The crime need not have any connection to the electoral process, nor need it be classified as notably serious.

The number of people disenfranchised as a result of criminal convictions has increased dramatically in recent years as a result of the introduction of harsh sentencing policies such as mandatory minimum sentences, "three strikes" laws and truth-in-sentencing laws. Although crime rates have been relatively stable, these laws have increased the number of offenders sent to prison and the length of time they serve. "In California, for example, more than 40,000 offenders have been sentenced under the state's "three strikes" law as of June 1998.... Seventy percent of sentenced three-strike offenders were either African American or Hispanic."

Nationwide, African Americans are incarcerated at a rate 7.66 times that of whites. Twelve states and the District of Columbia incarcerate African Americans at more than ten times the rate of whites. The over-representation of people of color in the criminal justice system means that a disproportionate number of people of color are being disenfranchised.

In Alabama and Florida, for example, 31% of all African American men are permanently disenfranchised. In six other states, Iowa, Mississippi, New Mexico, Virginia, Washington and Wyoming, one in four African American men (24% to 28%) are permanently disenfranchised. If current trends continue, the rate of disenfranchisement of men of color could reach up to 40%. For additional information regarding racial discrimination in the criminal justice system refer to the "Discrimination in Criminal Justice" section of this report.

Today, forty-seven states deny convicted felons who are serving time in prison the right to vote. Thirty-two states deny the vote to felons on parole and twenty-nine disenfranchise those on probation. In fourteen states, ex-offenders who have fully served

their sentences nonetheless remain disenfranchised for a certain period of time, usually a minimum of five years after they are released. Ten of these states disenfranchise ex-felons for life. Nearly three-quarters of the disenfranchised are not in prison, but are on probation or parole or have completed their sentences.

The reason behind denying these individuals the right to vote on a permanent or semi-permanent basis is unclear, as deprivation of the right to vote is not an inherent or necessary aspect of criminal punishment, and can not be said to promote the reintegration of offenders into lawful society. Common sense would tell us that it has the opposite effect, further marginalizing former criminals. The effect of such policies is to severely limit the number of people of color who are able to vote, and to impair their “enjoyment of human rights and fundamental freedoms” in violation of CERD Articles 2 and 5.

1. Specific Measures Taken To Eliminate and Prevent Racial Discrimination

Since the United States ratified CERD, there have been increased efforts to reduce the number of disenfranchised felons. In four states, Alabama, Florida, Pennsylvania and Nevada, legislation has been proposed that would automatically restore voting rights to former felons after release. The Connecticut legislature is considering restoring voting rights to those on probation and parole, and in Delaware, legislation was adopted that restores voting rights to certain felons five years after their release. Meanwhile, Nevada is working to provide ex-felons with information that would allow them to petition to have their voting rights restored.

Under Virginia statute, ex-felons convicted of both violent and non-violent offenses can apply for the restoration of their voting rights five years after the completion of their sentence. For drug offenses, however, the waiting period is seven years, and this disproportionately affects African American, inner-city communities.

The most encouraging news comes from Pennsylvania where a law banning ex-felons from registering to vote for five years recently was overturned. The court ruled the ban to be unconstitutional.

Unfortunately, at the same time that some states are considering the restoration of voting rights, other states are taking them away. The Utah electorate voted overwhelmingly (80%) in favor of disenfranchising inmates in November 1998. This November, Massachusetts voters will act on a ballot measure that could strip inmates of their voting rights. New Hampshire's State Supreme Court recently rejected a constitutional challenge to the denial of inmates' voting rights.

Federally, the situation is not much better, with felons denied the right to vote in federal elections by most states. The Subcommittee on the Constitution of the House Judiciary Committee held a hearing in October 1999 to consider restoring federal voting rights to ex-felons. Members of the Subcommittee generally supported the policy of permitting ex-felons to vote, but raised questions

regarding the constitutionality of the proposed legislation. The restoration bill never was referred to the floor of Congress for a vote.

2. The Discriminatory Underpinnings of the Disenfranchisement Laws

The United States is the only democratic country where convicted offenders who have served their sentences are nonetheless disenfranchised for life. One of the historical underpinnings for disenfranchisement laws was the exclusion of African Americans from voting and from participation in national politics prior to adoption of the Voting Rights Act of 1965 that prohibited discrimination in voter registration and in the design of electoral districts. Although laws excluding criminals from the vote had existed in the South previously, "between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other voting qualifications, to increase the effect of these laws on black citizens." Crimes that triggered disenfranchisement were written to include crimes blacks supposedly committed more frequently. For example, in South Carolina, "among the disqualifying crimes were those to which [the Negro] was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man was as disposed as the Negro, were significantly omitted from the list." "In 1901, Alabama lawmakers, openly stating that their goal was to establish white supremacy, included a provision in the state constitution that made conviction of crimes of 'moral turpitude' the basis for disenfranchisement." John Fielding Burns, one of the drafters of this law, estimated that the crime of wife-beating alone would disqualify 60% of Negroes.

Although many of these racially motivated voting exclusion laws have since gone off the books, they have been replaced by more felony disenfranchisement laws having the same impact on people of color.

