EX-OFFENDERS VOTING RIGHTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 9020

TO AMEND THE VOTING RIGHTS ACT OF 1970 TO PROHIBIT THE STATES FROM DENYING THE RIGHT TO VOTE IN FEDERAL ELECTIONS TO FORMER CRIMINAL OFFENDERS WHO HAVE NOT BEEN CONVICTED OF ANY OFFENSE RELATED TO VOTING OR ELECTIONS AND WHO ARE NOT CONFINED IN A CORRECTIONAL INSTITUTION

JANUARY 30, 1974

Serial No. 29

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
30-578 WASHINGTON : 1974

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

HAROLD D. DONOHUE, Massachusetts
JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
WILLIAM L. HUNGATE, Missouri
JOHN CONYERS, JR., Michigan
JOSHUA EILBERG, Pennsylvania
JEROME R. WALDIE, California
WALTER FLOWERS, Alabama
JAMES R. MANN, South Carolina
PAUL S. SARBANES, Maryland
JOHN F. SEIBERLING, Ohio
GEORGE E. DANIELSON, California
ROBERT F. DRINAN, Massachusetts
CHARLES B. RANGEL, New York
BARBARA JORDAN, Texas
RAY THORNTON, Arkansas
ELIZABETH HOLTZMAN, New York
WAYNE OWENS, Utah
EDWARD MEZVINSKY, Iowa

EDWARD HUTCHINSON, Michigan
ROBERT McCLORY, Illinois
HENRY P. SMITH III, New York
CHARLES W. SANDMAN, JR., New Jersey
TOM RAILSBACK, Illinois
CHARLES E. WIGGINS, California
DAVID W. DENNIS, Indiana
HAMILTON FISH, JR., New York
WILEY MAYNE, Iowa
LAWRENCE J. HOGAN, Maryland
M. CALDWELL BUTLER, Virginia
WILLIAM S. COHEN, Maine
TRENT LOTT, Mississippi
HAROLD V. FROEHLICH, Wisconsin
CARLOS J. MOORHEAD, California
JOSEPH J. MARAZITI, New Jersey
DELBERT L. LATTA, Ohio

JEROME M. ZEIFMAN, *General Counsel*
GARNER J. CLINE, *Associate General Counsel*
HERBERT FUCHS, *Counsel*
HERBERT E. HOFFMAN, *Counsel*
WILLIAM P. SHATTUCK, *Counsel*
H. CHRISTOPHER NOLDE, *Counsel*
ALAN A. PARKER, *Counsel*
JAMES F. FALCO, *Counsel*
MAURICE A. BARBOZA, *Counsel*
FRANKLIN G. POLK, *Counsel*
THOMAS E. MOONEY, *Counsel*
MICHAEL W. BLOMMER, *Counsel*
ALEXANDER B. COOK, *Counsel*
CONSTANTINE J. GEKAS, *Counsel*

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

ROBERT W. KASTENMEIER, Wisconsin, *Chairman*

GEORGE E. DANIELSON, California
ROBERT F. DRINAN, Massachusetts
WAYNE OWENS, Utah
EDWARD MEZVINSKY, Iowa

TOM RAILSBACK, Illinois
HENRY P. SMITH III, New York
CHARLES W. SANDMAN, JR., New Jersey
WILLIAM S. COHEN, Maine

HERBERT FUCHS, *Counsel*
WILLIAM P. DIXON, *Counsel*
BRUCE A. LEHMAN, *Counsel*
THOMAS E. MOONEY, *Associate Counsel*

CONTENTS

EX-OFFENDERS VOTING RIGHTS

WEDNESDAY, JANUARY 30, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:22 a.m., in room 2226, Rayburn House Office Building, Hon. Robert M. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinin, Mezvinsky, Railsback, and Cohen.

Also present: Herbert Fuchs, William P. Dixon, and Bruce A. Lehman, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice has convened this morning to receive testimony on bills designed to prohibit the States from denying the right to vote in Federal elections to persons who have been convicted of offenses other than offenses relating to voting or elections. The legislation excepts from its coverage persons who are confined in a correctional institution at the time of a primary or a general election.

The denial to former criminal offenders of the right to vote is a serious obstacle to the full enjoyment of voting rights by all American citizens. The subcommittee for some time has been concerned about the corrections implications of such a denial of the right to vote. The subcommittee expressed concern for the loss of voting rights at hearings on the problems of ex-offenders held in Chicago 2 years ago, in January 1972. Information relating to voting rights was published in the printed hearings. Subsequently, H.R. 15049, which was identical to the legislation before us today, was introduced in May 1972.

This legislation sets forth the finding that the denial of voting rights is contrary to the principles of the Constitution. It grants enforcement powers to the Attorney General and provides criminal penalities for violation of its provisions.

H.R. 9020 and the report from the U.S. Commission on Civil Rights follow:

93D CONGRESS
1ST SESSION

H. R. 9020

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 1973

MR. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Voting Rights Act of 1970 to prohibit the States from denying the right to vote in Federal elections to former criminal offenders who have not been convicted of any offense related to voting or elections and who are not confined in a correctional institution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) is amended by adding at the end thereof the following new title:

"TITLE IV—SECURING VOTING RIGHTS FOR FORMER CRIMINAL OFFENDERS

"DECLARATION AND FINDINGS

"SEC. 401. (a) The Congress finds and declares that depriving a citizen who is not confined in a correctional institution of the right to vote in any primary or other election for President, Senator, Representative in the Congress, or for any other Federal official on the grounds that such citizen has been convicted of a criminal offense (other than an offense related to voting or elections)—

"(1) denies and abridges the inherent constitutional right of citizens to vote;

"(2) does not bear a reasonable relationship to the criminal offense sufficient to warrant the deprivation of such right to vote;

"(3) has the effect of denying to such citizens the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(4) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote in the primaries or elections referred to in subsection (a) in the

case of citizens who have been convicted of a criminal offense (other than an offense related to voting or elections) and who are not confined in a correctional institution.

"PROHIBITION

"SEC. 402. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or election, for President, United States Senator, Representative in the Congress, or Delegate or Resident Commissioner to the Congress, shall be denied the right to vote in such primary or election on the grounds that such citizen has been convicted of a criminal offense (other than a criminal offense related to voting or elections), unless such citizen is confined in a correctional institution or facility at the time of such primary or election.

"ENFORCEMENT

"SEC. 403. (a) (1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITIONS

"SEC. 404. As used in this title the term—

"(a) 'correctional institution or facility' means any place for the confinement or rehabilitation of juvenile offenders or individuals charged with or convicted of criminal offenses; and

"(b) 'State' means each of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory of the United States granted a Delegate, or Resident Commissioner, to the Congress by an Act of the Congress.

"EFFECTIVE DATE

"SEC. 405. The provisions of this title shall take effect with respect to any primary or election held on or after January 1, 1974."

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, D.C., September 21, 1973.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for comments and expression of this Commission's views on H.R. 9020 which would amend the Voting Rights Act of 1970 to prohibit the States from denying the right to vote in Federal elections to former criminal offenders who have not been convicted of an offense relating to voting or elections and who are not presently incarcerated. H.R. 9020 is similar to H.R. 15049 introduced in the previous session of Congress.

In H.R. 9020, Congress declares that depriving any citizen who is not confined in a correctional institution of the right to vote in a Federal election because that citizen has been convicted of a criminal offense not related to voting or elections: (1) denies the citizen his constitutional right to vote; (2) bears in reasonable relationship to the offense sufficient to warrant deprivation of the right to vote; (3) denies to such citizen his constitutional right to due process and the equal protections of the laws; and (4) bears no reasonable relationship to any compelling State interest. The bill prohibits such denials of the right to vote and directs the Attorney General to institute actions against States or their political subdivisions when needed to implement the purposes of the title. The bill provides that any actions filed under the title shall receive an expedited hearing before a three-judge Federal court. The bill also provides for a fine of up to $5,000 or imprisonment for up to five years, for any person convicted of denying or attempting to deny any citizen of the rights secured by the title.

The Commission on Civil Rights supports passage of H.R. 9020. The denial of the right to vote to citizens who have been convicted of a criminal offense remains as one of the last major obstacles to the full enjoyment of that right by all United States citizens. Through passage of constitutional amendments subsequently ratified by the States, Congress has eliminated voter qualifications based on race, sex, and wealth and has extended the right to vote to all citizens 18 years old or older. Through passage of the Voting Rights Act of 1965 and the Voting Rights Amendments of 1970 the Congress has suspended the use of literacy tests as qualifications for voting and has assured that residency requirements will no longer prevent citizens from voting in Presidential elections. It is now most appropriate for Congress to end the denial of the right to vote to former criminal offenders.

State provisions restricting the voting rights of citizens convicted of criminal offenses vary greatly. A few States restore full voting rights to former criminal offenders after they have completed their sentences. Colorado and Oregon disqualify only convicted felons who are confined to correctional institutions at the time of an election. The ex-offender's rights to vote is automatically restored upon his release from prison.[1] In addition, New York and Illinois have recently amended their disfranchising laws or State constitutions to automatically restore the right to vote to former offenders following completion of their sentences.[2]

The largest number of States have provisions which establish general categories of disfranchising offenses. These States generally establish the conviction of a felony or other "infamous crime" as the basis for withholding the right to vote.

Some States have established particularized lists of disqualifying crimes. The greatest majority of these listed crimes have no reasonable relationship to voting or the electoral process. For example, Article 2, Section 6, of the Constitution of

[1] Const. of Colorado, Art. VII, 10; Oregon Rev. Stat. 137.240 (1969) and ch. 137.250 (1969).
[2] New York Election Code, 152, Laws of N.Y., 1971, ch. 310, 1 (McKinneys 1971); Const. of Illinois of 1970, Art. 3, 2.

South Carolina disqualifies persons from voting who have been convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of the trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny, or crimes against the election laws. Only the latter crime bears any reasonable relationship to the electoral process.

Often in the past States have carefully selected disfranchising crimes in order to disqualify a disproportionate number of black voters. The list of South Carolina's disqualifying crimes undoubtedly reflects such a discriminatory purpose. Such a purpose was clearly present in Mississippi. The Mississippi Constitution did not disqualify murderers or rapists from voting until 1968. Prior to that year, Article 12, Section 241 of the State constitution only disfranchised persons convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy. In 1896, the Mississippi Supreme Court described the intent behind the former disfranchising provision in these words:

By reason of its previous condition of servitude and dependence, this (the Negro) race had acquired or accentuated certain pecularities of habit, of temperament, and of character which clearly distinguished it as a race from that of the whites—a patient docile people—but careless, landless, and migratory within limits, without forethought, and its criminal members given rather to furtive offenses than to robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.[4]

The Commission would also point out that blacks and other minority group Americans are convicted of serious crimes at rates disproportionate to their representation in the Nation's total population. Thus, even in those States where the list of disqualifying crimes were not selected with the purpose of disfranchising blacks, the use of serious crimes unrelated to the electoral process to disqualify voters in effect established in invidious racial discrimination against minority citizens.

The Commission on Civil Rights believes that it is necessary for Congress to act to guarantee the right to vote to former offenders. Clearly, the States have an important interest in insuring the integrity of their elections. But just as clearly the States cannot indiscriminately limit the right to vote, the most fundamental of all rights in a democratic society. The disqualification of a voter convicted of a crime is constitutionally permissable, if at all, only if the elements of the crime are such that it may reasonably be concluded that allowing a person convicted of the crime to vote would constitute a direct threat to the elective process. H.R. 9020 would come close to establishing this standard for Federal elections by permitting only the disqualification of former offenders who have committed an offense related to voting or elections.

The bill, however, only applies to primary and other elections for President, United States Senator, Representative in the Congress, or Delegate or Resident Commissioner to the Congress. The denial of the right to vote to former criminal offenders in State elections is equally deserving of Congressional remedial action. Therefore, the Commission recommends that the Committee on the Judiciary consider expanding the scope of H.R. 9020 to also prohibit the States from denying the right to vote in State and local elections to former criminal offenders.

We believe that the Congress has the constitutional authority to enact such an expanded prohibition. The Supreme Court's holding in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), establishes that Congress has the authority to set the qualifications for voters in Federal elections. The Court, however, declared unconstitutional Congress' attempt to require the States to lower the voting age to 18 in State and local elections. The Court held that the power to set voter qualifications for these elections was reserved to the States *except when it has been curtailed by specific constitutional amendments*. Applying this exception, the Court held that Congress had the authority under the enforcement clauses of the Fourteenth and Fifteenth Amendments to ban the use of literacy tests after Congress found that those tests had been used to discriminate against the voting rights of minority citizens. We believe that Congress has the authority under Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment to prohibit the disqualification of former criminal offenders from voting in State and local elections if the Congress finds that State disfranchising provisions have the effect and, at least in some cases, were adopted with the purpose of discriminating against minority voters.

[4] Ratliff v. Beale, 74 Miss. 247, 266, 20 So. 865. 868 (3896).

We suggest that the Committee investigate whether State disfranchising provisions were enacted for the purpose of discriminating against minorities or have such an effect in any hearings held concerning H.R. 9020. If such a finding is warranted by the facts, as we believe it will be, then we recommend that the bill be extended to include State and local elections.

Sincerely,

JOHN A. BUGGS,
Staff Director.

The Chair takes note of the fact that there is presently pending before the Supreme Court, in the case of *Richardson* v. *Ramirez*, litigation which may resolve the question of whether the denial of voting rights to former offenders violates the 14th amendment.

Mr. Railsback.

Mr. RAILSBACK. Mr. Chairman, may I make a brief comment?

I would like to commend our chairman for scheduling these hearings. Legislation dealing with prisons or prisoners' rights is not necessarily politically popular. Whether popular or not, I believe it is important to move these tough issues into public focus and let them succeed or fail based upon their merits.

H.R. 9020, introduced by our chairman, would prohibit the States from denying former criminal offenders the right to vote in Federal elections. The laws of almost every State contain some provisions for disenfranchising persons convicted of certain crimes. The specific crimes for which the conviction results in disenfranchisement, vary from State to State. In most of these States the right to vote is regained only after the convicted felon obtains a pardon. In my State of Illinois the right to vote is automatically regained after sentence has been served.

In 1971, the Congress approved a change in the District of Columbia Code to permit a person convicted of a felony to automatically regain the right to vote 5 years after completion of sentence or release on parole or probation, or 3 years after completion of sentence or release on parole or probation with a character certification by the Superior Court of the District of Columbia. This provision passed the Congress with very little controversy.

In 1885 and in 1890 the Supreme Court directly addressed the issue of disenfranchisement upon a criminal conviction (*Murphy* v. *Ramsey*, 114 U.S. 15, 1885, and *Davis* v. *Beason*, 133 U.S. 333, 1890) and held that territories of the United States had the constitutional authority to deny the vote to anyone who had committed a crime. Although there is a case directly in point presently pending before the U.S. Supreme Court (*Ramirez* v. *Richardson*, 9 Cal. 3d 199, 507 P. 2d 1345, 1973), the cases decided in the last century remain in effect today.

However, the issue in H.R. 9020 is not whether the States can constitutionally disenfranchise ex-offenders, but whether the Congress can establish qualifications for voters in Federal elections. Historically, control over the franchise has been considered largely within the dominion of the States. The authority of Congress to legislate with regard to congressional elections must reside in article I, section 4, of the Constitution, which provides that:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

Oregon v. *Mitchell*, 400 U.S. 112, 119 (1970), upheld the argument that article I, section 4 empowers Congress to lower the voting age to 18 in Federal elections and to abolish residency requirements for voting in Presidential elections but struck down the lowered voting age in State and local elections.

Assuming that Congress has authority to prohibit States from disenfranchising ex-offenders in Federal elections, there remain other questions such as the possible legislative encroachment on the Executive power to pardon (art. II, sec. 2, clause 1, granting the President power to grant reprieves and pardons for offenses against the United States); whether there should be disenfranchisement for criminal offenses other than those relating to "voting for elections" such as conviction for bribery of an elected official or other officer of trust, such as a Federal judge; is there any validity to the contention that preclusion of convicted felons from voting seems to protect the integrity of the ballot box. How much of an administrative burden will be placed on the States if they have to administer a double standard at the voting booths; how many potential voters are we talking about? I am sure that the answer to these and other questions will be thoroughly developed on the record by our witnesses.

Mr. KASTENMEIER. This morning the subcommittee will hear testimony from representatives of the Civil Rights Commission, the Department of Justice, and the American Bar Association. The Chair now would like to welcome our first witness, Mr. John A. Buggs, Staff Director, U.S. Civil Rights Commission.

Mr. Buggs, you are most welcome, if you like, to identify your colleagues. You may proceed, sir. We have your statement.

TESTIMONY OF JOHN A. BUGGS, STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS; ACCOMPANIED BY LAWRENCE GLICK, ACTING GENERAL COUNSEL; AND WILLIAM BLAKEY, DIRECTOR, CONGRESSIONAL LIAISON

Mr. BUGGS. Thank you, Mr. Chairman. To my left is Mr. Lawrence Glick, our Acting General Counsel, and to our right, Mr. William Blakey, Director of Congressional Liaison.

I am delighted, Mr. Chairman, to be here this morning to testify in connection with the bill before you.

Among other duties, the Commission has statutory responsibility to:

> . . . study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or, and I emphasize, in the administration of justice.

I want to emphasize our jurisdiction with respect to the administration of justice because there are two significant issues I will address in my testimony today—the adverse effect of denying the franchise to ex-offenders, regardless of their race, and most particularly the effect of denying the franchise to minority ex-offenders. Let me inindicate before moving into the body of my remarks, that the Commission has always held that its jurisdiction in the area of the administration of justice was not limited to investigating or collecting in-

formation having to do with race, sex, color, religion, and national origin. The administration of justice jurisdiction is broader and permits the Commission to look into problems which do not relate to race or sex or national origin or religion. The Commission is, of course, concerned with H.R. 9020 because it addresses the issue of voting rights, with which we have been concerned since the Congress created the Commission in 1957.

The Commission on Civil Rights supports passage of H.R. 9020, which is being considered by this subcommittee. H.R. 9020 is similar to H.R. 15049, which was introduced in the 92d Congress and supported by the Commission at that time. H.R. 9020 would amend the Voting Rights Act of 1970 to prohibit the States from denying the right to vote in Federal elections to former criminal offenders who have not been convicted of an offense relating to voting or elections and who are not presently incarcerated.

