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# BLIND INJUSTICE: SEEING BEYOND THE D.C. SUPERIOR COURT EXCLUSION OF BLIND CITIZENS FROM JURY DUTY

Deborah Ann A'Hearn

On January 4, 1994, the Council of the District of Columbia (D.C. Council) adopted PR 10-361, the "Sense of the Council on Blind Citizens' Right to Jury Service Resolution of 1993." This Resolution, which supports the United States District Court's decision in *Galloway v. Superior Court of the District of Columbia*,<sup>1</sup> would afford blind citizens the same privilege and right to serve as jurors that is granted to non-disabled citizens.

Currently, D.C. CODE ANN. § 11-1903 (1981)<sup>2</sup> prohibits exclusion of citizens from jury service on the basis of physical handicap. Specifically, the Code provides that:

[A] citizen of the District of Columbia may not be excluded or disqualified from jury service as a grand or petit juror in the District of Columbia on account of race, color, religion, sex, national origin, ancestry, economic status, marital status, age or (except as provided in this chapter) physical handicap.<sup>3</sup>

Another provision of the statute provides that "an individual shall not be qualified to serve as a juror—if determined to be incapable by reason of physical or mental infirmity of rendering satisfactory jury service."<sup>4</sup>

PR 10-361 solicits the sponsorship of legislation by Eleanor Holmes Norton that would preclude the Superior Court of the District of Columbia from "categorically disqualifying or excluding blind individuals from jury service."<sup>5</sup> Congresswoman Norton is the non-voting member of the House of Representatives from the District of Columbia.<sup>6</sup> The purpose of the proposed Resolution is to enable Judge

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1. 816 F. Supp. 12 (D.D.C. 1993).

2. 100 Stat. 3635, Pub. L. 99-650, § 2 (1986).

3. D.C. CODE ANN. § 11-1903 (1981).

4. D.C. CODE ANN. § 11-1906(b)(2)(A) (1981).

5. REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA FROM THE COMMITTEE ON THE JUDICIARY, PR 10-361, at 3 (November 12, 1993).

6. 2 U.S.C. § 25(a), P.L. 103-210. On May 7, 1974, Congress passed the District of Columbia Home Rule Charter which authorized the District of Columbia to elect a mayor, a 13-member council, and one non-voting member to the House of Representatives. All legislation passed by the Council must be signed by the mayor (or in the case of a veto, override by two-thirds vote) and then sent to Congress for a period of review. However, pursuant to the District of Columbia Self-Government and Governmental Reorganization Act (the

Green's March 16, 1993, Order in *Galloway* to be codified as D.C. law. The Resolution only has persuasive force; however, Congress could adopt the suggested language and pass a law that would be binding upon the local courts.

In proposing the Resolution, the D.C. Council seeks to amend D.C. CODE ANN. Section 11-1906(b) (1981) by adding the following paragraph:

An individual who is blind shall not be disqualified from jury service solely on the basis of blindness; however, an individual who is blind is subject to exclusion if such person's blindness renders that person incapable of serving in a particular case, pursuant to D.C. Code Section 11-1908(b).<sup>7</sup>

In addition to the import of the *Galloway* holding, the D.C. Council drafted the Resolution largely in response to the lobbying efforts of Paul Kay, a Washington lawyer who has been rejected twice from jury duty—in 1991 and 1993—because he is blind. Mr. Kay sought to combat an informal policy of the District of Columbia Superior Court, in effect at that time, that categorically excluded blind citizens from jury service.<sup>8</sup>

Less than two weeks after the Superior Court excluded Kay from jury duty, the United States District Court struck down the exclusion policy in *Galloway v. Superior Court of the District of Columbia*. According to the legislative history of PR 10-361, the D.C. Council was impressed by testimony given in that case.<sup>9</sup>

In *Galloway*, the plaintiff received notice that he had been selected for jury duty. Upon reporting for registration, the Clerk of the Court informed Donald Galloway that he would not be allowed to serve as a juror because of his blindness and, furthermore, that it was the policy of the Superior Court to exclude all blind persons from jury service.<sup>10</sup> Subsequently, Galloway brought an action alleging that the defendant's policy of precluding blind persons from jury duty violates the

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"Home Rule Act"). 87 Stat. 813; D C CODE § 1-233(a)(4), the Council cannot enact any act, resolution, or rule which amends certain sections of the D.C. Code, including the structure of the courts. Therefore, unlike the fifty state legislatures, the D.C. Council is forced to resort to the unique legislative vehicle of passing a nonbinding resolution, and attempt to lobby Congress to adopt it.

7. REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA FROM THE COMMITTEE ON THE JUDICIARY, § 2, at 3 (November 12, 1993). Section 1908 of the DC CODE ANN governs the conditions under which a person may be excluded from jury service.

8. Sandra Torrey, *Court Irks Blind Lawyer*, WASH. POST, March 15, 1993, at B6.

9. REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA FROM THE COMMITTEE ON THE JUDICIARY, PR 10-361, at 2 (November 12, 1993).

10. *Galloway*, at 15.