B. Denial of Voting Rights to District of Columbia Residents

Though Congress is empowered to grant District residents full voting rights, it has not chosen to do so in nearly 200 years. Pursuant to provisions of the U.S. Constitution, Congress is granted plenary authority over the District of Columbia. Congress, therefore, has the legislative authority to enfranchise the people of the capital city, but has refused to do so despite repeated attempts on the part of the citizenry to win the right to vote. Since the creation of the District of Columbia, residents have never enjoyed full voting representation in their national legislature. They have been continually denied the right to vote in both the House of Representatives and the U.S. Senate, unlike all other U.S. citizens in each of the fifty states.

With regard to local issues, District residents also have never enjoyed the right to full self-government, a right otherwise guaranteed to every other U.S. citizen under Article 4 of the U.S. Constitution. D.C. residents were granted a limited degree of self-government in 1974, subject to Congressional oversight of its local budgets and legislation. But in 1997, Congress stripped the District's elected officials of virtually

all their powers, vesting legal authority in the hands of an unelected "Control Board" which is answerable only to Congress, and not to the people of the District of Columbia. To date, D.C. residents exercise little or no control over their own local affairs through their duly elected representatives, and continue to be deprived of any voting participation in their national legislature.

Historically, Republicans and conservative Southern Democrats in Congress have continually blocked all attempts to grant full political rights to D.C. residents. In light of the fact that the District's population is 67% African-American and 8% Latino, and supports generally liberal, Democratic candidates in both presidential and local elections, it is clear that racial and partisan politics play a significant role in Congress' decision to deny D.C. citizens the right to equal political participation. The effect of this disenfranchisement is to impair the "recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms" guaranteed under CERD.

1. U.S. Government's Position

Under Article 1 and the 17th Amendment of the U.S. Constitution, only "the people of the several states" are entitled to voting Congressional representation. Further, Article 1, Section 2, Clause 17 of the Constitution states that Congress has plenary authority over the District in "all cases whatsoever." Thus, any legal challenges to the voting status of District residents, who live not in a state, but in a separate and distinct federal enclave comprising the nation's capital, must be based on the failure of Congress to authorize their vote.

In the U.S. government's "Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights" (at p. 193), the government maintains that the Framers of the Constitution envisioned the District as a separate enclave, "apart from the influence of any state government and responsible to the federal government alone." The government appears to be suggesting that if D.C. residents were granted equal rights under law, they might exert undue influence over Congress by virtue of their close proximity to Congress.

Two hundred years ago, when the fledgling U.S. government was dependent upon state militias for its physical safety and security, a basis for the deprivation of equal voting rights to the District's population may have been defensible. But today, closer proximity to the seat of government is not a legitimate basis for denying voting rights. In light of modern-day communications and transportation, it is disingenuous to claim that the residents of the District would enjoy an unfair advantage influencing the legislative affairs of Congress by virtue of their proximity to Congress. D.C. residents enjoy no more influence on the legislative agenda of Congress than the fully enfranchised residents of Maryland and Virginia, living, as they do, within a mile or two of the Capitol. Clearly, in this day and age, legislative and

political influence is no longer controlled to such a large extent as in the past by geography.

2. International Concern About The Voting Status Of D.C. Residents

In March 1995, the U.N. Human Rights Committee expressed concern about the disenfranchisement of D.C. residents, in the context of U.S. compliance with provisions of the International Covenant on Civil and Political Rights. Article 25 of the Covenant, mirroring the language of Article 5 of CERD, states, among other things, that[e]very citizen shall have the right and the opportunity, without any of the distinctions.....:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.... [and]
- (c) To have access, on general terms of equality, to public service in his country.

In August 1996, the U.N. Human Rights Committee provided additional detail on the meaning of the right to participate in government referred to in Article 25 of the Covenant, issuing General Comment 25. General Comment 25 assures every citizen the right to take part in the "formulation and implementation of policy at international, national, regional and local levels." Further, it maintains that a citizen's right to take part in the conduct of public affairs "relates to the exercise of political power" in the legislative branch of national government, and that "[w]here citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit.... that those representatives do in fact exercise governmental power."

This explanation of the right to participate politically suggests that the disenfranchisement of D.C. citizens is a direct violation of Article 25 of the Covenant. Notably, as was true for Articles 2 and 5 of CERD, the U.S. Senate also took no reservation to Article 25 of the Covenant regarding the non-voting status of District of Columbia residents.

The Inter-American Commission on Human Rights of the Organization of American States currently is investigating possible human rights violations taking place in the District of Columbia as a result of the denial of the right to vote. Under Articles 2 and 20 of the American Declaration of the Rights and Duties of Man, which defines the human rights referred to in the OAS Charter, all people are guaranteed the fundamental right to equal political participation in their national legislature through their duly elected representatives. A complaint was filed with the Inter-American Commission on Human Rights in 1993 on the disenfranchisement of District residents, and a public hearing on

the complaint was held in 1995. A decision on the admissibility and merits of the case is pending.

IV. RECOMMENDATIONS

Pursuant to the requirement of CERD, Congress should enact legislation granting convicted felons the right to vote in all federal elections and encourage states to overturn existing state and local felony disenfranchisement laws as well.

Congress should enact legislation granting the residents of Washington, D.C. the right to vote in Congressional elections and the right to representation within the national legislature, as well as returning the authority to control local affairs back to the elected District of Columbia government.