In H.R. 9020, Congress declares that depriving any citizen who is not confined in a correctional institution of the right to vote in a Federal election because that citizen has been convicted of a criminal offense not related to voting or elections: (1) denies the citizen the constitutional right to vote; (2) bears no reasonable relationship to the offense sufficient to warrant deprivation of the right to vote; (3) denies to such citizen the constitutional right to due process and the equal protection of the laws; and (4) bears no reasonable relationship to any compelling State interest. The bill prohibits such denials of the right to vote and directs the Attorney General to institute actions against States or their political subdivisions when needed to implement the purposes of the title.

We support H.R. 9020 because the denial of the right to vote to citizens who have been convicted of a criminal offense remains as one of the last major obstacles to the full enjoyment of that right by all citizens of the United States. Through passage of constitutional amendments subsequently ratified by the States, Congress has eliminated voter qualifications based on race, sex, and wealth and has extended the right to vote to all citizens 18 years old or older. Through passage of the Voting Rights Act of 1965 and the Voting Rights Amendments of 1970, the Congress has enacted legislation whose objective is the enforcement of these constitutionally protected rights. It is now most appropriate for Congress to end the denial of the right to vote to former criminal offenders.

Establishing a uniform standard for granting the franchise to ex-offenders in Federal elections.

The Commission on Civil Rights believes that it is necessary for Congress to act to guarantee the right to vote to former offenders. Clearly, the States have an important interest in insuring the integrity of their elections. But just as clearly the States cannot arbitrarily limit the right to vote, the most fundamental of all rights in a democratic society. The disqualification of a voter convicted of a crime is constitutionally permissable, if at all, only if the elements of the crime are such that it may reasonably be concluded that allowing a person convicted of that particular crime to vote would constitute a direct threat to the elective process. The Supreme Court is on record in several cases, including one recent decision in which they have barred the deprivation of the right to vote to a class of individuals because of

some remote benefit to the State. It seems clear that an equitable, uniform standard is needed to insure the right of ex-offenders to vote.

The adoption of such a standard would demonstrate the rational relationship between the crime committed and the continued denial of the franchise. It would also establish an exemplary standard for State legislatures to follow with respect to State and local elections. H.R. 9020 would come close to establishing a uniform standard for Federal elections by only permitting the disqualification of former offenders who have committed an offense related to voting or elections.

I would like to talk about discriminatory effect of varying State standards because State provisions restricting the voting rights of citizens convicted of criminal offenses vary greatly. Many States restore full voting rights to former criminal offenders after they have completed their sentences. Colorado and Oregon disqualify only convicted felons who are confined to correctional institutions at the time of an election. The ex-offenders right to vote is automatically restored upon release from prison. In addition, New York and Illinois have amended their disfranchising laws or State constitutions to automatically restore the right to vote to former offenders following completion of their sentence.

Many States have provisions which establish general categories of disfranchising offenses. These States generally establish the conviction of a felony or other "infamous crime" as the basis for withholding the right to vote.

Some States have established particularized lists of disqualifying crimes. The greatest majority of these listed crimes have no reasonable relationship to voting or the electoral process. For example, article 2, section 6, of the constitution of South Carolina disqualifies persons from voting who have been convicted of burglary, forgery, robbery, bribery, adultery, bigamy, wifebeating, housebreaking, receiving stolen goods, breach of the trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny, or crimes against the election laws. The fact that certain crimes are selected by the States and labeled "infamous" and that the criminal conduct involved bears no reasonable relationship to the electoral process and voting, operates indiscriminately to deprive the right to vote to all ex-offenders. Rehabilitated ex-offenders as a class have not been demonstrated as a class to be unworthy of the ballot, nor is there any showing of a State interest in continuing to deny this basic constitutional right.

A second and more profound effect of varying State standards exists with respect to minority group persons. In the past, States have carefully selected disfranchising crimes in order to disqualify a disproportionate number of black voters. The list of South Carolina's disqualifying crimes noted previously, undoubtedly reflects such a discriminatory purpose. Such a purpose was clearly present in Mississippi, The Mississippi constitution did not disqualify murderers or rapists from voting until 1968. Prior to that year, article 12, section 241 of the State constitution, only disfranchised persons convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy. In 1896, the Mississippi Supreme Court described the intent behind the disfranchising provision in these words:

> By reason of its previous condition of servitude and dependence, this (the Negro) race had acquired or accentuated certain peculiarities of habit, of temperament, and of character which clearly distinguished it as a race from that of the whites—a patient, docile people—but careless, landless, and migratory within limits, without forethought, and its criminal members given rather to furtive offenses than to robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the Negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.

The Commission would also point out that blacks and other minority group Americans are arrested and convicted of serious crimes at rates disproportionate to their representation in the Nation's total population. As early as 1965 The President's Commission on Law Enforcement and Administration of Justice stated that ". . . Negroes over 18 are arrested five times as often as whites for crimes of violence." A California Federal district court in *Gregory* v. *Litton Systems*, 316 F. Supp. 401 (1970), noted that:

> Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, Negroes nationally comprise some 11 percent of the population and account for 27 percent of reported arrests and 45 percent of arrests reported as "suspicion arrests."

The Court held that a substantial and disproportionate number of blacks are excluded from employment by the defendant's policy of denying employment to those with prior arrest records. The 1972 Uniform Crime Reports also support the fact that minority groups are arrested for violent crimes out of proportion to their numbers in society. This is particularly true for blacks and American Indians, who respectively account for 30.1 percent and 2.0 percent of arrests for all crimes and 39.2 percent and 0.7 percent of arrests for violent crimes—yet blacks constitute only 11 percent of the population and native Americans only 0.37 percent. Although the Uniform Crime Reports do not record figures for Mexican Americans, the Commission's investigation in a report entitled "Mexican-Americans and the Administration of Justice in the Southwest," published in 1970, shows a similarly high arrest rate among Chicanos in five Southwestern States.

Although arrests do not always lead to convictions, if blacks and other minorities are disproportionately represented among those arrested, it is probably true that they are also disproportionately represented among those convicted. Taking the 1972 Uniform Crime Report figures which show about a 65 percent conviction rate (without race breakdown), one gets a rather shocking idea of how disfranchising prohibitions based on felony convictions affect minorities. The overrepresentation of minority groups in State prison populations is further evidence of the discriminatory impact of State disenfranchising statutes.

While history and society clearly bear some of the responsibility for the higher crime rates among black, brown, and red Americans, a socioeconomic condition which is exacerbated by the absence of adequate counsel and racism in the selection of jurors and pitifully few minority group jurists—the existence of voting barriers based on felony has a debilitating effect on all ex-offenders, which falls particularly hard on those who are members of minority groups.

Thus, even in those States where the lists of disqualifying crimes were not selected with the purpose of disfranchising blacks, the use of serious crimes unrelated to the electoral process to disqualify voters in effect established an invidious racial discrimination against minority citizens. We would suggest that the subcommittee investigate whether State disfranchisement provisions have the effect of discriminating against minorities. Such an investigation might provide the statistical basis for broader congressional action than is now contemplated in H.R. 9020.

STATE ELECTION PROCEDURES

As the subcommittee is well aware H.R. 9020 only applies to primary and other elections for President, U.S. Senator, Representative in the Congress, or Delegate or Resident Commissioner to the Congress. The denial of the right to vote to former criminal offenders in State elections is equally deserving of congressional remedial action. Therefore, the Commission recommends that the Committee on the Judiciary consider expanding the scope of H.R. 9020 to also prohibit the States from denying the right to vote in State and local elections to former criminal offenders.

We believe that the Congress has the constitutional authority to enact such an expanded prohibition. The Supreme Court's holding in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), establishes that Congress has the authority to set the qualifications for voters in Federal elections. The Court, however, declared unconstitutional Congress attempt to require the States to lower the voting age to 18 in State and local elections. The Court held that the power to set voter qualifications for these elections was reserved to the States except when such State powers have been curtailed by specific constitutional amendments. Applying this exception, the Court held that Congress had the authority under the enforcement clauses of the 14th and 15th amendments to ban the use of literacy tests after Congress found that those tests had been used to discriminate against the voting rights of minority citizens. We believe that Congress has the authority under section 5 of the 14th amendment and section 2 of the 15th amendment to prohibit the disqualification of former criminal offenders from voting in State and local elections if the Congress finds that State disfranchising provisions have the effect and, at least in some cases, were adopted with the purpose of discriminating against minority voters.

The Supreme Court recently heard arguments in *Ramirez* v. *Richardson* (*Brown*) No. 72–1058 on appeal from the California Supreme Court. Ramirez raises for the Court's consideration the question of the constitutionality, under the 14th amendment's equal protection clause, of State constitutional prohibitions against voting by ex-offenders who were convicted of "infamous crimes" but who have completed their sentences and probationary period. Although we understand the subcommittee's caution in taking any action while this issue is before the Court, the Commission believes that the adverse effect of these State prohibitions on minorities warrants congressional consideration of some action regardless of the outcome in Ramirez.

The Voting Rights Act of 1965 establishes a clear precedent for action in this area, where there was a congressional finding that voting practices in certain States were carried out to prevent blacks from exercising the right to vote, or that those devices had the effect of denying or abridging the right of any citizen to vote because of race or color. If a similar finding could be made regarding the reason for the selection of disqualifying crimes or the effect of utilizing certain crimes to disqualify former felons—there may be room for remedial legislation. Such legislation would benefit all ex-offenders, even though it was premised on the discriminatory effect of disqualifying crimes on minority groups. The Commission, therefore, recommends that the subcommittee investigate whether State disfranchising provisions were enacted for the purpose of discriminating against minorities or have that effect.

Mr. Chairman, I would hope along with my colleagues to respond to any questions you may have.

Mr. KASTENMEIER. I appreciate your statement, Mr. Buggs. It was right on point. I could not have hoped that you would make a more useful statement in terms of this committee's interest.

Because it has been a preexisting interest of this subcommittee, and notwithstanding the *Ramirez* case, nonetheless, we want to explore this area to see what prospectively might be accomplished through legislation. And I might say to you this is my bill, and at the outset 2 years ago, I did have in mind not only Federal elections, but State and local elections as well.

Mr. BUGGS. Yes.

Mr. KASTENMEIER. So I am grateful to you for your testimony. It suggests that I should have geared the bill somewhat more broadly at the outset.

As I reexamine the bill, I also wonder whether perhaps those who would deny or attempt to deny any person of his rights secured by the title should be fined not more than $5,000 or imprisoned not more than 5 years, or both.

Do you think it might be a little bit harsh for a committee concerned with corrections?

Do you think that is rather a harsh penalty?

Mr. BUGGS. It is pretty stiff. I don't think there is any question about that.

Mr. KASTENMEIER. Particularly insofar as this subcommittee is not interested in long terms for offenders. Certainly, on this type of offense, it occurs to me on reexamination, we may have been a bit harsh.

Mr. BUGGS. I suspect since this is probably directed more at State and local officials who insist on—who would insist on applying rules in contravention of this act, a lighter sentence for such people might suffice. A State or local official who generally holds some considerable stature in his community, serving a far lighter sentence would have almost the same effect of a person of lesser stature serving a greater sentence.

Mr. KASTENMEIER. I would agree.

It has been my view of the matters that have come before this committee that, of course the voting franchise should be extended as broadly as possible in this country. That is one of the major reasons

for this legislation. And I ask for your remarks as to limitations not only in terms of State and local elections which you have already expressed yourself on but to other limitations in this bill.

The limitation I refer to is other than an offense related to voting or elections and to those who are not confined in a correctional institution. Is it unthinkable that those people, too, should still be able to vote?

Mr. BUGGS. Mr. Chairman, we debated that at some considerable length, the Acting General Counsel and Mr. Blakey and I, and at one point we were persuaded that perhaps we ought to make such a suggestion. We thought, however, that it might have been a little too revolutionary at this point and to suggest in this testimony, oral testimony, to the subcommittee, that we would certainly support that. It might be easier to get it through the Congress, we felt, if we did it in incremental stages.

Mr. KASTENMEIER. I agree with that statement and I am speaking conceptually when I ask you the question because I wonder whether there is really a practical State interest any longer in denying a person the right to vote even though that person was engaged in a mammoth voting fraud. The point being that it scarcely seems in the State's interest to deny that person's ability to vote thereafter. Would you not agree?

Mr. BUGGS. I would agree. I would agree.

Mr. KASTENMEIER. The other is a more practical problem of institutional voting. If we assume that offenders, exoffenders, might vote on the outside, what about those in the inside? Except to the question of whether their residence for purposes of where they are incarcerated is at the prison site and they would thereby, as many felt was the case with the universities if we lowered the voting to 18, would overwhelm the precinct or voting district. So excepting for local elections, what is the real State interest in denying those presently incarcerated from voting?

Mr. BUGGS. I am not sure that there is any reasonable State interest. I would say one other thing, though, Mr. Chairman. I think I am probably accurate in stating that a large percentage of the people who inhabit the prisons throughout this country are individuals who for whatever socioeconomic and cultural reasons have not really been the people who exercise the right of franchise to the extent we would like to see them, although the deprivation of the right to vote for such people certainly does not help that situation any when they get out. If prison represents a rehabilitating institution, which unfortunately many times it does not, and if one of the responsibilities of all such institutions is to try to make better citizens out of individuals certainly the first thing that the prison needs to do is to teach people how to exercise the right of citizenship. To say that in such a situation the State is denying to a felon the most important element in being a citizen is to make it impossible, certainly, when that person gets out, to believe that the State cares about him in any sense. And here is an excellent opportunity, it seems to me, for the State to do something that society in general has not been able to do outside of the prison, and that is to make offenders not only aware of their responsibility, but to assist them in discharging it.

Mr. KASTENMEIER. I would agree with you. Actually, we tend to characterize our prison populations as comprising largely the young, the educationally deprived, the disadvantaged, the poor, and minority groups. As you say, many of these people are alienated from the political process partly because they may be in some cases too young to exercise it or otherwise not in a position to exercise it. But for the first time we would be able to bring them into the system.

Mr. BUGGS. Sure.

Mr. KASTENMEIER. At least symbolically, through having them vote for certainly most offices if not local offices, and part of the prison system could be as you suggest to give them a stake in the national political system which apparently they have offended in some respect previously or which has offended them perhaps through omission.

So that is something which I think we might well look at, keeping in mind that practically this may not now be realizable but I think it ought to be the goal eventually if we are interested in a truly universal franchise to vote and everybody having the occasion to participate in our Nation's political processes.

Thank you.

I now yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman, very much, and Mr. Buggs, thank you for your testimony.

The bill says that those who shall be precluded are those who have committed an offense related to voting or elections and I have grave difficulties making this exception. I assume that Maurice Stans and people like that who laundered campaign funds would be disbarred from voting forever because that relates to voting.

Come markup time, I move we delete that. This number would be infinitesimally small and we just don't know what it means.

But let me ask you about *Richardson* v. *Ramirez*. Following you, we are going to have testimony from the Department of Justice which in my judgment is a copout saying this committee should wait until we hear the result of *Richardson* v. *Ramirez* and you say in your testimony you impute some hesitancy to this committee.

I don't have any hesitancy and I just for the record want to correct that. I have no hesitancy in moving forward and I think, win, lose, or draw on that case in the Supreme Court that this committee should enact the bill that has been pending before us for some time.

You say on page 9: "Although we understand the subcommittee's caution in taking any action while this issue is before the court,"—this is at the bottom of page 9—I as one member of the committee have no caution in this respect and I do not like you to be saying that. I want the U.S. Commission on Civil Rights to come forward clearly and say what you said here so powerfully.

Would you say *Richardson* v. *Ramirez* is totally irrelevant to the legislation here?

Mr. BUGGS. I will ask our acting general counsel to respond.

Mr. GLICK. Father Drinan, I would say it is not irrelevant. It would certainly indicate what the court is thinking about. I would not see the court's reversal as meaning that Congress should not proceed with the legislation.

Mr. DRINAN. Therefore, it is irrelevent.

Mr. GLICK. Pardon?

Mr. DRINAN. It is irrelevant.

Mr. GLICK. It is irrelevant in the sense that——

Mr. DRINAN. That is what I want. It is irrelevant.

Mr. GLICK. Yes.

Mr. DRINAN. And the testimony of the Department of Justice is totally irrelevant, too. When they say we should wait, they come and caution this committee to wait until we get the results on that and I just want to repudiate ahead of that time that particular copout.

Now, Mr. Buggs, would you go so far, and I wonder if the U.S. Commission has to testify—I am sure you do—on the impact of other forms of discriminatory legislation against ex-felons, in employment, in licensing, in loaning money or getting money from agencies. Has the U.S. Commission ever prepared a whole catalog of these statutes that place these disabilities on ex-felons?

Mr. BUGGS. Not to my knowledge, Mr. Drinan. I know of my own personal knowledge, because on occasion I served as a deputy probation officer, of the great liabilities placed upon ex-felons in connection with all kinds of things that we take for granted as we move about as citizens. But in direct answer to your question, I do not believe that the Commission has done that. We are just now as you may know involving ourselves in a very wide ranging study of prisons of the United States under our jurisdiction in the field of administration of justice, the first part of which has been, or is a study of the institution itself. The next study will be with respect to what happens to the prisoners after they get out of prison, so that this is our first foray into that area and I am sorry that we could not give you——

Mr. DRINAN. All right.

I would just like to share with you and also with the Chairman that I think in due course we should prepare a bill of rights for ex-felons, that it seems to me that the statutes may have been well intended a century ago, but I do not see any rationale now or even then for them and, Mr. Chairman, I would suggest that with the collaboration of every agency that can give us input that we ought to draw up this bill of rights for ex-felons and say that at a moment in time any disabilities should just vanish.

Thank you very much, Mr. Buggs, for your testimony.

[Subsequently, by letter dated February 1, 1974, Mr. Buggs submitted additional information and a revised statement which appear at p. 115]

Mr. BUGGS. You are quite welcome. Thank you, gentlemen.

Mr. KASTENMEIER. I think Congressman Cohen has a question or two for you, unless counsel can pose questions for Mr. Cohen.