Rehabilitation Act of 1973,<sup>11</sup> the Americans with Disabilities Act of 1990,<sup>12</sup> and the Civil Rights Act of 1871.<sup>13</sup> Galloway sought declaratory and injunctive relief, asking the court to declare the policy discriminatory, and accordingly, to enjoin defendants from barring blind persons from jury service.

In deciding this issue, the court was interested in whether blind persons are able to perform the necessary functions of a juror. The defendant, assuming that sight was necessary, failed to produce evidence that individuals must be sighted to assess the credibility of a witness or other evidence. Instead, the Clerk of the Superior Court testified that he decided not to utilize blind jurors based on his "previous experience in the court, . . . influenced by some information that he had read over the years or had come to know about, but not with any specific document in mind."<sup>14</sup> The Superior Court further defended its exclusion policy by asserting that "no blind person is ever 'qualified' to serve as a juror because he or she is not able to assess adequately the veracity or credibility of witnesses or to view physical evidence and thus cannot participate in the fair administration of justice."<sup>15</sup>

On the other hand, the plaintiff "offered uncontradicted testimony that blind individuals, like sighted jurors, weigh the content of the testimony given and examine speech patterns, intonation, and syntax in assessing credibility."<sup>16</sup> The district court found that "the manner in which defendants decided not to permit blind jurors to serve is disturbing."<sup>17</sup>

The district court rejected the defendant's position and stated that, "this conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate".<sup>18</sup> The judge found that the informal policy "was based on the assumption that blind individuals could not fully appreciate the veracity or credibility of evidence or witnesses".<sup>19</sup> Moreover, the court noted that:

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11. Rehabilitation Act of 1973, § 504(b)(1)(a), as amended, 29 U.S.C.A. § 794(b)(1)(a). This statute was enacted to protect individuals with disabilities from discrimination. The Act applies to government agencies which receive federal funding.

12. 42 U.S.C. §§ 12131(1), 12132. The purpose of the Americans with Disabilities Act is to provide protection to individuals with disabilities from discriminatory practices.

13. 42 U.S.C. § 1983.

14. *Galloway*, at 17.

15. *Id.* at 16.

16. *Id.*

17. *Id.* at 16 n. 4.

18. *Id.*

19. REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA FROM THE COMMITTEE ON THE JUDICIARY PR 10-361, at 3 (November 12, 1993).

[A]t least ten states have enacted statutes that forbid exclusion of blind persons from jury pools solely because of their disability; and that the U.S. District Court for the District of Columbia allows blind persons to serve as jurors, if they so elect.<sup>20</sup>

In many of these jurisdictions,<sup>21</sup> a blind individual may be disqualified if there is a significant amount of physical evidence within the case or if a blind juror's service would threaten the defendant's right to a fair trial. Similarly, the D.C. Council's Resolution provides for exclusion of blind jurors "solely on the basis of blindness" if such blindness "renders that person incapable of serving in a particular case . . . ."<sup>22</sup>

The district court also based its conclusion that blind individuals are able to perform the functions required of jurors on the fact that there are several active judges who are blind, and on the past performance of blind Judge David Norman. Judge Norman was often the sole trier of fact and was able to effectively assess documentation and physical evidence. The court, therefore, concluded that it is "illogical" for the defendant to exclude all blind persons from jury service when a blind judge in the same Superior Court successfully fulfilled the very duties a blind juror would perform.

Interestingly, the Superior Court allows deaf individuals to serve as jurors and "accommodates"<sup>23</sup> them by providing sign language interpreters. In effect, the Superior Court has acknowledged the deaf individual's ability to make credibility determinations even though such an individual cannot hear. In *Galloway* no attempt at accommodation was made. The plaintiff was summarily dismissed, without regard to his personal qualifications, after being told that blind individuals could not be accommodated. The Court determined that whether a blind juror is able to serve competently must be addressed on a case-by-case basis through voir dire by the judge and the attorneys. Moreover, the court found that "blindness alone, does not disqualify an individual from serving on many juries, and with

20. *Galloway*, at 17.

21. The court referred to the following statutes: OKLA STAT. tit. 38, § 28 (1991); CAL CIV PROC. § 198 (West 1991); VA CODE ANN. § 8.01-337 (1990); TEX GOV'T CODE ANN § 62.104 (1989); S C CODE ANN §14-7-810 (1991). WASH REV CODE ANN. § 2.36.070 (1991); MASS GEN LAWS ANN. ch. 234, § 4 (West 1991); WIS STAT. ANN. § 756.01 (West 1990); NY JUD LAW § 510(3) (McKinney 1992).

22. 41 D.C. Reg. 110 (1994).

23. The term "reasonable accommodation" is defined in 42 U.S.C. § 12111(9). The term requires employers to make existing facilities accessible and usable, and it requires employers to modify work schedules and make other accommodations for individuals with disabilities.

reasonable accommodation, the number of cases for which a blind person could be chosen increases even further."<sup>24</sup>

In sum, the Court found that the policies of the Superior Court of the District of Columbia were:

[I]nherently self-contradictory. They allow a deaf person to serve as a juror and provide accommodation to those deaf individuals who need it. At the same time, they categorically exclude blind persons without even considering or offering accommodation. Defendants' rationale for this distinction is irrational and cannot withstand scrutiny.<sup>25</sup>

Therefore, the United States district court enjoined the Superior Court of the District of Columbia from categorically excluding blind persons from jury service.