Mr. MOONEY. One of the questions I believe relates to the definition of "correctional institutions." As you read that definition, Mr. Buggs, does it include halfway houses, and if not, should it?

Mr. BUGGS. I would think that it does not include halfway houses. They say for the confinement. People are not generally confined in the strictest sense of the word in a halfway house.

Mr. MOONEY. Should these people be allowed to vote? I mean, if the bill as drafted were enacted?

Mr. BUGGS. Well, if we have taken the position as I think in answer to the Chairman's question that people who are incarcerated in an honest to goodness prison ought to have the right to vote, certainly people in the halfway house ought to, surely, and perhaps that should be made clear.

Mr. MOONEY. Thank you.

Mr. KASTENMEIER. I recognize the gentleman from Maine.

Mr. COHEN. Thank you, Mr. Chairman.

I just would like to support the Chairman's statement about the interests of this committee and that of the Chairman in your statement and what we are trying to accomplish. I would perhaps offer one contradiction to Father Drinan who frequently rushes in where angels fear to tread. Apparently he has some divine help in that matter as well. But I am not quite as quick to rush in as Father Drinan is without at least an exploration of the basis by which we could undertake to impose such a rule upon the States.

On page 9 of your testimony you indicate that under this Supreme Court decision, we could impose this legislation on the States because disenfranchising provisions discriminate against minority voters. It seems to me that we may have a great deal of difficulty establishing that proposition. We have some testimony coming up from Senator John Dunne of the American Bar Association which very clearly points out that most of these statutes were passed long before blacks or other minorities were even voting or had the right to vote, and historically these were imposed under what we now consider to be an obsolete penal system of just purely punitive action against anyone who committeed a crime. I think we would have a great deal of difficulty on that basis.

But secondly, I would like to ask your opinion, about the difficulties that we will encounter inevitably if we pass the bill as applying only to Federal elections or if we were to attempt to impose it on the States? Assuming we cannot constitutionally impose it on the States, we then have a bill which provides that we cannot disenfranchise ex-felons in Federal elections. I perhaps should direct this to the chairman as well, we should at least be aware of the procedural complications that State officials are going to have when you set up a national election listing the President, Vice President, Senators, and Congressmen on one ballot and then listing State officials on a different ballot. How would they supervise it?

I think we ought at least to be cognizant of some of the major problems encountered.

Mr. KASTENMEIER. I think that is a problem, if my friend will yield. It is one I believe we faced before in general voting rights. Before 1965 the Voting Rights Acts and the titles in other Civil Rights Acts did not apply to State and local elections, as I recall. Consequently, those States, particularly Southern States, had to make distinctions and this was true, I think, even in the poll tax qualification. Poll tax qualifications constitutionally were lifted for Federal elections only at one point. So States have in the past had to distinguish if they chose to between the Federal and State elections or Federal and local elections for certain purposes. So there has been some experience with this in the past.

But I would agree it is an undesirable situation. It would be preferable that the limitation on the right to vote be universally lifted with respect to Federal, State, and local elections.

Mr. COHEN. I think from a uniformity point of view it would be desirable to have a uniform policy, but again assuming we cannot constitutionally do that, it seems to me that we are going to have difficulty establishing that existing statutes were enacted for the purpose of discriminating against minorities. I think history would not demonstrate that.

Mr. BUGGS. I disagree. I think two things. History does demonstrate that at least in some States, almost the whole purpose of such disqualifying requirements were made in order to keep blacks from voting. We quoted, for example, the statements of the Supreme Court in Mississippi in connection with the law there and suggested that in South Carolina and perhaps in other Southern States, and I am sure if we looked very hard we would discover things of that nature.

Mr. COHEN. Would you have the specific dates, for example, upon which the statutes were enacted and could you furnish to the committee the various States and the time the statutes were enacted which would prohibit voting?

Mr. BUGGS. Yes, sir. We will be glad to provide you with that information.

Mr. COHEN. I think that would be helpful to us.

Mr. BUGGS. I pointed out in my testimony that in 1969, the Mississippi Supreme Court described the intent behind the disenfranchising position in the words which were quoted here. But aside from that, Mr. Cohen, I think we all know that courts have ruled—and the Acting General Counsel can correct me if I am wrong—that if an act has the effect of being discriminatory in its application, that remedial action can also be taken. The plain fact is, as many of us know, particularly those of us who have been involved in problems of civil rights and human relations for a long time, minority group people, whether guilty or not, are arrested much more frequently than persons of the majority group and in many instances are convicted more frequently and easier. The inability of such people, poor people in general, to obtain counsel from their own resources mitigates many times against equal justice being provided.

I recall, for example, during the Watts riots I was the director of the Human Relations Commission for Los Angeles County. We discovered one instance in which one black young man, 23 years old, had been arrested 19 times in 1 week, simply because the police had the description of a black man around 20 to 25, 6 feet tall, with a bush. Well, you know, almost anyone in Watts could have been arrested.

In addition to that, 40, by our count, young men were arrested for one crime that was reported to the police.

If those kinds of things happened then—they happened prior to that time, and they do continue to happen, and if it is true that because of one's place in society, because of race, religion, or sex, because of his status, he is subject not only to arrests for criminal offenses but conviction for those offenses for whatever reason, disqualifying actions in terms of voting, falls with particular difficulty and particularly hard on such classes of people and I think our General Counsel will support the contention that the Congress has made findings of that kind based upon adequate statistical information and thereby fell under the constitutional—it made it possible for the Congress to provide relief on that basis, and we feel that the same thing could be true in connection with State election laws.

Mr. COHEN. I would assume that your position during the arguments and debates in *Oregon* v. *Mitchell* was not that the statutes which prohibited 18 year olds from voting were enacted or enforced for the purpose of depriving minority voting.

Mr. BUGGS. No.

Mr. COHEN. I simply point out in my own great State of Maine we seem to be far ahead in the field of penal reform. Our constitution provides that the legislature may enact laws excluding from the right of sufferage for a period not exceeding 10 years all persons convicted of bribery in any election or voting in any election under the influence of a bribe. To my knowledge the legislature has never enacted such legislation. It has the power under the Constitution but never have passed laws to that effect.

Thank you very much.

Mr. RAILSBACK. No questions.

Mr. DRINAN. Mr. Chairman——

Mr. KASTENMEIER. Mr. Drinan.

Mr. DRINAN. One further question, Mr. Buggs. Moving forward, looking forward down the line a little, I think that penology is moving very fast and what you have eloquently recommended this morning was recommended by the American Bar Association as far back as 1964. Twenty-five States now have laws that automatically restore voting rights at the end of the sentence upon release on parole. Would you suggest that the committee might look forward and say we ought to wipe out all laws that touch upon the voting rights of persons even if they are convicted felons in confinement? Isn't that the modern trend? Wouldn't you feel that in 5, 10 years that will be the law, that the penology will say that it is disruptive of a person's psyche to take this basic civil right away and that it is better to let the felon have it even in prison?

Mr. BUGGS. I would certainly hope sometime in the not too distant future that position would prevail and I would urge this subcommittee to start the ball rolling in that direction.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The committee appreciates your appearance this morning, Mr. Buggs, and that of your colleagues, Mr. Blakey and Mr. Glick.

Mr. BUGGS. Thank you very much, sir.

Mr. KASTENMAIER. Next the Chair would like to call Hon. Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice.

TESTIMONY OF MARY LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Ms. LAWTON. Mr. Chairman, the committee obviously has the testimony. Do you want me to read it or——

Mr. KASTENMAIER. Because it is short, I would welcome your reading it to the committee so we all have a common point of reference.

[Ms. Lawton's statement appears at p. 118.]

Ms. LAWTON. Mr. Chairman, we find it somewhat awkward to testify with respect to H.R. 9020 at this time when the question to which it is addressed is pending before the Supreme Court, *Ramirez* v. *Richardson*, No. 73–324, which has been alluded to. The only recommendation that the Department of Justice can make with respect to the bill is that Congress withhold any action until the *Ramirez* case is decided and the state of the law becomes clearer.

H.R. 9020 would prohibit States from denying the right to vote in Federal elections to persons convicted of criminal offenses, except offenses relating to voting or elections, unless the convicted person is currently incarcerated. It recites as the premises for Federal action in this area that (1) the exclusion of convicted persons from the franchise by the States abridges an inherent constitutional right to vote, (2) bears no reasonable relationship to criminal offenses, (3) denies due process and equal protection, and (4) bears no reasonable relationship to any compelling State interest. The bill would authorize the Attorney General to bring suit to enforce its provisions before three-judge Federal courts.

While we consider it inappropriate for the Department to take a position with respect to the constitutional authority of Congress to enact this proposal while the question of the constitutionality of disenfranchising ex-felons is before the Court, the following description of past case law may be of some assistance to the committee.

The practice of barring convicted persons from the vote dates from the earliest days of this country but it was rarely challenged in the courts until quite recently. In 1967 the second circuit considered the issue in connection with the dismissal of a suit and refusal to convene a three-judge court to hear a challenge that the New York law barring ex-felons from the vote constituted a bill of attainder and violated the eighth amendment prohibition on cruel and unusual punishment. *Green* v. *Board of Elections*, 380 F. 2d 445 (C.A. 2, 1967). The court dealt rather summarily with these contentions, citing the historic practice of excluding ex-felons from the vote and the recognition of this practice in section 2 of the 14th amendment:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such state.

The court then concluded that the lack of substance in the claim of unconstitutionality of the New York law was "sufficiently obvious" that there was no need to convene a three-judge court.

A three-judge court was convened in *Beacham* v. *Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), where the Florida law was challenged on the ground that denying the franchise to some ex-felons while permitting those granted a discretionary pardon the right to vote violated the inherent rights of citizenship, equal protection of the laws and due process. The court rejected the various contentions, again relying on the historic practice, earlier court decisions, and section 2 of the 14th amendment. This decision was summarily affirmed by the Supreme Court, 396 U.S. 12.

Similarly, in *Fincher* v. *Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), a three-judge court rejected the contention that the North Carolina ban against voting by ex-felons violated the Eighth amendment and

the equal protection clause of the 14th amendment. With respect to the latter contention, the court cited section 2 of the 14th amendment and the cases relating thereto and observed:

> We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the equal protection clause.

The decision was also summarily affirmed by the Supreme Court, 411 U.S. 961.

This same equal protection challenge to the exclusion of ex-felons is the question on which certiorari was granted in *Ramirez* v. *Richardson*, 9 Cal. 3d 199, 507 P. 2d 1345 (1973); the lower court's decision there was styled *Ramirez* v. *Brown*.

The case has been argued and is now awaiting decision. In our view it would be unwise to proceed with legislation such as H.R. 9020, which is premised in large part on section 1 of the 14th amendment, until the Supreme Court decides *Ramirez* and provides additional insight into the legal issues involved, perhaps clarifying the impact of its summary affirmances of *Beacham* and *Fincher*. Since *Ramirez* has already been argued the delay should not prove substantial.

Mr. KASTENMEIER. Thank you, Ms. Lawton.

Do you have any view apart from *Ramirez* v. *Richardson* whether there would be any constitutional difficulty in expanding the coverage of the legislation to include State and local elections as well as Federal, on that point only?

Ms. LAWTON. As near as we can ascertain what *Oregon* means, and that is not very near since there are five separate opinions, there would be some question about extending it to State and local elections. I think it would depend a great deal on the findings, however, Mr. Chairman.

Mr. KASTENMEIER. Before the pendency of *Ramirez* v. *Richardson*, did the Department of Justice have a position——

Ms. LAWTON. Not to my knowledge.

Mr. KASTENMEIER [continuing]. On this question?

After *Ramirez* v. *Richardson* is disposed of, and I take it the Department of Justice is not a party to that suit in any connection——

Ms. LAWTON. No.

Mr. KASTENMEIER [continuing]. Do you expect the Department of Justice will have a position?

Ms. LAWTON. I should think so, yes. It would be a matter of—well, first, reading whatever is said in *Ramirez* and then taking a position as to whether or not we think Congress can enact such legislation and if so, what kind.

Mr. KASTENMEIER. I take it that while this may be a general practice of the Department, it is not followed in every case, is it, that you withhold an opinion on matters that are in pendency before the Court? Aren't there some situations in which the Department of Justice must, because of the interest of the United States, offer an opinion, whether or not a matter is before the Supreme Court?

Ms. LAWTON. In cases in which we are not involved this may be the situation. Otherwise, we are prohibited.

Mr. KASTENMEIER. But you are not involved in this case.

Ms. LAWTON. No, we are not involved in this case.

Mr. KASTENMEIER. You are not forbidden to offer an opinion.

Ms. LAWTON. No. We simply do not know what the state of the law is and hope that *Ramirez* will clarify it.

Mr. KASTENMEIER. But in that regard, do you not have a point of view with respect to what the law ought to be?

Ms. LAWTON. I think in this particular instance, that is, in the whole franchise area, what the Congress can do in terms of changing State qualifications, we do not have a position.

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much for your testimony. As is well known, this bill has been approved in principle by two prestigious national commissions, set up by two Presidents. The National Advisory Commission on Criminal Justice reported just last October. Secondly, by the President's Commission on Law Enforcement and the Administration of Justice. It has been endorsed by the American Bar Association and is contained in the model penal code of the American Law Institute. It is highly recognized by the National Commission on Uniform State Laws and in the Uniform Act on the Status of Convicted Persons this is strongly recommended.

How can you say the Department of Justice doesn't know what is the view?

Ms. LAWTON. I don't believe that any of them have taken a position, with the possible exception of the American Bar Association position today, with respect to a Federal statute changing the State qualifications. As a policy matter, whether States ought to do it, is one very different question from whether Congress can do it by legislation alone. This is the question we are addressing.

Mr. DRINAN. Congress clearly can make the qualifications for participation in Federal elections.

It is very clear, it seems to me, from the *Mitchell* case. What does *Mitchell* mean if it doesn't mean that?

Ms. LAWTON. As near as I can tell, what *Mitchell* means is that nine good judges can find five different reasons for voting a different way on——

Mr. DRINAN. But the rule is clearly that Congress may spell out who may vote in a Federal election.

Ms. LAWTON. No. I think it is not clearly that. Justice Black says Congress can set the qualifications for Federal elections, yes, but he speaks only for himself. Three of the Justices turn on a finding of discrimination in literacy tests and the protection of the right to travel and say Congress cannot otherwise set constitutional requirements for voting unless it is implementing some specific right.

Mr. DRINAN. As the——

Ms. LAWTON. You have Justice Harlan saying they can't do it, period. You have five opinions on the majority. There is no single opinion on the Court.

Mr. DRINAN. Did the Civil Rights Division think of participating as amicus in *Richardson* v. *Ramirez?*

Ms. LAWTON. Not to my knowledge.

Mr. DRINAN. If not, why not?

Ms. LAWTON. I believe it is the practice, and I am not involved in Supreme Court practice, to go in on a State case only when requested by the Court, which was not done.

Mr. DRINAN. They may go in any time they want to.

Ms. LAWTON. Oh, no. We may request the Court to hear us but it is up to the Court whether we go in or not.

Mr. DRINAN. Did anybody recommend that the Civil Rights Division take a position and go in on *Richardson* v. *Ramirez* in order to implement the basic right of ex-felons to vote?

Ms. LAWTON. Not that I know of.

Mr. DRINAN. Who would know?

Ms. LAWTON. Well, I have asked the man in the Civil Rights Division who heads the appellate section and he is unaware of any such request, so unless it was discussed orally with the Assistant Attorney General in charge of the division, I don't know.

Mr. DRINAN. What do you think of my characterization of your testimony as a cop-out by the Department of Justice? Not by yourself.

Ms. LAWTON. Well, Congressman, I disagree.

Mr. DRINAN. What?

Ms. LAWTON. I disagree. I think we have an obligation to the Congress in discussing matters——

Mr. DRINAN. To tell us to be cautious?

Ms. LAWTON. In matters of constitutional law to tell you what we think the Constitution says.

Mr. DRINAN. Well, you are not telling me what it says. You are saying we don't know it until *Ramirez* comes down.

Ms. LAWTON. That is right.

Mr. DRINAN. Why did you come at all? We are lawyers. We know enough to be cautious.

Ms. LAWTON. You understand——

Mr. DRINAN. Do you think your testimony is helpful to us? It doesn't help us at all.

Ms. LAWTON. No, which is why——

Mr. DRINAN. Why did you testify on it, then?

Ms. LAWTON. Because the committee insisted I appear.

Mr. DRINAN. Who wrote the testimony?

Ms. LAWTON. I did.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I would be interested in your own personal views, that is if you care to express them. Do you think perhaps there should be a distinction between Federal elections and State elections?

Ms. LAWTON. Some judges have made some distinctions sometimes. The Constitution still says the State will set the qualifications for voters. Obviously, that line is not a definitive one. There are some instances where Congress properly strikes down the State qualification, particularly where that State's qualification is discriminatory. But where the line is I just have no idea. I am so totally confused by the recent decisions in this area, including the three referred to here, that I have no idea where the law is between Federal and State, between congressional setting of——

Mr. RAILSBACK. Well——

Ms. LAWTON [continuing]. Qualifications.

Mr. RAILSBACK. For instance, my recollection is that it was in the *Katzenbach* v. *Morgan* case where they actually upheld the law that struck down a particular State statute, a literacy test statute, I believe.

Mr. MOONEY. The literacy tests as they were applied to Puerto Ricans in New York.

Mr. RAILSBACK. That is right. The Court upheld the Voting Rights Act of 1965, which had the effect of overturning the New York State English literacy test as a qualification for voting as applied to Puerto Ricans.

You referred to *Oregon* v. *Mitchell* which did uphold the 18-year-old right to vote statute for Federal elections but not in State elections. I am just wondering from your own personal viewpoint why you believe that in this particular area it is not right that certain persons who have committed a felony in one State may be permitted to vote in Presidential and congressional elections and yet in another State they are not permitted to vote. I personally have trouble with that.

Ms. LAWTON. With the fact as you state it, yes. With Congress doing something about it is where I have the difficulty.

Mr. RAILSBACK. I mean why should we have to wait for the *Ramirez* case to be decided before acting?

Ms. LAWTON. Well, the general premise upon which congressional action in this area is normally based, and I will grant you there are judges going in other directions in both the *Oregon* case and *Katzenbach* case, but the general authorization is found in section 1 of the 14th amendment. Where that premise has been considered by Federal courts with one exception that is difficult to interpret because they dealt with a particular State law, the answer has been section 1 can not apply because section 2 expressly recognizes the right to disenfranchise ex-felons in the State. And this has been the argument. If section 1 is not available to the Congress as a basis for authorizing a right to vote in Federal elections, then I have some question what might be available.

Now, Justice Black would say section 4 of article 1 is available.

Mr. RAILSBACK. You mean under the equal protection clause of——

Ms. LAWTON. Either equal protection or privilege and immunity or due process. The three have all been raised in the State cases.

Mr. RAILSBACK. Usually it is equal protection, isn't it?

Ms. LAWTON. Well, in *Oregon*, Justice Douglas talks of privileges and immunities. Three of the Justices talk of equal protection. I believe it is White, Brennan, and Marshall. It is hard to say. It is very difficult to say. But the specific question has been raised twice before three-judge courts in this instance and the Supreme Court has summarily affirmed.

Now the Supreme Court has taken a very scholarly California opinion on the subject which details the test under equal protection from the earliest times until the present day and has granted certiorari on it. Why, we don't know. That can only mean four Justices wished to consider it—it can mean more than that.

Mr. RAILSBACK. What was the State court findings?

Ms. LAWTON. The State court finding was that section 2 notwithstanding, section 1 of the 14th amendment invalidates a State law which disqualifies ex-felons from voting.

Mr. DRINAN. Would the gentleman yield?

If the Court reverses *Ramirez*, we can still enact H.R. 9020, would you agree?

Ms. LAWTON. That would depend on the premise. If you enact on a section 1 premise and the Court says section 2, throws section 1 out, I doubt it.

Mr. DRINAN. That is a small point. Mr. Buggs said *Richardson* v *Ramirez* is totally irrelevant to the enactment of H.R. 9020. What the Supreme Court says in *Richardson* v. *Ramirez* is totally irrelevant.

Ms. LAWTON. I disagree.

Mr. DRINAN. Prove it.

Ms. LAWTON. You can't prove why people disagree.

Mr. DRINAN. No matter what *Ramirez* says I am going to push through H.R. 9020 and it will go through Congress. No matter what they say it will not have any relationship to the enactment of constitutional power in H.R. 9020.

Ms. LAWTON. I disagree. I think first of all you do not have a majority in *Oregon* indicating any particular bases for Federal action. You have different judges finding different bases, some of which would not be affected by *Ramirez*, some of which would. So I think it depends entirely how the opinion in *Ramirez* is written.

Now, of course, Congress can say the Supreme Court is wrong. There is no question about that. But as a lawyer, I don't think I should.

Mr. RAILSBACK. Isn't there a question as to whether it would have to be done by a constitutional amendment?

Ms. LAWTON. Yes. There is no doubt Congress can do it by the constitutional amendment process. No question there.

Mr. RAILSBACK. Frankly, I would like to support the legislation because I do think that there are built-in discriminations because of the application of different State laws and I think voting rights are so important. I want to support this legislation. I was just interested in your personal views and I also found your observations about the pending case very helpful because I have not studied that case.

Mr. KASTENMEIER. The gentleman from Maine, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

What is the status of the *Ramirez* case? My understanding is that it has been briefed and argued before the Supreme Court and is now awaiting a decision.

Ms. LAWTON. Yes. It was argued the first week in January, the first week of court.

Mr. COHEN. As a practical matter, what do you see is the difficulty in this committee, subcommittee, the full Judiciary Committee, the full House and full Senate voting a measure which even subsequently might come down from the court? Let's assume that the Court decision could come down tomorrow and rule on the *Ramirez* case. It could be next September. But as a practical matter what real difficulty is there? This Congress can go on record as a moral leader. We have to take that moral leadership from time to time. Let's suppose, for example, we pass the bill and the *Ramirez* decision is not as clear as you might like to see it. You say you can't tell the state of the law now because you have got a 5-3 split. Suppose we have another 5–3 split? Again Congress is taking some lead in this particular area, an agreed nebulous area, but assuming they rule it to be unconstitutional or they overrule the California decision. What harm is done in Congress serving as a model to the rest of the States that this is the direction we think we ought to go?

Ms. LAWTON. The only harm or the prime harm would be in the confusion that might result in the election if——

Mr. COHEN. It might—

Ms. LAWTON [continuing]. it would ultimately be found, for example, that Congress could not do this and Congress had in fact told the States that their restrictions were overruled.

Mr. COHEN. So there would be a suit filed in a State challenging the constitutionality of the Federal statute.

Ms. LAWTON. It might be decided ahead of time like *Oregon* was decided before the election. It might not.

Mr. COHEN. That is a possibility but the other possibility is if Congress does set this standard saying we think it is fundamentally wrong within the meaning of the Constitution, our interpretation of the Constitution, that we might serve as an impetus for other States to reexamine their own laws and say we think that they are correct. There is no nexus, no connection between a violation of the law pertaining to, say, larceny or some other offense, and a person's civil right to vote, and that one cannot be tied to the other. Would you think we would serve a valid function going ahead and asserting this kind of moral leadership throughout the States?

Ms. LAWTON. Well, I have a lawyer's prejudice against doing anything that I think from the outset cannot be done legally, but aside from that, the State legislatures, the bulk of them are meeting now, will not meet again until 1974 as I understand it, and may well be out of session when Congress enacts such legislation.

Mr. COHEN. We might have this bill enacted far before the Supreme Court decision comes down.

Ms. LAWTON. Yes, indeed.

Mr. COHEN. In that case it would serve as a model for these States.

Ms. LAWTON. It would.

Mr. COHEN. That is all I have. Thank you.

Mr. KASTENMEIER. I have one other question for you and that is, Ms. Lawton, you are a representative of the Department of Justice in which the Bureau of Prisons is situated. In that context, do you think it might be beneficial for Federal prisoners, ex-prisoners, ex-felons, in Federal institutions—do you think it might be beneficial or rehabilitative for them to have the right to vote as a class?

Ms. LAWTON. I just simply cannot address myself to that, Congressman, other than say I know the Bureau of Prisons takes the general position that community involvement is good for their prisoners as a general proposition. On the specifics of the vote, I don't know.

Mr. KASTENMEIER. Well, that is one thing you might be aware of because it is in your Department and it relates to the question before us today.

The gentleman from Massachusetts.

Mr. DRINAN. I would just like to ask Miss Lawton, the U.S. parole officials, do they have any position or did you check with them before hand?

Ms. LAWTON. The Board of Parole? I did not check with them. I do not know.

Mr. DRINAN. This is the central key question. Who makes up the policy or the nonpolicy that you give to us this morning? I note that Mr. Durham from the Department of Justice is sitting here all morning. I don't know why. But it seems to me we have a right to a better position by the Department of Justice. This is a nonposition. This is warning us to be cautious and giving us no position at all, no leadership.

Who makes up the policy? Who decided what was to be said today?

Ms. LAWTON. Well, I think you know the general system.

Mr. DRINAN. I really don't. It is chaos. We have never been treated this shabbily by the Department of Justice, frankly.

Ms. LAWTON. I am sorry that you view it as shabby. I don't. I really think——

Mr. DRINAN. We have no position from you. You don't know what the parole people feel. You don't know what the Federal officials with 22,000 people in prison want for their ex-felons and we just wanted to get some moral support for what Congressman Cohen says is the moral leadership we are trying to exercise here.

Mr. COHEN. Will the gentleman yield? I think you are taking undue advantage of the witness. She is coming to us expressing a legal opinion a matter of policy on the part of the Department of Justice. They do not wish to intervene and make recommendations on a purely State matter that is now before the courts and I don't consider that to be a nonpolicy judgment on their part. If you ask her a personal opinion that is one thing, but I don't think she can be held accountable for the Department. I don't think they treated us shabbily.

Mr. KASTENMEIER. Well, I think the point has been made. In any event, we are glad you are here this morning, even though perhaps your testimony is not as illuminating as we might wish, and we hope you will come back some other time.

Next the Chair would like to call Senator John Dunne, who is a State Senator from New York. Senator Dunne is representing the American Bar Association today. He is certainly no stranger to the Congress. He has testified before the House Select Committee on Crime and in his own State of New York has sponsored many measures relating to penal reform and criminal justice. His reputation indeed precedes him not only in his own State of New York but nationally and we are very pleased and grateful, Mr. Dunne, for your coming here this morning to represent the American Bar Association.

TESTIMONY OF JOHN R. DUNNE, STATE SENATOR, STATE OF NEW YORK; MEMBER, AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES; ACCOMPANIED BY RALPH H. LOWENSTEIN, ASSISTANT DIRECTOR, ABA RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES; AND DANIEL L. SKOLER, STAFF DIRECTOR, AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES

Mr. DUNNE. Thank you, Mr. Chairman, members of the subcommittee.

Before I proceed with my remarks I would like to introduce two men accompanying me here this morning. Sitting on my left, Mr. Daniel Skoler, the staff director for the ABA Commission on Correctional Facilities and Services, and on my right is Mr. Ralph Lowenstein, who is assistant director, ABA Resources Center on Correctional Law and Legal Services of the ABA Commission on Corrections.

[Mr. Dunne's prepared statement appears at p. 120.]

Mr. DUNNE. Let me open by stating that I sincerely appreciate this opportunity to testify before your committee on behalf of the American Bar Association Commission on Correctional Facilities and Services in support of the principles underlying H.R. 9020. This kind of legislation represents a significant step in eliminating one of the most basic restrictions placed on former offenders—the loss of the right to vote.

Once a person has "paid his debt to society," there is in my judgment, and the judgment of my colleagues on the Commission and the American Bar Association, no justification for shutting him out from full citizenship. The American Bar Association supports measures like H.R. 9020 which seeks to overcome these irrational restrictions. We view this as an important component of the overall correctional program our commission and association have been supporting. The most directly related element of that program is our work to remove unreasonable job restrictions confronting ex-offenders. I am submitting for the committee's information a short pamphlet which describes these efforts more fully.

[The pamphlet referred to appears at p. 39.]

Mr. DUNNE. As you, Mr. Chairman, stated in your opening remarks, just a few weeks ago the case of *Richardson* v. *Ramirez* was argued before the Supreme Court, a case in which the American Bar Association appeared as Amicus Curiae, and there the issue was raised as to whether the deprivation of an exoffender of his right to vote represents a violation of the U.S. Constitution.

We look forward to a clear decision by the Court abolishing such blanket restrictions once and for all, and I would like to submit further a copy of the brief which the ABA submitted as Amicus in that case for the record here.

Mr. KASTENMEIER. Without objection that brief will be received and made part of the record. Thank you.

[The document referred to appears at p. 45:]

Mr. DUNNE. Thank you, Mr. Chairman. And if I may suggest, the Congress as a coequal branch of the Federal judgment ought, in my judgment, to pursue with great zeal its responsibilities in this area and not to await an outcome of the decision in that case.

Not only is the practice of disenfranchising exoffenders questionable from a constitutional standpoint, it also violates sound correctional practice. It is estimated that each year approximately 100,000 people are released from correctional facilities across the country. Additional thousands successfully complete parole terms. Although they have endured the punishment imposed by the sentencing court, many States deny them the full rights of other citizens. This punishes a man or a woman for his entire life for a mistake he has long since come to regret.

Civil disabilities—of which the right to vote is but one—originated at a time when the philosophy of crime and punishment was much different from what it is today. Retribution and deterrence were the two most important elements of crime control. It was thought that by severely punishing anyone convicted of a crime, the offender would get his "just desserts" and others would be deterred. As we are aware, the most common penalty was death. At a time when relatively few people could exercise the franchise and other citizenship rights, their denial was an important way to punish the criminal and set him apart from the rest of society.

Our approach, is different today. Thankfully, we no longer use the death penalty for every possible offense; nor do we rely upon mutilation. Experts agree that the retribution and deterrent models of punishment do little to combat crime. As a consequence, we now emphasize helping offenders so they can return to society as useful and productive citizens. Millions of dollars are spent annually in

institutions on vocational training, educational programs, and drug rehabilitation. Hopefully, these efforts will contribute to a decrease in recidivism and an increase in the successful reintegration of former offenders to society.

Even as these clearly defined efforts toward rehabilitation are expanded, many States persist in the counterproductive stigmatization of exoffenders by denying them basic rights. Perhaps the most fundamental is the right to vote since this is the basis of ordered, representative Government in a democratic society. Denial of this right only serves to fence these people out of society and convince them that no matter what they do, they can never be treated as anything but an "ex-con." As the prestigious National Advisory Commission on Criminal Justice Standards and Goals concluded in its report on corrections—released just last October—"Loss of citizenship rights—the right to vote, hold public office, and serve on juries—inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest." [Standard 16.17, p. 593.]

There appears to be little justification for disenfranchising persons for past crimes which are in no way connected with the balloting process. Not only does it harm rehabilitative efforts; it also fails to accomplish any positive goals. The most common reason given for denying the right to vote to former offenders is that it "protects the purity of the ballot box." This justification assumes that previous criminals are more likely to commit election frauds than any other member of the public. There is no credible evidence to support this assumption. In fact, I might say inferentially there are disclosures here in our own city that indicate otherwise.

At one time, there may have been a valid reason to fear such fraud. Voting was commonly conducted in an open room without benefit of voting booths. Balloting was commonly done on different colored sheets of papers which could be obtained from party headquarters. Registration was nonexistent and the ballot box was often nothing more than an old shipping crate. In those days, it was not uncommon for party leaders to round up drunks and vagabonds and take them from polling place to polling place to vote.

Over the years, voting practices have drastically changed. All voters are now required to register prior to the election and balloting takes place in precincts under the supervision of poll watchers. Most places use voting machines, but even those which do not, use numbered ballots with special watermarks. These precautions make it almost impossible to commit voting frauds, at least in the balloting process. This is well illustrated by the fact that between 1962 and 1970, there were only 19 convictions for Federal election code violations and the statistics available fail to indicate whether those convictions were for vote buying or such esoteric crimes as keeping troops at the polls (18 U.S.C. section 592) or soliciting political contributions from persons on relief (18 U.S.C. section 604). In California, the last reported case of vote buying occurred in 1908.

Even should an election code violation occur, the States, I submit, are well prepared to take care of them. Every State has laws making it a criminal offense to commit election fraud. The prohibitions cover

everything from vote buying to campaigning too close to the ballot box. California, for example, has 76 different acts dealing with voting listed as felonies and 60 more as misdemeanors. In our view, imposing criminal penalties on actual violators is a more acceptable and efficient way of protecting against election fraud than blanketing out an entire class of citizens from the electoral process. It achieves the result of deterring voter fraud, while not assuming the guilt of everyone who has ever been in trouble with the law.

In the past several years, a number of nationally prominent groups, and two prestigious commissions have recommended that these restrictions be abolished. The President's Commission on Law Enforcement and Administration of Justice stated: " * * * there seems to be no justification for permanently depriving all convicted felons of the vote, as the laws in most States provide. The convicted person may have no strong personal interest in voting, but to be deprived of the right is an important symbol. Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote." [Task Force Report: Corrections, p. 90].

As I already mentioned, the National Advisory Commission on Criminal Justice Standards and Goals had a similar view. It specifically suggested that all States should enact legislation repealing mandatory provisions depriving convicted persons of their civil rights.

National Commissions are not the only ones who favor the right to vote for ex-felons. In a recent survey taken by the Education Fund of the League of Women Voters, 16 categories of community organizations were asked whether persons convicted of a felony and released from prison should be eligible to vote. At least two-thirds of every group surveyed approved of granting ex-felons the right to vote. Interestingly, 80 percent of the Democratic Party chairmen and 65 percent of the Republican Party chairmen approved. In the 1972 Democratic Party Platform, there is a plank calling for the reform under consideration here. Other groups have expressed their sentiments in the form of model legislation. The National Conference on Commissioners of Uniform State Laws has proposed a Uniform Act on the Status of Convicted Persons. This act—which the American Bar Association approved in 1964—would restore an offender's rights upon final discharge from his sentence or upon his release from incarceration on either parole or probation. It delineates the specific policy of our association in this matter. This act has been passed by New Hampshire and Hawaii. And I offer further, if I may, with your permission, Mr. Chairman, to submit part V of a compendium on model correctional legislation and standards which contains this proposal plus a number of other State proposals relating to loss and restoration of civil rights.

Mr. KASTENMEIER. Without objection, that pamphlet designated part V will be accepted and made part of the record. Thank you.

[The pamphlet referred to appears at p. 95]

Mr. DUNNE. Like H.R. 9020, the Uniform Act, (which generally abrogates all common law "civil death" penalties) forfeits the right to vote only for felons whose confinement sentences have not expired. It specifically permits felons on suspended sentence, probation or parole to continue to vote. On completion of sentence, the felon is to be given an "order, certificate or other instrument" which explicitly states, among other things, that the offender's "rights to vote * * * are thereby restored * * *"

The American Law Institute has taken a similar position in section 306.3 of the Model Penal Code. This section states: "Notwithstanding any other provision of law, a person who is convicted of a crime shall be disqualified from voting in a primary or election if and only so long as he is committed under a sentence of imprisonment."

This committee can thus be assured that the bill before it squares with a long line of distinguished and carefully considered legislative and national commission proposals on the subject. A substantial number of States in the last few years have eliminated voting restrictions previously placed on ex-offenders. Four States—Arkansas, Maine, Michigan, and Tennessee—have no disenfranchisement provisions. Twenty-five other jurisdictions automatically restore voting rights at the end of the sentence, upon release on parole, or at some stated period after final discharge. There is no evidence from any of these jurisdictions that the purity of their election process has been endangered.

The trend, therefore, in penology is clear. The purpose of corrections has shifted from one of blind retaliation to preparing the offender for lawful participation in society. Numerous organizations and commissions have voiced their support for an end to these needless restrictions. Many States have recognized the need to drop these restrictions and have done so with no adverse effects. The American Bar Association supports these efforts and those like H.R. 9020 to restore the right to vote to ex-offenders who are no longer confined in a correctional facility at the time of the election.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you very much, Senator Dunne, for a helpful presentation.

Let me ask you about the limitations placed in the bill, H.R. 9020. You offer very compelling testimony to the point that the capacity of ex-offenders to vote does not harm the purity of the ballot box. What about ex-offenders who are convicted of an offense relating to voting or elections? Would that be harmful if they were able to vote?