Subsequent to the United States district court order striking down the Superior Court's exclusion policy, on April 7, 1993, District of Columbia Councilmember James E. Nathanson introduced Bill 10-234, the "Blind Citizens Right to Jury Service Amendment Act of 1993." Nathanson stated that "blind people believe that the only way to [insure] [sic] they will not be categorically excluded from jury service would be to statutorily prohibit the Superior Court from implementing its former policy of exclusion."<sup>26</sup>

Some individuals opposed the proposed legislation, stating that the recent decision in *Galloway* secured the right for blind people to serve when appropriate, and further pointed out that the Superior Court is now complying with Judge Green's Order. Others warned that while Judge Green's Order recognized that in some cases blind individuals would not be capable of serving as jurors, the proposed legislation would preclude blind individuals from ever being disqualified solely on the basis of blindness, even when ineligibility was warranted.<sup>27</sup>

Additional written testimony submitted in opposition to the legislation also expressed a primary concern that the language used in the draft might be misinterpreted. Some individuals noted that the Rehabilitation Act, the ADA, and the decision in *Galloway* did not require "an absolute bar against excluding a prospective juror from serving in a particular case on the basis of blindness. . . .

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24. *Galloway* at 19.

25. *Id.* at 20.

26. REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA FROM THE COMMITTEE ON THE JUDICIARY, PR-10361, at 8 (November 12, 1993).

27. *Id.* at 6.

and that such a bar could be harmful to the interest of litigants in civil and criminal cases, the court, and community at large."<sup>28</sup> This concern is misplaced, however, given that the *Galloway* court expressly stated that "just as no per se rule of exclusion should be employed against blind persons who wish to serve as jurors, no per se rule of inclusion should apply either".<sup>29</sup>

Thus, as contended by the Director of the D.C. Public Defender Service, who testified at the Resolution hearings, the enactment of the proposed legislation serves no purpose unless the legislation is misconstrued as creating an absolute right — in effect, preferential treatment — for blind individuals to serve as jurors, which would be discriminatory toward individuals with other disabilities.<sup>30</sup> If the proposed legislation, prohibiting a finding of ineligibility for jury service on the basis of blindness, is interpreted to limit the court's general authority to strike prospective jurors even in cases where a blind juror would be unable to perform the requisite duties, the anti-discrimination principle embodied in *Galloway* would be compromised.

The D.C. Council was impressed during the hearing by testimony urging them to adopt a clarifying amendment. Noting that "the proposed amendment to D.C. CODE ANN. Section 11-1906 . . . is clearly intended to remove any categorical prohibition against jury service by blind people, rather than to foreclose the case-by-case evaluation of a blind person's ability to perform jury service contemplated in *Galloway*,"<sup>31</sup> the following clarifying amendment was proposed:

An individual who is blind shall not be disqualified for juror service solely on the basis of blindness; however, an individual who is blind is subject to exclusion if such person's blindness renders that person incapable of serving in a particular case, pursuant to D.C. CODE ANN. Section 11-1908(b).<sup>32</sup>

The language was subsequently approved and incorporated in District of Columbia Council Res. 10-235, Sec. 4, 10th Sess. (1974). This clarifying amendment, which was approved by the D.C. Council, secures the right of blind individuals not to be categorically disqualified.

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28. *Id.* at 4.

29. *Galloway* at 18.

30. REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA FROM THE COMMITTEE ON THE JUDICIARY, PR 10-361, at 5 (November 12, 1993).

31. *Id.*

32. *Id.* at 6.

## CONCLUSION

The Superior Court subsequently implemented Judge Green's Order and only in cases when vision is an essential and legitimate qualification is a blind juror now disqualified. Although the Superior Court no longer implements the exclusion policy, the D.C. Council seeks to amend the law in the District of Columbia to expressly preclude the local court from engaging in the discriminatory practice of automatically disqualifying blind citizens from jury service.

The proposed Resolution bridges the gap between the D.C. Code, federal statutes, and the recent case law in *Galloway*. In fact, the *Galloway* Court noted that "[t]he Rehabilitation Act and the ADA were enacted to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all United States citizens".<sup>33</sup> The statute is not a panacea for blind citizens who desire to serve as jurors because a blind juror may still be struck by preemptory challenge during the voir dire. Moreover, the Resolution does not address what objective criteria should be used to determine which cases are appropriate for blind jurors.

On January 12, 1994, the City Council forwarded the Resolution to the office of Eleanor Holmes Norton, where it is still pending. Although Delegate Norton has total discretion regarding whether or not to introduce legislation consistent with the Resolution, it is in the best interest of all individuals that she do so. The proposed amendment preserves the rights of blind citizens who have previously been denied those privileges in the past, and protects them from future policy decisions by the Superior Court which may impede these rights.

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33. *Galloway*, at 20.