Mr. DUNNE. I personally do not think it would.

Mr. KASTENMEIER. What about those who are institutionalized, who are serving sentences? What about the prospect of their voting?

Mr. DUNNE. If I may relate to my own experience as a member of the State legislature in New York, which has confronted this issue, more immediately since the Attica tragedy, I believe if you are to accept the rationale supporting our position favoring this legislation, you would have to extend it to granting the right to people under incarceration. As one who is involved in the political governmental process, however, and one who has recognized that in the area of, if you want to call it, prison reform, steps must be small. But keeping in mind your ultimate goal, within the framework of the political process, it would be extremely difficult in my judgment, if you are talking about the operation of the legislative branch of Government as distinguished from a judicial finding, to convince a majority of the members of the legislature that this, what I would consider ultimate step to be taken at this time, and I base that upon my own experience in 1971 and again in 1973, of whittling away of section 152 of our own election law to expand the rights for ex-offenders to vote. While a restriction against incarcerated felons troubles me philosophically, I believe that it might be something best left legislatively to some later date.

Mr. KASTENMEIER. Now, as former chairman of the New York State Committee on Crime and Corrections, and as a member of the observer team at the Attica State Prison in September 1971, could you tell us whether this issue was raised in the context of Attica, and what your experience has been in the State legislature in New York State with reference to the difficulties and the pitfalls and the desirability of enactment of this sort of legislation?

Mr. DUNNE. I must be candid with you, Mr. Chairman, and the members of your committee. During the course of those 5 days at Attica when the now well-known 30-odd demands were made by the prisoners or on the numerous occasions in which I have visited prisons across New York State, at no time did the inmates list as one of their principal grievances, particularly when I would inquire of them individually what is bothering you? What are your problems? Did any one of them list, "Gee, I sure would like to get a chance to get a shot at my congressman or the President next time around."

Mr. KASTENMEIER. I assume that is the case and what we are talking is that it is in the interests of the State——

Mr. DUNNE. Yes.

Mr. KASTENMEIER. That the felon or ex-felon vote.

Mr. DUNNE. I think the average inmate having so many hassles and so many things to contend with just to survive in one of our institutions, voting is not a matter of paramount concern, but I do feel, as I attempted to stress in my remarks, I think it is darn close to a cornerstone to any meaningful rehabilitation on the outside to participate in society from which obviously most of them feel alienated, and I don't think it is tokenism. I think it is so fundamental, with so much more emphasis being placed on the ballot box and having so much greater significance in our society, and having worked with many groups who worked with ex-offenders, I can tell you it is a matter of top priority among those who are seeking to reintegrate people into society. So I would say it is a key consideration on the outside.

Mr. KASTENMEIER. As far as what the outside means, we had a question before as to correctional institutions because the language says "who are not confined in a correctional institution." What would your understanding be of that? What is a reasonable restriction or limitation in terms of what that ought to apply to? Should it be to a prison, or halfway house? Where should we draw the line in terms of what a correctional institution means in terms of the application of this bill?

Mr. DUNNE. I would say, Mr. Chairman, that any residential facility should be the determinant. If I may go back and relate to my own experience in New York, former Governor Rockefeller appointed a select committee on crime and their first responsibility was to look into the whole correctional system, and they used the term "a person in custody" as embracing not only a person confined in some type of a residential facility but a person who is subject to parole or probation or any type of supervision, be it residential or otherwise.

My distinction would be, for the purposes of this bill, one who is under confinement in some type of a residential facility, halfway house, community-based facility, so long as he is under the mandate of the court to be restricted to that facility and subject to what would almost be a daily supervised regimen. That would be my cutoff.

Mr. KASTENMEIER. In other words, those in a halfway house ought not be given the right to vote but once they emerge from that facility, really get out on the street, so to speak, under parole, then they ought to be given the right to vote.

Mr. DUNNE. My response to you I would hope would be taken in the context of my entire remarks. I would say within the reading of the restrictions of this statute at page 4, I would say a residential facility. Of course, I mentioned before my general philosophical approach would be to remove all restrictions.

Mr. KASTENMEIER. At this point I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I want to thank you, Senator, for your testimony and also to commend you for your interest. Apparently, you in the past have been very interested in penal reform and I wish there were more legislators like you. I think we are going to have some difficulty selling even a short step as far as reform in this area. I agree with what you said that from a political standpoint it would be tough to give everybody voting rights including people that were in custody even if you believe we should do that. Your statement does not go into the legal questions.

Now, maybe by submitting the brief that you have submitted where you intervened in a suit, that may go into some of the legal questions. We may have some problems legislating in this area and I wonder if—for instance, how you feel about the problems with section 2 of the 14th amendment which would seem to permit States to disenfranchise convicted felons? Do you feel that the first section would really have an overriding importance so that we could use it as our basis to legislate.

Mr. DUNNE. I would certainly feel that way, that section 1 would provide you with an adequate basis for this. Let me, in light of the previous witness—I don't want to pull a cop-out here, and it was refreshing to hear a good legal argument after being more on the political end of things in my career. I didn't come here prepared really to discuss with you definitively. I would be pleased to defer to our staff director if you would welcome his testimony. I believe that the Congress can take the action that is proposed here, particularly because of the added requirement that there be some compelling State reason to justify the denial of voting rights, and in our judgment the facts and the trend in penology indicate to us quite clearly that there is no overriding or strong State objective to be accomplished by permitting these restrictions to continue.

Mr. RAILSBACK. Yes. Let me just say that we look to the ABA for leadership in our legislative efforts and it is very helpful when you spell out some of your legal positions which you really haven't done in this particular brief. Like I said earlier to another witness, I want to support this legislation. However, I want to feel like I am on sound legal ground in doing so, so that when we do get to the floor of the House we can argue persuasively for this legislation. I assume they go into all of the legal arguments, too, as far as the supremacy of section 1 when placed in opposition to section 2.

Mr. KASTENMEIER. Would the gentleman yield?

Mr. RAILSBACK. Yes.

Mr. KASTENMEIER. I am wondering whether the brief you have in fact offered in which you, the ABA, were amicus curiae, touches on the questions raised by the gentleman from Illinois.

Mr. DUNNE. Oh, very fully, and I would ask, with permission of the chairman, would you allow Mr. Skoler to comment on this?

Mr. RAILSBACK. I apologize for running. I have a luncheon engagement. Thank you.

Mr. KASTENMEIER. Mr. Skoler.

Mr. SKOLER. As Senator Dunne indicated, Mr. Chairman, the brief does analyze the legal issues in detail and presents the American Bar Association's views in this matter. The brief as such was authorized by the administration committee of our Board of Governors and was described by a special appellate review committee, so it does represent an ABA stance.

Very briefly, to point out some of the highlights, the section 2 exclusion for persons convicted of—persons who participated in rebellion or other crimes, was a reconstruction amendment and we feel that it is not a strong overriding factor in the supremacy of section 1 of the 14th amendment in this area. With any kind of a close examination of the legislative history, there is no evidence whatever that a common law exclusion was intended in that amendment. Indeed, as the brief indicates, if anything, the purpose was to create a narrow exclusion that justified the disenfranchisement of those who had participated in the rebellion as such. It has a reconstruction intent behind that.

A further comment is that while there is some serious adverse authority which was alluded to by the previous witness, that was all decided under—at a time when the prevailing test to voting rights was what may be called the rational connection test rather than the compelling State interests and less drastic alternative test which makes us quite optimistic about the equal protection mandate requiring the striking down of blanket provisions which disenfranchise ex-felons as a class. Concededly, the matter has not been finally determined.

Mr. KASTENMEIER. Thank you for that clarification, Mr. Skoler.

The gentleman from Maine, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

Thank you for your testimony, Senator Dunne. I would share Congressman Railsback's sentiment that we appreciate your candor in discussing the political feasibility of granting voting rights to those incarcerated. I just want to stretch that a bit further, pertaining to your own philosophical viewpoint.

What about those who might be incarcerated for violating the election laws such as the Maine constitution might provide for bribery, fraud, those who are serving their time as such for violating election laws? Would you still think philosophically that those individuals ought to be granted the right to vote after having violated that specific law and having served their term for that offense?

Mr. DUNNE. I don't think there should be any blanket irretrievable prohibition against it. However, politically I don't think we in New York could ever get a bill through which would remove the restriction against people who had been convicted for election fraud.

Mr. COHEN. You were here when Mr. Buggs, who testified earlier——

Mr. DUNNE. Unfortunately, I was not, but——

Mr. COHEN. You were not. Let me go back and recapture some of what he was discussing. I assume from your brief and statement today that you are really approaching this problem on the basis of the moral right or civil right to vote being accorded to citizens who have been

convicted of crimes who now are free on parole or probation. Did your committee or the ABA do anything in the way of studying this from a racial point of view? There was testimony offered today in which the argument was advanced that we ought to extend this not only at the Federal level, namely, impose this rule upon States as far as Federal elections are concerned, but also impose it on States for State elections on the basis that if we determined that Congress or this committee finds sufficient factual information to determine that the States have these disenfranchising laws for the purpose of depriving racial minorities from exercising their franchise, that we could extend it to the States. And I was wondering, it seems from the general context of your statement that these laws were originally adopted long before we had the issue of civil rights, long before even black people were allowed to vote, and that this really stems from the penal or the previously adopted penal thoughts of a punitive nature, that we are going to punish these people by taking away all of their rights. I was wondering, if you came across any evidence whatsoever in your study or recommendations that would touch upon this from an ethnic or minority point of view? If you understand what I mean.

Mr. DUNNE. Yes, I certainly do. At least I think I do. Insofar as the American Bar Association study is concerned, it was not approached from a standpoint of whether these laws discriminated against any particular racial group, minority or majority. I would have to say, though, from my own experience in New York State, because of the obvious large majority of State prison inmates being from the two major ethnic or racial minorities, that our laws did have a substantial impact upon blacks and people of Spanish heritage.

Mr. COHEN. The question I am getting at is probably the chicken-and-egg type of philosophy, I guess, but on page 9 you say "The trend in penology is clear. The purpose of correction has shifted from one of blind retaliation." That seems to be the thrust of your statement. These laws were adopted at a time when we were talking about blind retaliation and now we are shifting to a different type of penology.

What I am getting at is I suppose the laws originally being enacted for punitive purposes may in their application have an impact upon racial minorities although they weren't originally adopted for that particular purpose.

Mr. DUNNE. Well, I would submit to you that most of the laws in New York State were enacted when the prisons were jam packed with Irishmen, so I don't think it was that.

Mr. COHEN. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. I want to thank you very much, Senator Dunne and Mr. Skoler and your other associate. This is beautiful testimony and it supports everything that we have been trying to do, and I just would ask this. Are you inclined to think that at the Federal level we should just wash out the restrictions on election fraud felonies because as you say so well, there have been very, very few, only 19 convictions in these 8 years, rather than try to detail it, and so on. Would you suggest that we just drop that?

Mr. DUNNE. Philosophically, Congressman, yes, but as I mentioned, and I wouldn't preempt your political judgment, I think it would make it extremely difficult and here once again, if I may be personal, having been one who has been disappointed time and time again in efforts, modest efforts, to pass legislation in this area, I am just convinced that we have to take it a step at a time and that perhaps to delete that restriction would imperil the prospects of passage of this important legislation.

Mr. DRINAN. Well, I wonder, in all the recommendations that you cite here so well, do they urge the inclusion or exclusion of election fraud felons?

Mr. DUNNE. My counsel advises me that some do, some don't, but there is no definite pattern.

Mr. DRINAN. My thought would be that if we were silent on it, I don't think people would raise it necessarily.

Well, your testimony is so good I really have nothing to add except this, that on the business of incarceration, this subcommittee was instrumental in getting a bill through that was made into law encouraging furloughs at Federal prisons. Would they in your judgment be able to vote? They are on furlough. They have to come back, and so on. I am not certain that this legislation precisely covers that.

Mr. DUNNE. If your bill is anything like our furlough bill that has a 7- or 8-day limitation on the extent of a furlough, I would say no, they would not be beneficiaries of this legislation.

Mr. DRINAN. Even though they happen to be home on election day. All I can say is that I am very grateful for this and I would appreciate you and your organization, the ABA, being in touch with us, and I just give you a blanket invitation, how can this legislation be improved. So thank you very much.

Mr. DUNNE. Thank you.

Mr. KASTENMEIER. The gentleman from Iowa, Mr. Mezvinsky.

Mr. MEZVINSKY. I want to add my thanks and then I really want to focus on the comments made by the Deputy Assistant Attorney General. Were you here when that testimony was given?

Mr. DUNNE. Yes, I was.

Mr. MEZVINSKY. Would you care to comment as to the arguments given by the Attorney General as to why we should delay taking action as a Congress? Would you care to add any of your comments in view of the American Bar Association position?

Mr. DUNNE. Only the general comment that I made in passing earlier in my remarks, that I feel as one who is a member of a coordinate equal branch of Government, I would urge you, too, to move forward. I am also a lawyer. I recognize the niceties of the law as well as the ethics of the legal profession, but I don't think it should be a bar at all to our proceeding directly.

Mr. MEZVINSKY. Now, the other point is that I was interested on page 4, when you cited the National Advisory Commission on Criminal Justice standards in pointing out that to a great extent the prisoner could find himself feeling that if he is able to participate in a system, it may have a very positive effect. Are you aware of case studies or

evidence that was done in that report to give justification for that? I personally think philosophically and subjectively that it makes sense but I would be interested whether there are any objective case studies or thoughts or psychological testing that has been done to justify that statement.

Mr. DUNNE. I don't know about any psychological testing in a formal sense but this aspect of a citizen's rights and participation in society is typical of studies which were made as part of this Commission's work and also reflects my own experience, that to put it in the vernacular, many people who come in contact with the law have been there because they haven't been a part of the action. They have been alienated in their eyes by society, perhaps many of them voluntarily alienated from society, but to suggest that there is any irrationality in restricting a person's coming back into society I think can do serious damage to some of the other more tangible efforts that we undertake to rehabilitate a person. So that is why I gave great weight to the psychological effect that participation in the system has in the whole area of rehabilitation. I can't add anything more to that except that the studies seem to come out with basically the same response. Give them a piece of the action. Let them participate.

Mr. MEZVINSKY. I buy that and I certainly thank you for it. Thank you.

Mr. KASTENMEIER. On behalf of the committee, Senator Dunne, I would like to express our appreciation to you and to your associates and the American Bar Association for the position you have taken today in support of H.R. 9020, and I hope that notwithstanding the *Ramirez* case, that this Congress in the very near future can move on this very important piece of legislation.

Thank you very much.

Mr. DUNNE. Thank you.

Mr. KASTENMEIER. This concludes this morning's hearings and we stand adjourned.

[Whereupon, at 12:15 p.m., the committee was adjourned.]

[The pamphlet referred to at p. 29 follows:]

AMERICAN
BAR
ASSOCIATION

NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS

A Project of the
ABA Commission
on Correctional
Facilities
and Services
and Criminal
Law Section

What is the National Clearinghouse on Offender Employment Restrictions?

The National Clearinghouse on Offender Employment Restrictions is a project to gather and disseminate information relating to the removal or modification of unreasonable restrictions on employment opportunities for ex-offenders, and to provide information on significant offender employment programs. It is sponsored jointly by the American Bar Association's Commission on Correctional Facilities and Services and its Criminal Law Section, and funded by the Manpower Administration of the United States Department of Labor.

What are offender employment restrictions?

Employment restrictions are those laws, court decisions, policies, regulations, and practices that prevent or limit a former offender's employment opportunities. These restrictions are reflected in situations such as an offender's inability, because of his record, to obtain a bond which is required for a job; his inability to engage in a trade, profession, or occupation because of a government agency's refusal or failure to issue him a license without regard to whether the offense he committed relates to the qualifications for the license sought; public (government) and private employers barring former offenders from jobs because of law, regulation, practice, or tradition; and civil disabilities affecting employment.

Why should these restrictions be removed or modified?

Two of every three released offenders return to prison within five years. This recidivism—repetition of crime by an individual—often results from an inability to get a job because of restrictions on employment opportunities for ex-offenders. The removal or modification of unreasonable barriers is, therefore, necessary to help to reduce recidivism—and thereby help reduce crime—by expanding employment opportunities for offenders.

How can restrictions be removed and employment opportunities for ex-offenders be expanded?

The following are examples of action that can be taken:

- Employers—both public and private—can review their employment practices to determine whether they arbitrarily deny employment to rehabilitated ex-offenders.
- Licensing authorities, legislators, bar committees, and citizen groups can examine licensing laws and practices to see if ex-offenders have a reasonable opportunity to obtain a license when one is required for employment.
- Job qualifications and educational requirements can be reviewed to determine whether the requirements for a job exclude certain applicants because the qualifications or educational requirements are higher than those actually required for the position.
- When an ex-offender is unable to obtain a bond required for a job, the state employment service can be contacted to obtain a bond under a program instituted by the U.S. Department of Labor for such individuals.

- Employers, business associations, labor unions, and other organizations can sponsor training programs to upgrade the unskilled and semi-skilled in order to assist the majority of released prisoners who have little or no training in job skills and are, therefore, limited in the jobs they can presently seek.
- Pre-trial intervention projects can be instituted to divert the offender who has had minimal contact with the criminal process from the corrections systems into a program offering manpower training and counseling services.
- Lawyers, other professionals, and aware citizens can act as voluntary aides to probation, parole, and other correctional agencies to assist the offender in his rehabilitation, including personalized help in preparing for and obtaining jobs.

What information or assistance can the Clearinghouse on Offender Employment Restrictions provide?

The Clearinghouse is available to provide technical assistance to legislators and other persons interested in developing remedial legislation or otherwise attacking the problem. It has also prepared several publications to assist in the removal of employment restrictions and to provide information on manpower programs for offenders. These include:

- A handbook on "Removing Offender Employment Restrictions." A technical guide for bar committees, legislators, and other interested persons, this handbook contains such examples as legislative models for removing barriers to employment opportunities for ex-offenders.

- A resource handbook containing a description of various programs developed by the Department of Labor and other agencies and groups to assist the former offender in productive training and work placement. It lists select publications which the reader can obtain for more information about offender programs.
- A pamphlet on "Expanding Government Job Opportunities for Ex-Offenders." This publication summarizes the state laws restricting the public employment of former offenders and contains recommendations for their modification.
- A newsletter, "The Offender Employment Review," reporting on current developments in programs, studies, laws, and court decisions dealing with offender employment matters.
- A soon-to-be released publication cataloguing restrictions on ex-offenders seeking professional, trade or occupational licenses.

How can one obtain a copy of the information that was just mentioned?

Individuals and groups who are interested in obtaining copies of these and future publications should contact:
The National Clearinghouse on
Offender Employment Restrictions
1705 DeSales Street, N.W.
Washington, D.C. 20036

Advisory Committee National Clearinghouse on Offender Employment Restrictions

Members of the twelve-man advisory committee, which provides policy guidance to the Clearinghouse project, are:

Carl M. Loeb, Jr., New York, New York, *President, National Council on Crime and Delinquency, and Limited Partner of Loeb Rhoades, Co. Mr. Loeb is also Chairman of the Advisory Committee.*

Myrl E. Alexander, Carbondale, Ill., *Director of the Center for the Study of Crime, Delinquency and Corrections, Southern Illinois University.*

James V. Bennett, Washington, D.C., *former Director, U.S. Bureau of Prisons.*

Brian D. Forrow, New York, New York, *Vice-President and General Counsel, Allied Chemical Corporation.*

William D. Leeke, Columbia, S.C., *Director, South Carolina Department of Corrections.*

Herbert S. Miller, Washington, D.C., *Deputy Director, Institute of Criminal Law and Procedure, Georgetown University Law Center.*

Leonard Nord, Seattle, Washington, *Director, Washington State Department of Personnel.*

Nick Pappas, Washington, D.C., *Law Enforcement Specialist, Law Enforcement Assistance Administration, U.S. Department of Justice.*

Boyd E. Payton, Philadelphia, Pa., *Associate Regional Manpower Administrator for Pennsylvania, U.S. Department of Labor.*

Leo Perlis, Washington, D.C., *National Director, AFL-CIO Community Services.*

Melvin Rivers, New York, New York, *President, The Fortune Society.*

Howard Rosen, Washington, D.C., *Director, Office of Research and Development Manpower Administration, U.S. Department of Labor.*

The National Clearinghouse on Offender Employment Restrictions
1705 DeSales Street, N.W.
Washington, D.C. 20036

[The document referred to at page 45 follows:]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE

CHESTERFIELD SMITH, President
RICHARD J. HUGHES
DANIEL L. SKOLER
MELVIN T. AXILBUND
RICHARD C. HAND
PAUL F. ATTAGUILE
RALPH H. LOEWENSTEIN

American Bar Association
1155 E. 60th Street
Chicago, Illinois

Attorneys for Amicus Curiae

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-5537

30-558 O - 74 - 4

INDEX

TABLE OF AUTHORITIES

Cases:

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE

INTEREST OF AMICUS

The American Bar Association is a national organization of the legal profession. It has more than 155,000 members from all states and has for some years maintained an active interest in criminal justice improvement. One of its recent and more ambitious undertakings in this area has been the Project on Minimum Standards for Criminal Justice.

In 1970, the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services to address its growing interest in and commitment to the correctional phase of criminal justice administration. The Commission has undertaken a program to stimulate broadscale improvement in all aspects – legal and operational – of the nation's systems for correction and rehabilitation of criminal offenders. Among the Commission's several action projects is a Resource Center for Correctional Law and Legal Services concerned, among other things, with analysis and resolution of the growing number of legal and constitutional issues being raised in connection with the operation of correctional programs and systems. Focusing on the demands of both law and sound correctional practice, the Commission is anxious to contribute to full consideration of legal questions which bear significantly on the effectiveness and fairness of our correctional apparatus.

Sharing these interests are other major components of the American Bar Association, including the Young Lawyers Section and the Section of Individual Rights and Responsibilities. They join the Commission in submitting this brief on behalf of the Association to aid the Court in resolving the issues before it.*

SUMMARY OF ARGUMENT

This case presents difficult questions about the application of current Constitutional standards to state laws which restrict the fundamental right to vote. The Court is being

---

* The Association has filed with the clerk of the Court letters from counsel for both parties consenting to the submission of this amicus curiae brief.

asked to determine whether the Supreme Court of California was correct when it found that provisions of the State Constitution disenfranchising persons convicted of "infamous crimes" or "high crimes" were in violation of the Equal Protection Clause of the Fourteenth Amendment, as applied to former felons whose sentences and periods of parole had expired.

While there is broad recognition today of the desirability of restoring rehabilitated offenders to the normal rights and privileges of citizens, including the right to vote, this case deals only with the Constitutional dimension of that goal, *i.e.*, the extent to which the Federal Constitution will tolerate disenfranchisement of former offenders who have rejoined the general class of citizens, and how established tests under the Equal Protection Clause for justification of voting restrictions apply to this class of citizens.

The issues are complicated by (i) special language in the Fourteenth Amendment which may warrant different treatment of the ex-offender class than groups affected by other kinds of voter eligibility requirements, and (ii) recent offender disenfranchisement cases, affirmed without opinion by this Court, which suggest that a separate standard or frame of reference may exist for measurement of ex-felon voting exclusions against Fourteenth Amendment guarantees. Only restrictions on the voting rights of discharged ex-felons are under review in this case, and not those of convicted persons still serving sentences, whether in prison or under parole, probation or other correctional supervision.

In the view of amicus, the judgment of the court below was correct. Because the right to vote is central in our representative government system, this Court has enunciated exacting tests for determining whether state classifications

which deny the franchise to certain groups of citizens and not others contravene the Equal Protection Clause. Briefly, these require the identification of a "compelling state interest" behind the exclusion and a determination that the exclusion is a necessary and not unduly burdensome method, among available alternatives, for adequately protecting that interest.

Amicus contends, first, that these tests presumptively are and should be applicable to classifications which deny ex-felons the right to vote. Whatever special considerations may exist for felons still under sentence, both the Constitutional priority for protection of voting rights and the language of the Equal Protection Clause warrant no exception for discharged ex-offender citizens.

Given the legitimacy of applying these Equal Protection standards, it appears clear that blanket restrictions disenfranchising all former felons are neither "necessary" nor "non-burdensome" methods of insuring the state's compelling interest in preservation of the integrity of the electoral process and the representative government framework of which it is an integral part. Indeed, in light of the current character of our election systems, contemporary balloting and voter registration machinery, and penal sanctions available for unlawful interference with the electoral and governmental processes, blanket disenfranchisement for felony violations would have difficulty meeting the "rational relationship" test which previously applied (*i.e.*, up to 1969) in determining the Constitutional appropriateness of voting restrictions. In asserting this infirmity for broad "felony", "high crime", "infamous crime" disqualifications, amicus expresses no judgment on whether laws disenfranchising ex-offenders for specific enumerated crimes related to the electoral or governmental process (*e.g.*, vote fraud,

bribery of officials, violence against or intimidation of candidates) would be Constitutional.

It has been asserted that ex-felon disenfranchisement may stand on a different Constitutional footing than other voter restrictions by virtue of special language in Section 2 of the Fourteenth Amendment. Section 2 reduces the basis of Congressional representation in states which deny the right to vote to male citizens "except for participation in rebellion, or other crime". The argument is that Section 1 (equal protection) could not have been intended to outlaw a discrimination which Section 2 (reduced representation penalty) expressly allows. This reasoning seems unsupported by either the language of the exception or its limited legislative history.

The legislative history of this Reconstruction measure offers no substantiation of an intent to establish a traditional felon disenfranchisement qualification in Section 2. If anything, it suggests a desire to validate disenfranchisement of those who participated in the rebellion or in related disloyal or seditious conduct. The phrase "or other crime", if literally interpreted to preclude Equal Protection scrutiny, would permit the untenable conclusion that a state could Constitutionally disenfranchise individuals even for such minor criminal misbehavior as traffic violations, petty gambling, etc. This Court cannot avoid interpretation of the "other crime" exception and should do so, in amicus' view, (i) in terms of the disloyal behavior rationale that seemed to motivate the phrase's coupling with "participation in rebellion" and (ii) without precluding Equal Protection examination of state ex-offender disenfranchisement laws.

6

Finally, the Court will need to consider its recent memorandum affirmances of disenfranchisement measures in North Carolina and Florida which were broadly applicable to felons, and Petitioner's assertion (grounded in *Green v. Board of Elections*) that the propriety of excluding felons from the franchise has been frequently articulated by this Court "as an example of what states may properly do". While the Florida and North Carolina decisions do indeed suggest an immunity from current Equal Protection standards for felon disenfranchisement, they should not be considered controlling. They did not involve full and reasoned analysis by this Court, and are distinguishable from the instant case. (One involved an incarcerated felon and the other applied the "rational relationship" test). The assertion that this Court has assumed the Constitutional legitimacy of offender disenfranchisement in numerous opinions is not well founded, since it is based on dicta and factual situations which are not pertinent to or consistent with today's tests of the Constitutional legitimacy of voter restriction measures.

For the Court to affirm a Fourteenth Amendment prohibition against blanket ex-felon disenfranchisement measures will do no harm to state interests in effective correctional administration. Such disenfranchisement cannot be shown to serve any significant rehabilitative purpose. Indeed, it has been the near unanimous position of correctional administrators, study commissions, law reform codes, and students of penology that restoration of offender civil rights serves the commitment to offender rehabilitation and reintegration that is now a basic tenet of every state correctional system.

ARGUMENT

I. CALIFORNIA'S DISENFRANCHISEMENT OF FORMER FELONS IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST AND THEREFORE DENIES EQUAL PROTECTION OF THE LAWS

There is no right more basic to our democratic form of government than the right to vote. Indeed, this Court has recognized that voting is perhaps the one right most fundamental to our system.[1] "Other rights, even the most basic, are illusory if the right to vote is undermined". *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). Because the provisions of California law challenged herein[2] deprive a class of

---

[1] The fundamental nature of the right to vote has been expressed by the Court in numerous voting cases. *Dunn v. Blumstein,* 405 U.S. 330 (1972) (invalidating Tennessee's one year residency requirement); *Bullock v. Carter,* 405 U.S. 134 (1972) (invalidating a Texas primary filing fee system); *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970) (provision limiting the vote on city general obligation bonds to landowners held unconstitutional); *Evans v. Cornman,* 398 U.S. 419 (1970) (invalidating a regulation limiting the vote on local revenue bonds to property taxpayers); *Kramer v. Union Free School District,* 395 U.S. 621 (1969) (regulation limiting voting in school board elections to property owners, parents of school children and those leasing property in school district held unconstitutional); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966) (invalidating poll tax); *Carrington v. Rash,* 380 U.S. 89 (1965) (restriction of voting privilege of certain military personnel held unconstitutional). *See also* the reapportionment cases, *Reynolds v. Sims,* 377 U.S. 533 (1964), and *Baker v. Carr,* 369 U.S. 186 (1962).

[2] California Constitution, Art. II, Section 3 and Art. XX, Sec. 11 with implementing legislation. These sections, respectively, mandate legislation to exclude persons convicted of "infamous crimes" or "high crimes" from the franchise. The exclusion also applies to

(continued)

citizens of this most fundamental of rights, their operation must withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

In *Dunn v. Blumstein,* 405 U.S. 330, 337 (1972), this Court set forth the standard of review to be applied under the Fourteenth Amendment when testing the validity of state-imposed voting restrictions:

> ". . . if a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."

In enunciating this stringent test for reviewing voter classifications in *Dunn,* the Court went beyond the then existing standard which required the showing of a "rational relationship" between the classification and a legitimate

---

2 (continued) certain enumerated offenses, *e.g.,* misappropriation of public money, bribery, malfeasance in office, but the basic felony (infamous/high crime) exclusion is at issue in this case since the crimes of all individual respondents fell in this classification (*i.e.* robbery, burglary, drug use) and the class action was brought on behalf of disenfranchised felons generally. In *Otsuka v. Hite,* 64 Cal. 2d 596, 414 P.2d 412 (1966), the California Supreme Court construed the foregoing provisions as requiring an inquiry into the nature of the crime and, on that basis, determining whether the offender "may be reasonably deemed to constitute a threat to the integrity of the elective process." There was no attempt to delimit the meaning of "high crimes" or "infamous crimes" to specific felonies. The same court found this limitation of the disenfranchisement provisions inadequate under new equal protection standards and, in substance, reversed the *Otsuka* decision in the case at bar.

state purpose.[3] In so doing, it was following the logical course charted by previous cases dealing with the election process in general and voting in particular.[4]

The concept that a state no longer may invoke even a "compelling interest" to limit the right to vote without examining the necessity of the method used, was earlier established in *Kramer v. Union Free School District,* 395 U.S. 621 (1969):

> "For assuming, arguendo, that New York legitimately might limit the franchise in these school district elections to those 'primarily interested in school affairs', close scrutiny of the §2021 classification demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise . . . In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal." *Id.* at 632.

---

[3] See *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), wherein the Court upheld a North Carolina literacy test because it found a relationship between the test and the state's interest in promotion of the intelligent use of the ballot. See also *Breedlove v. Suttles,* 302 U.S. 277 (1937), overruled by *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); and *Pope v. Williams,* 193 U.S. 621 (1904).

[4] See n. 1, *supra.* See generally, *Developments in the Law – Equal Protection,* 82 Harv. L. Rev. 1065 (1969).

Dunn, which involved a Tennessee statute that required an eligible voter to be a state resident for one year or a county resident for 90 days, simply adopted, then, the *Kramer* standards of "necessity" and of statutory "precision" for the questioned classification. Significantly, *Dunn* also held that where fundamental rights are involved, states should pursue less rather than more burdensome ways of protecting the government interests involved.[5] It is against this exacting equal protection standard that the California Supreme Court in this case measured that State's constitutional and legislative prohibitions authorizing disenfranchising of former felons.

Petitioner, and the cases upon which she relies,[6] argue that restricting the right of former offenders to vote is necessary, as it must be under *Dunn,* in order to maintain the integrity of the electoral process. Apart from assertion of the historic exclusion of felons from the franchise under old "civil death" concepts, substantive justification seems to turn on the reasonableness of the state's judgment that

---

[5] 405 U.S. 330, 343 (1972). The Dunn Court in discussing less restrictive alternatives, indicated that "Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared." *Id.* at 353.

[6] *Fincher v. Scott,* 352 F.Supp. 117 (M.D.N.C. 1972) *aff'd mem.* 411 U.S. 961 (1973); *Kronlund v. Honstein,* 327 F.Supp. 71 (N.D. Ga. 1971); *Beacham v. Braterman,* 300 F.Supp. 182 (S.D. Fla. 1969), *aff'd mem.,* 396 U.S. 12 (1969); *Green v. Board of Elections of the City of New York,* 380 F.2d 445 (2d Cir. 1967), *cert. den.,* 389 U.S. 1048 (1968); all applying the "rational relationship" test rather than the more exacting "necessary to a compelling interest" test enunciated in *Dunn v. Blumstein, supra,* and *Kramer v. Union Free School District, supra.*

perpetrators of serious offenses, given the heavy incidence of recidivism and organized crime now prevalent, should not be in the position to vote for public officials. Such voting is said to be particularly harmful with respect to officials such as legislators, judges, and prosecutors who will make or enforce the very laws under which the ex-felon's subsequent crimes may be tried. See *Green v. Board of Elections,* 380 F.2d 445 (1967), *cert. den.,* 398 U.S. 1048 (1968).[6.5] Furthermore, in the words of the Petitioner, if former offenders were permitted to vote:

> ". . . California would be in precisely the position of allowing ex-felons to vote for and conceivably be elected, if otherwise qualified, to the office of legislator, sheriff, district attorney, or judge. This situation would be intolerable." Petitioner's Brief at 10.

This potential harm from ex-offender enfranchisement is asserted because, under California legislation, a person can run for and be elected to any office for which he is an eligible voter.[7]

Several presumptions are implicit in the foregoing assertions. First is the presumption that former offenders as a group make poor or illegally motivated voters, and, as voters, would have a significant impact on the election results for legislators, judges, and prosecutors; second, that they are more likely candidates for commission of election

---

6.5 But see E. du Fresne and W. du Fresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges:" Beyond Green v. Board of Elections of New York City,* 19 DePaul L. Rev. 112 (1969).

7 Cal. Govt. Code §275 (West 1966).

fraud offenses; and, third, that released offenders, if elected to office, would make untrustworthy public servants. As to the last, the question of disqualification of former felons to hold public office is an issue distinct from the voting rights question presented in this case. The State of California is not without means to provide separate standards and eligibility requirements as to the rights of ex-offenders to hold public office. While these too may be called to pass Constitutional muster, it is quite possible that different standards, methods, and results would emerge in balancing state and citizen interests.

As to the other justifications, no empirical evidence has been shown, nor indeed can it be, that "catch alls" embracing the wide variety of offender types and behaviors embraced in "felon" or "infamous crime" classifications are necessary or, indeed, reasonably calculated to forestall against the propensity of some offenders to abuse the franchise or recidivate to illegal acts which undermine the governmental process. Although these concerns seem to pertain to protection of the "purity of the ballot box," the 9th Circuit in *Dillenburg v. Kramer,* 469 F.2d 1222, 1224-25 (1972), has, like the Supreme Court of California, expressed its difficulty in discerning the nature of the interest served:

> ". . . Search for modern reasons to sustain the old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process (*e.g.*, Green v. Board of Elections of City of New York (2d Cir. 1967) 380 F.2d 445, 451, cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840)

> or a quasi-metaphysical invocation that the interest is preservation of the "purity of the ballot box". (*E.g.*, Washington v. State (1884) 75 Ala. 582, the venerable sire of abundant progeny; *cf.* Kronlund v. Honstein (N.D. Ga. 1971) 327 F.Supp. 71, 73.)
>
> "Few decisions have penetrated the disenfranchisement classification to ascertain whether the offenses that restrict or destroy voting rights have anything to do with the integrity of the electoral process or whether there is any constitutionally valid distinction between the class of offenses that disenfranchise and the class of offenses that do not. When the facade of the classification has been pierced, the disenfranchising laws have fared ill. (*E.g.*, Stephens v. Yeomans, D.N.J. 3-judge court 1970) 327 F.Supp. 1182; Otsuka v. Hite, (1966) 64 Cal. 2d 596, 51 Cal. Rptr. 284, 414 P.2d 412)."

Nor is it Respondent's burden to rebut these presumptions. This Court, in dealing with statutory presumptions in the past, has indicated that governmental authority imposing the presumption must establish its validity by showing that "the presumed fact is more likely to flow from the proved fact on which it is made to depend". *Leary v. United States,* 395 U.S. 6, 36 (1969). Yet, Petitioner has failed to establish, by empirical proof or otherwise, any rational connection between the fact of felony conviction and commission of election fraud or other crimes destructive of the governmental process. Rather, the presumption that former felons will be likely candidates for

election offenses punishes the ex-offender in advance, without credible evidence to support such probability.

Further, even assuming that a correlation between conviction and election crimes could be shown, states have at their disposal "less drastic means" than disenfranchisement of all felons to protect their interests. Virtually every state has a variety of criminal statutes dealing with election code offenses. As the California Supreme Court has stated in this case, "the voting and counting process is now thoroughly hemmed in by control mechanisms at every stage so that deliberate irregularities, if present today, are rare and have negligible effects on election results . . ." *Ramirez v. Brown,* 9 Cal.3d 199, 215 (1973). The California Court also observed:

> "In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squad of computer technicians." *Id.* at 214.

Finally, the proffered explanations for disenfranchisement fail to account for (i) the absence of former felon disenfranchisement provisions in many states, (ii) the ability of states to impose as severe and comprehensive a set of criminal snactions as may be desired to protect against damage to or corruption of the electoral or political process, and (iii) the existence in several states of election code provisions, which are misdemeanors

and which do not impose the consequence of disenfranchisement.[8] These alternatives, already employed by states no less concerned than California with safeguarding their electoral processes, suggest that viable and less drastic means do indeed exist for protecting state interests.

The classification involved in the instant case is devoid of relationship to the crime or public dangers protected against. Neither is it based on any qualities of the offender; rather, "it rests solely on the nature of the punishment that can be given for an offense". *Dillenburg v. Kramer, supra,* at 1225. Therefore, it cannot be said that the state has tailored its classification with sufficient precision to meet the exacting standard of the Equal Protection Clause. Just as "wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process", *Harper v. Virginia Board of Elections,* 383 U.S. 663, 667 (1966), neither can the fact of prior felony conviction, standing alone, be justified as a total bar to the exercise of this most fundamental right.

---

[8] *See, e.g.,* Wash. Rev. Code §29.85.050 (fraudulently misleading voters in marking ballots); Wash. Rev. Code §29.85.060 (voter coercion by election official); Wash. Rev. Code §29.85.020 (tampering with ballots by election officer), cited in *Dillenburg v. Kramer,* 469 F.2d 1222, n. 6 (1972). Indeed, this is true in California itself where ". . . at least 60 additional acts are punished as misdemeanors in 40 separate sections." *Ramirez v. Brown, supra* at 215.

II. SECTION 2 OF THE FOURTEENTH AMENDMENT IS NOT AN INDEPENDENT GRANT OF AUTHORITY TO STATES TO DISENFRANCHISE FORMER OFFENDERS

Although a blanket prohibition on voting by ex-offenders should fail under the Equal Protection Clause, both the Petitioner[9] and the State of California[10] argue that Section 2 of the Fourteenth Amendment expressly reserves to states the power to withhold the franchise from former offenders. Section 2 provides in pertinent part:

> ". . . But when the right to vote is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced . . ." (Emphasis added)

A. Neither the language of Section 2 nor its legislative history support the view that it was meant to establish a discrimination not susceptible to equal protection scrutiny

The proviso "except for participation in rebellion, or other crime" is part of a general penalty clause and must be read in that context. Section 2 penalizes, by reduced representation in the House of Representatives, states which deny the vote to eligible persons. It also provides that states which deny the vote to persons who have participated

---

[9] Petitioner's Brief at 20.

[10] Brief of State of California as *Amicus Curiae* at 13.

in "rebellion, or other crime" will not be so penalized. Only by reading into Section 2 an intent not evident from the words themselves may one conclude that states are affirmatively authorized to exclude former offenders from exercising the franchise.

To accord the phrase "or other crime" the meaning ascribed by Petitioner would suggest that states might deny the vote to individuals convicted of such misdemeanors as traffic offenses, trespass and littering ordinances, minor vandalism and similar infractions. (Unlike the Fifth Amendment reference to "infamous crimes", the Section 2 reference to "other crime" is not in any way limited.)[11] Such reasoning, of course, would produce an overbroad and irrational result. This result can be avoided but it makes clear the need to go beyond a literal reading of the "other crime" phraseology as an affirmative authorization.

Even if this Court were to conclude that Section 2 is an affirmative grant of authority to exclude criminals from the franchise, rather than an exception from a penalty provision, the issue of extent and duration of such disenfranchisement would remain. Where different sections of a constitutional provision are enacted contemporaneously, as with Sections 1 and 2 of the Fourteenth Amendment, the favored course is to interpret such provisions so that they may be read together harmoniously and without giving such force to one that it excludes the other.[12] In the instant case, such a reading is not only possible, but it produces, in the view of amicus, a more logical and

---

[11] Black's *Law Dictionary* 444 (4th ed. 1951). In technical usage, the general term "crime" includes misdemeanors.

[12] 16 Am. Jur.2d *Constitutional Law* §§66, 67, 76 (1964) and cases cited therein.

Constitutionally secure result. This course was followed in *Stephens v. Yeomans,* 327 F.Supp. 1182 (D.N.J. 1970). There the court found (at p. 1186):

> ". . . [The phrase "participation in rebellion or other crime] is an express exception or proviso in section 2, which in its general terms imposes a penalty on those states which disenfranchised for reasons other than rebellion or crime. Since it is now clear that the entire section 2 imposes no limitation on section 1, it can hardly be argued that the exception or proviso in section 2 was intended to impose such a limitation. We conclude, therefore, that the New Jersey statute which disenfranchises plaintiff must be judged by the exacting equal protection standards laid down by the Supreme Court in the voter disqualification cases referred to hereinabove."

Put to that test, disenfranchisement of persons guilty of minor violations, or the continuance of a valid disenfranchisement beyond the full term of a felon's sentence, should fail. It is difficult to regard this as anything but an unnecessarily drastic means of protecting a compelling state interest, even under the old "rational relationship" test.

The full intent of Section 2 is not revealed from its language and resort to legislative history is therefore necessary. The historical record on enactment of the Fourteenth Amendment shows that early drafts of Section 2 contained no language concerning exceptions to the penalty for a state's disenfranchisement of qualified voters. Such drafts

initially imposed the penalty only with respect to denial of the vote on grounds of race or color. When the Amendment was later broadened to impose the penalty on states which abridged the franchise on any grounds, the exception relating to participation in rebellion was added. Nowhere is there clear indication of what the words "or other crime" were to mean. Indeed, the only indicator is the common practice at the time, by the drafters and others, to equate "crime" with misconduct which might reasonably be expected of Confederates in the wake of defeat by the North. This explains why the phrase "or other crime" follows close on the heels of the word "rebellion."

> "Furthermore, the crucial words 'or other crimes' are utterly devoid of independent legislative intent, and take on historical meaning only as part of the phrase 'participation in rebellion, or other crime.' Proposed § 2 (H.R. 51, 39th Cong., Sess. (1866)) was sent to a Joint Committee with the phrase 'participation in rebellion.' *CONG. GLOBE,* 39th Cong., 1st Sess. 1289 (1866). It is clear that the thrust of this language was to limit governmental activity by former rebels. *See* H.R. Rep. 30, 39th Cong., 1st Sess. 14, 15 (1866). The final version of the bill (H.R. 127, 39th Cong., 1st Sess. (1866)), however, was reported out six weeks later with the language 'or other crime' tacked on. There is no apparent legislative intent for this addition, and it makes sense only as giving the states a broader weapon to use against former Confederates." [13]

---

[13] Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments,* 11 Am. Cr. L. Rev. 720, 746 n. 158 (1973).

It seems, therefore, that the operative intent, if any, in use of the phrase "other crime" was to validate disenfranchisement of Confederate officials and sympathizers for a variety of offenses and outlawed political activities related to the rebellion, *i.e.* violations which the phrase "participation in rebellion" might not technically encompass. An interpretation of this kind would comport with the recognized "ejusdim generis" concept under which general words and phrases ("or other crime") following words of specific meaning ("rebellion") are not construed in their widest extent but rather within the same general class or category as the specific reference.

B. Prior judicial interpretations of the effect of section 2 on offender voting restrictions were not well reasoned, are distinguishable from this case, and should not be deemed binding.

The assertion that Section 2 may be read to exclude former offenders from the right to vote is not without precedent. The cases on which Petitioner relies generally support this interpretation and two of them have been affirmed by this Court in response to its obligatory appellate jurisdiction.[14] *Fincher v. Scott,* 352 F.Supp. 117 (M.D.N.C. 1972), *aff'd mem.,* 411 U.S. 961 (1973), and *Beacham v. Braterman,* 300 F.Supp. 182 (S.D. Ga. 1969), *aff'd mem.,* 396 U.S. 12 (1969).

---

14 "A summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance. (Frankfurter & Landis, 'The Business of the Supreme Court at October Term 1929' (1930) 44 Harv.L.Rev. 1, 14. *See also* Serrano v. Priest (1971) 5 Cal.3d 584, 616-617, 96 Cal.Rptr. 601, 624, 487 P.2d 1241.)" *Dillenburg v. Kramer, supra* at 1225.

In *Fincher,* North Carolina's constitutional and statutory provisions disenfranchising prisoners were upheld. The lower court found that Section 1 of the Fourteenth Amendment must be read in light of Section 2 which "expressly allows the exclusion of felons from the franchise." See also, *Green v. Board of Elections, supra,* and *Beacham v. Braterman, supra.*

However, well reasoned and contrary authority exists, whose analysis of current equal protection standards and the realities of ex-felon/electoral system relationships have not been adequately answered. See the decision of the California Supreme Court in this case, *Ramirez v. Brown, supra; Stephens v. Yeomans,* 327 F.Supp. 1182 (D.N.J. 1970); *Dillenburg v. Kramer, supra.*

Initially, it should be noted that neither *Fincher* or *Beacham,* nor *Green* (which appears to be the intellectual wellspring of the other cases) received plenary consideration by this Court. Thus, they may be regarded as having "little precedential significance," *Dillenburg v. Kramer, supra* at 1225. Further, none of these cases, as well as others relied on by Petitioner, is as broad as Petitioner asserts. *Fincher* dealt only with the right to vote of an incarcerated felon,[15] whereas the present case involves the voting rights of persons who have completed their sentence, whether on probation or in confinement and subsequently on parole. Insofar as it examined disenfranchisement directly, rather than the more extensively discussed pardon power of the Florida Governor, *Beacham* cited and relied

---

[15] Jurisdictional Statement, *Fincher v. Scott, supra* at 6, 7, 18, 20. Conversation with Norman B. Smith, counsel for Fincher, December 17, 1973.

only on *Green.* Similarly, *Green* is distinguishable from the instant case. First, and most significantly, it relied on the rational relationship test which no longer suffices to justify voting restrictions imposed on special classes or groups of citizens. Further, the precise question before the Second Circuit was procedural, concerning the criteria for convening a three-judge court to determine the constitutionality of certain New York disenfranchisement statutes. Moreover, the plaintiff in *Green* had been convicted of the type of offense which, a century earlier, would have been characterized as rebellious or seditious behavior under Section 2.

Beyond these differences, examination reveals that the lower court opinions in these cases offer little analysis as to why their reading of Section 2 was proper. Indeed, such analysis reveals that there are alternative readings which achieve a fair and just result, and which comport with the rules of Constitutional construction.

In *Fincher v. Scott, supra,* the cursory treatment accorded Section 2 may be laid to that Court's willingness to accept, at face value, the meaning given to the proviso "except for participation in rebellion, or other crime" almost ninety-nine years earlier in *United States v. Anthony,* 24 Fed. Cas. No. 14,459, p. 829 (C.C.N.D.N.Y. 1873) (criminal proceeding involving the defense of an asserted Constitutional right to vote for women citizens). However, in *Anthony,* the court discussed the meaning of Section 2 in even more summary fashion than *Fincher,* using it only to demonstrate that the Section assumed the right of states to deny the vote to certain classes of citizens:

> "This view is *assumed* in the second section of the fourteenth amendment which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section *assume* that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby *conceded* to the states as a state's right." *United States v. Anthony, supra* at 831. (Emphasis added)

Likewise, in *Green v. Board of Elections, supra,* analysis of Section 2 is absent.

In sum, the exact meaning of the proviso in question has never been considered by the courts which purported to construe its meaning. Rather, the exclusionary interpretation was assumed without the scrutiny of legislative history and contextual significance merited by an issue of this magnitude.

III. ACTIONS TAKEN BY THOSE CONCERNED WITH CRIMINAL JUSTICE, RECENT STATE LEGISLATIVE ACTIVITY, AND POSITIONS ADOPTED BY GROUPS CONCERNED WITH THE ELECTORAL PROCESS, CONFIRM THAT THERE IS NO JUSTIFICATION FOR DENYING FORMER FELONS THEIR FUNDAMENTAL RIGHT TO VOTE

The Constitution is a living document that, historically, has enabled this Court to maintain a proper balance between fundamental changes in our society and its institutions, and traditional legal concepts. Nowhere has this flexibility been more consistently demonstrated than in the context of voting rights.

> ". . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . Notions of what constitutes equal treatment for purposes of the Equal Protection clause do change." *Harper v. Virginia Board of Elections, supra* at 669.

Thus, when faced with state classifications that seek to disenfranchise selected groups of citizens, it becomes crucial that this Court examine the rationale behind the exclusion, and whether the rationale retains validity in modern society.

In its origins, penology stressed the need to impose severe physical penalties on lawbreakers. Severe penalties were deemed necessary for society to achieve retribution for the wrongful act and to deter others from committing

similar offenses.[16] So also was the imposition of various civil disabilities, collectively known as "civil death" provisions, thought to be an effective means of punishment.

These theories of crime and punishment were carried over to this country with the colonists, and although our Constitution prohibited certain of the more drastic penalties for commission of crime,[17] the penalty of "civil death" persisted. The penal philosophy which gave life to such onerous sanctions remained virtually unchallenged until the last half of the nineteenth century when a meeting of the National Congress on Penitentiary and Reformatory Discipline (now the American Correctional Association) adopted an historic Declaration of Principles. It was asserted among other things that:

> "The supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering."[18]

---

16 ". . . The early penal systems were designed for two purposes – to exact vengeance on wrongdoers and to deter other potential offenders. With those objectives, the penalties had to be brutal and they had to be widely observed, the only limiting factor being the tolerance of the community." Babington, *The Power to Silence,* 164 (1968).

17 See, Art. III, §3 of the United States Constitution (specifically prohibiting forfeiture and corruption of blood except during the life of a person convicted of treason), and the Eighth Amendment (prohibiting infliction of punishments which are "cruel and unusual").

18 Art. III of the Declaration of Principles (1870), reprinted American Bar Association and Council of State Governments, *Compendium of Model Correctional Legislation and Standards,* X-65 (1972).

26

Gradually, increasingly numbers of experts and administrators in the field of corrections have embraced this policy as the most promising means of dealing with crime and reducing recidivism.[19] Today such acceptance is almost universal. The underlying philosophy has also been endorsed by the nation's highest elected officials:

> "Locking a convict up is not enough. We must also offer him the keys of education, of rehabilitation, of useful training, of hope – the keys he must have to open the gates to a life of freedom and dignity."[20]

The emphasis of our nation's correctional programs likewise reflects the view that, while punishment may be a necessary evil of the correctional process, the goal of rehabilitation of offenders should be paramount. The wide range of programs and methods of treatment now flourishing either within, or as an adjunct to, the correctional process, bears witness to this view. Although problems of implementation and inadequate resources are quite real, vocational training, counselling, and treatment for alcohol and drug addiction are today considered an integral part of the prison regimen. Similarly, increased reliance on community correctional programs such as halfway houses, work release programs and probation and parole signals a

---

19 ". . . The ultimate goal of corrections under any theory is to make the community safer by reducing the incidence of crime. Rehabilitation of offenders to prevent their return to crime is in general the most promising way to achieve this end." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections,* 16 (1967).

20 Remarks of President Richard M. Nixon, First National Conference on Corrections, Williamsburg, Va., December 6, 1971.

dramatic departure from past willingness to segregate even harmless offenders from society-at-large.[21] There have been an increasing realization that society must either responsibly assume the burden of preparing offenders for productive citizenship (especially those whose debt has been fully paid) or reap a harvest of alienation and despair from those it has abandoned.

Despite agreement on the appropriateness of affirmative efforts to rehabilitate and reintegrate offenders into society, a number of states, including California, persist in denying to former offenders the fundamental right to vote. Virtually every national group which has examined this question has recognized the counterproductive nature of the practice. The most recent of these, the National Advisory Commission on Criminal Justice Standards and Goals, reached a similar conclusion:

> "Loss of citizenship rights – the right to vote, hold public office, and serve on juries – inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest." *Report on Corrections,* 593 (1973).

[21] National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections* (1973). A variety of standards are relevant, including especially: 2.9 – Rehabilitation; 2.10 – Retention and Restoration of Rights; 3.1 – Use of Diversion; 4.9 – Programs for Pretrial Detainees; 5.2 – Sentencing the Nondangerous Offender; 6.1 – Comprehensive Classification Systems; 7.1 – Development Plan for Community-Based Alternatives to Confinement; See also Chapters 10 (Probation), 11 (Major Institutions), 12 (Parole) and 16 (Statutory Framework of Corrections).

30-558 O - 74 - 6

28

Other groups intrinsically concerned with electoral and governmental processes, such as the National Democratic Party [22] and the California League of Women Voters, [23] have specifically adopted as policy the position that restrictions on the right to vote of former offenders should be abolished. The President's Commission on Law Enforcement and Administration of Justice was no less explicit in its 1967 appeal for restoration of the franchise to former offenders.

> "There seems to be no justification for permanently depriving all convicted felons of the vote, as the laws in most states provide. The convicted person may have no strong personal interest in voting, but to be deprived of the right to representation in a democratic society is an important symbol. Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote." [24]

Further, various model acts and suggested legislation propose abolition of restrictions on ex-offenders' voting rights. The American Bar Association has approved legislation developed by the National Conference of Commissioners on Uniform State Laws which would restore an offender's

---

22 In its *Party Platform:* 1972, the Democratic Party endorsed ". . . restoration of civil rights to ex-convicts after completion of their sentences, including the right to vote."

23 ". . . the right to vote should be restored to ex-felons," California League of Women Voters, *Policy Statement,* February 16, 1972.

24 President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections,* 90 (1967).

right to vote upon his discharge from sentence or if placed on probation or parole. *Uniform Act on the Status of Convicted Persons,* §§2, 3 (1965). A similar position was incorporated by the American Law Institute in the *Model Penal Code:*

> "§306.3 Notwithstanding any other provision of law, a person who is convicted of a crime shall be disqualified (1) from voting in a primary or election if and only so long as he is committed under a sentence of imprisonment."

Legislatures in a growing number of states have recognized the wisdom of this view and have been moving to eliminate voting restrictions placed on ex-felons. Four states—Arkansas, Maine, Michigan, and Tennessee—now have no restrictions while others provide for automatic restoration of voting rights.[25] Such actions reflect a trend that is unmistakable.[26]

---

[25] See Appendix A of this brief for state law disenfranchisement provisions. See Appendix B of this brief for provisions respecting re-enfranchisement. Nineteen states automatically restore civil rights upon termination of imprisonment, parole or probation while five more states and the District of Columbia restore rights after a fixed period of time. *Restoring the Ex-Offender's Right to Vote: Background and Development,* 11 Am. Crim. L. Rev. 721, 758 and n. 215, *et seq.* California's procedure (Petitioner's brief at pp. 21-24 and Appendix A thereof) is more cumbersome, requiring an application, a judicial proceeding, and a discretionary determination based on no more explicit standard than "rehabilitation and fitness to exercise all of the civil and political rights of citizenship."

[26] The National Advisory Commission on Criminal Justice Standards and Goals has called for all states to enact by 1975 legislation removing all mandatory restrictions on ex-offender civil and political rights, including the right to vote and hold public office. *Report on Corrections,* Standard 16.17 (1973).

30

The purpose of corrections has shifted from one of thoughtless retaliation to that of attempting to prepare the offender for lawful participation in society. However, at the same time that millions of dollars are being spent to implement this program, with unprecedented commitment of federal, state, and local resources to that end, laws grounded in the antiquities of penology conflict with today's goals of rehabilitation and reintegration. If the strength of democratic government is truly drawn from its collective citizenry, surely those who have endured its sanctions deserve also to participate in its most valued entitlements. As de Tocqueville once noted:

> "There is no more invariable rule in the history of society: the further electoral rights are extended the greater is the need for extending them; for after each concession the strength of democracy increases, and its demands increase with its strength." *Democracy in America,* 57 (Knopf 1956).

CONCLUSION

For the above reasons, the American Bar Association respectfully urges this Court to affirm the decision of the Supreme Court of California.

Respectfully submitted,

CHESTERFIELD SMITH, President
RICHARD J. HUGHES
DANIEL L. SKOLER
MELVIN T. AXILBUND
RICHARD C. HAND
PAUL F. ATTAGUILE
RALPH H. LOEWENSTEIN

American Bar Association
1155 East 60th Street
Chicago, Illinois

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I, Chesterfield Smith, attorney for amicus, hereby certify that 3 copies of this brief were duly served upon attorneys for both parties by mail service, postage pre-paid.

_____

Chesterfield Smith

APPENDIX A

TABLE I

STATE DISENFRANCHISEMENT PROVISIONS

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Alabama		√	√	√	√		√	√
Alaska	√					√	√	
Arizona	√					√*		√
Arkansas	√E							
California		√		√		√*		
Colorado						√*		
Connecticut	√			√E				
Delaware	√				√	√*		
District of Columbia	√							
Florida	√					√*		
Georgia			√	√			√	√
Hawaii	√							
Idaho	√	√		√	√			√

E: enabling provision

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Illinois	√					√*		
Indiana	√	√E			√	√*		
Iowa		√			√			
Kansas	√			√			√	√
Kentucky	√			√E	√	√*		√
Louisiana	√					√*	√	
Maine					√E			
Maryland		√		√	√			
Massachusetts					√			
Michigan						√*E		
Minnesota	√	√E		√E				√
Mississippi				√				
Missouri	√			√	√	√*	√	

E: enabling provision

TABLE I—*Continued*

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Montana	√							
Nebraska	√							√
Nevada	√			√				√
New Hampshire				√	√	√		√
New Jersey				√[E]		√		
New Mexico	√	√						
New York	√	√		√	√			
North Carolina	√						√	
North Dakota	√				√			√
Ohio	√	√[E]		√[E]				
Oklahoma	√					√*		
Oregon						√	√	
Pennsylvania					√			

E: enabling provision

State	Felony [215]	Infamous Crimes [216]	Crimes Involving Moral Turpitude [217]	Specified Offenses [218]	Election Crimes [219]	While Incarcerated* or Under Sentence [220]	Crimes Punishable By Incarceration [221]	Treason [222]
Rhode Island		√		√			√	
South Carolina				√	√			
South Dakota	√					√*		√
Tennessee		√E						
Texas	√			√				
Utah					√	√*		√
Vermont					√			
Virginia	√							
Washington		√						
West Virginia	√				√			√
Wisconsin	√	√		√	√			√
Wyoming	√	√						

E: enabling provision

TABLE II
STATE PROVISIONS FOR RESTORATION OF VOTING RIGHTS

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Alabama					√
Alaska				√	√
Arizona				√	√
Arkansas				√	
California				√	√
Colorado	√			√	
Connecticut					√
Delaware	√		√	√	
District of Columbia		√			√
Florida	√			√	√
Georgia					√
Hawaii	√			√	
Idaho				√	√

E: enabling provision

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Illinois	√				
Indiana		√		√	
Iowa			√	√	
Kansas	√			√	
Kentucky			√	√	
Louisiana				√	
Maine		√[E]		√	
Maryland				√	
Massachusetts		√		√	
Michigan				√	
Minnesota	√			√	
Mississippi					√
Missouri			√	√	√

E: enabling provision

TABLE II—*Continued*

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Montana	√			√	
Nebraska	√			√	√
Nevada				√	√
New Hampshire	√				√
New Jersey	√			√	
New Mexico				√	
New York	√			√	
North Carolina		√		√	
North Dakota				√	√
Ohio	√			√	
Oklahoma				√	
Oregon	√			√	

E: enabling provision

State	Automatic Restoration [223]	Disenfranchisement For a Determinate Period [224]	Disenfranchisement For a Determinate Period: Only Certain Offenses [225]	Pardon By Governor [226]	Other Procedures [227]
Pennsylvania		√		√	
Rhode Island				√	√
South Carolina					√
South Dakota	√			√	
Tennessee				√	√
Texas				√	
Utah					√
Vermont		√		√	
Virginia				√	
Washington	√			√	
West Virginia	√			√	
Wisconsin	√			√	
Wyoming	√			√	

E: enabling provision

NOTES TO TABLES

[215] ALASKA CONST. art. V, § 2 (felonies involving moral turpitude); ALASKA STAT. § 15.05.030 (1971); ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. §§ 16–101, 16–921 (Supp. 1972–1973); ARK. CONST. amend. 8, art. 3, § 1 (enabling provision); 16–150, CONN. GEN. STAT. ANN. § 9–46 (1967) (except the crime of non-support); DEL. CONST. art. V, § 2 (accompanied by an enabling clause which permits the General Assembly to disenfranchise as punishment for crime); D.C. CODE ANN. § 1–1102 (Supp. 1973); FLA. CONST. art. VI, § 4; FLA. STAT. ANN. § 97.041 (Supp. 1973); HAWAII CONST. art. II, § 2 (Supp. 1971); HAWAII REV. STAT. § 716–2 (Supp. 1971); IDAHO CONST. art. VI, § 3 (Supp. 1972); IDAHO CODE § 34–403 (Supp. 1972); ILL. CONST. art. 3, § 2; IND. STAT. ANN. § 29–5964 (1964 Replacement); KAN. CONST. art. 5, § 2; KY. CONST. § 145; LA. CONST. art. VII, § 1; LA. CONST. art. VIII, § 6; LA. REV. STAT. tit. 15, § 572.1 (Supp. 1971); MINN. CONST. art. 7, § 2; MO. CONST. art. 8 § 2; MO. REV. STAT. § 111.021 (Supp. 1973); MO. REV. STAT. § 113.040 (1966); MONT. CONST. art. IX, § 2; MONT. REV. CODE § 23–2701 (Supp. 1971); NEB. CONST. art. VI, § 2; NEB. REV. STAT. § 29–112 (1964); NEV. CONST. art. II, § 1; N.M. CONST. art. VII, § 1; N.M. STAT. ANN. § 40A–29–14 (1964); N.Y. ELECTION LAW §§ 152, 462 (McKinney Supp. 1972–1973); N.C. CONST. art. VI, § 2(3); N.D. CONST. art. V, § 127; N.D. CENT. CODE § 16–01–04 (1971 Replacement); OHIO REV. CODE ANN. § 2961.01 (1954); OKLA. CONST. art. III, § 1 ("subject to such exceptions as the legislature may prescribe"); S.D. CONST. art. VII, § 8; TEX. CONST. art. 6, § 1; TEX. ELECTION CODE art. 5.01 (1967 rev. ed.); VA. CONST. art. II, § 1; VA. CODE ANN. § 24.1–42 (Supp. 1972); W. VA. CONST. art. IV, § 1; W. VA. CODE ANN. § 3–1–13 (1971); WISC. CONST. art. III, § 2; WISC. STAT. ANN. § 6.03 (1967); WYO. STAT. § 6–4 (1959).

[216] ALA. CONST. § 182; ALA. CODE tit. 17, § 15 (1958); CAL. CONST. art. II, § 1; IDAHO CONST. art. VI, § 3 (Supp. 1972); IND. CONST. art. 2, § 8 (enabling provision); IOWA CONST. art. 2, § 5; MD. CONST. art. 1, § 2 (enabling provision); MD. REV. STAT. ANN. art. 33, § 3–4, as amended, ch. 667 (Laws of Md. of 1972); MINN. CONST. art. 4, § 15 (enabling provision); N.M. CONST. art. VII, § 1; N.Y. CONST. art. II, § 3; OHIO CONST. art. V, § 4 (enabling provision); R.I. CONST. amend. 24, § 4; TENN. CONST. art. I, § 5 (enabling provision) (*see* note 203 *supra* and accompanying text); TENN. CONST. art. IV, § 2 (enabling provision); WASH. CONST. art. 6, § 3; WISC. CONST. art. III, § 6 (enabling provision); WYO. CONST. art. 6, § 6.

[217] ALA. CONST. § 182; GA. CONST. § 2–801.

[218] ALA. CONST. § 182 ("murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, . . . any person who shall be convicted as a vagrant or tramp. . . ."); ALA. CODE, tit. 17, § 15 (1958) (same in substance as constitution); CAL. CONST. art. II, § 1 (embezzlement, misappropriation of public money); CAL. CONST. art. XX, § 11 (bribery, perjury, forgery, malfeasance in office, or other high crimes); CAL. PENAL CODE §§ 228, 232 (1970) (duelling); CONN. CONST. art. VI, § 3; GA. CONST. § 2–801 (embezzlement of public funds, malfeasance in office, bribery or larceny); IDAHO CONST. art. VI, § 3 (Supp. 1972) (bigamy, polygamy); KAN. CONST. art. 5, § 2 (defrauding the government, bribery); KY. CONST. § 145 ("such high misdemeanors as the general assembly may declare"); KY. REV. STAT. § 432.350 (1969) (state official who receives a bribe); KY. REV. STAT. § 436.230 (1969) (bribery); MD. REV. STAT. ANN. art. 33, § 3–4, *as amended* ch. 667 (Laws of Md. of 1972) (larceny); MINN. CONST. art. 4, § 15 (bribery, perjury); MISS. CONST. art. 12, § 241 (murder, rape, bribery, theft, arson, obtaining money under false pretense, perjury, forgery, embezzlement or bigamy); MISS. CODE § 23–5–85 (1972) (same in substance as constitution); MISS. CODE § 99–19–35 (1972) (same in substance as constitution); MO. REV. STAT. § 557.490 (1953)

(perjury); MO. REV. STAT. § 559.470 (1953) (murder and other felonies involving physical assault); MO. REV. STAT. § 560.610 (Supp. 1973) ("any person who shall be convicted of arson, burglary, robbery or the stealing of any motor vehicle, narcotic drug, horse, mare, gelding, colt, filly, mule, dog, ass, sheep, goat, hog, meat cattle, domestic fowl in the nighttime, deed, will, court record, anything of the value of fifty dollars or more, or anything from a dwelling or from the person. . . ."); MO. REV. STAT. § 561.340 (Supp. 1973) (false acknowledgment of deed; affixing false jurat, certain felonies dealing with forgery and related offenses); NEV. CONST. art. XV, § 3 (duelling); N.H. CONST. pt. 1, art. II (bribery); N.J. CONST. art. II, § 7 (legislature may disenfranchise those convicted of "such crimes as it may designate"); N.Y. CONST. art. II, § 3 (bribery); OHIO CONST. art. V, § 4 (bribery, perjury); R.I. CONST. amend. 24, § 4 (bribery); S.C. CONST. art. II, § 6 ("persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny. . . ."); S.C. CODE ANN. § 23–62 (Supp. 1971) (same in substance as constitution); S.C. CODE ANN. § 16–61 (1962) (duelling); TEX. CONST. art. 16, § 2 ("bribery, perjury, forgery, or other high crimes"); WIS. CONST. art. III, § 6 (bribery, larceny); WIS. STAT. ANN. § 6.03 (1967) (bribery).

[219] ALA. CONST. § 182; ALA. CODE tit. 17, § 15 (1958); DEL. CONST. art. V, § 7; DEL. CODE ANN. tit. 15, § 1701 (Non-cum. Supp. 1972); IDAHO CONST. art. VI, § 3 (Supp. 1972); IDAHO CODE § 34–403 (Supp. 1972); ILL. ANN. STAT. ch. 46, § 29A–5 (Smith–Hurd Supp. 1972) (if sentenced to penitentiary); IND. STAT. ANN. §§ 29–5908, 29–5964, 29–5965 (1969 Replacement); IOWA CODE § 51.16 (1949); KY. CONST. § 145; KY. REV. STAT. §§ 124.150, 124.190, 160.991 (1971); ME. CONST. art. IX (enabling provision); MD. REV. STAT. ANN. art. 33 §§ 3–4, *as amended*, ch. 667, (Laws of Md. of 1972); MASS. CONST. amend. art. III; MASS. GEN. LAWS ch. 51, § 1 (Supp. 1973); MASS. GEN. LAWS ch. 55, § 37 (1958); MO. CONST. art. 8, § 2; MO. REV. STAT. § 111.021 (Supp. 1973); MO. REV. STAT. §§ 113.040, 129.420, 129.490, 129.500, 129.920 (1966); N.H. CONST. pt. I, art. 11; N.Y. ELECTION LAW § 152 (McKinney Supp. 1972–1973); N.D. CENT. CODE § 12–11–06 (1960); PA. CONST. art. VII, § 7 (only disenfranchises for the election in which crime committed); PA. STAT. ANN. tit. 25, § 3552 (1963) (only disenfranchises for four years); S.C. CONST. art. II, § 6; S.C. CODE ANN. § 23–62 (Supp. 1971); UTAH CONST. art. IV, § 6, VT. CONST. ch. II, § 51; W. VA. CONST. art. IV, § 1; W. VA. CODE ANN. § 3–1–13 (1971); WIS. CONST. art. III, § 6 (enabling provision); WIS. STAT. ANN. § 6.03 (1967).

[220] ALASKA STAT. § 11.05.070 (1970); ARIZ. REV. STAT. ANN. § 13–1653; CAL. PENAL CODE § 2600 (1970); COLO. CONST. art. VII, § 10; COLO. REV. STAT. ANN. § 49–3–2 (Perm. Cum. Supp. 1971); DEL. CODE ANN. tit. 11, § 4347 (Supp. 1970); FLA. STAT. ANN. § 97.041 (Supp. 1973); ILL. CONST. art. 3, § 2; IND. STAT. ANN. § 29–4804 (1969 Replacement); KY. CONST. § 145; LA. CONST. art. VIII, § 6; LA. REV. STAT. tit. 18, §§ 42, 270.210 (1969); MICH. CONST. art. II, § 2; MO. CONST. art. 8, § 2; MO. REV. STAT. § 111.021 (Supp. 1973); MO. REV. STAT. § 113.040 (1966); MO. REV. STAT. § 222.010 (1962); N.H. REV. STAT. 607–A (Supp. 1972); N.J. REV. STAT. ANN. § 19:4–1 (Supp. 1972–1973); OKLA. STAT. ANN. tit. 21, § 65 (1968); ORE. REV. STAT. § 137.240 (1969 Replacement); S.D. CODE § 23–48–35 (1967); UTAH CODE ANN. § 76–1–36 (1953).

[221] ALASKA STAT. § 15.05.030 (1971); GA. CONST. § 2–801; ILL. STAT. ANN. ch. 46 § 3–5 (Smith-Hurd Supp. 1972); KAN. STAT. ANN. § 21–4615 (Supp. 1972); LA. CONST. art. VII, § 1; LA. REV. STAT. § 18: 42 (1969); LA. REV. STAT. § 18: 270.210 (Supp. 1972); MO. REV. STAT. § 560.610 (Supp. 1973); N.C. GEN. STAT. § 163–55 (1972); ORE. CONST. art. II, § 3; R.I. GEN. LAWS ANN. § 13–6–2 (1969) Reenactment).

[222] ALA. CONST. § 182; ALA. CODE tit. 17, § 15 (1958); ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. § 16–101 (Supp. 1972–1973); GA. CONST. § 2–801; IDAHO CONST. art. VI, § 3 (Supp. 1972); IDAHO CODE § 34–403 (Supp. 1972); KAN. CONST. art. 5, §

2; KY. CONST. § 145; MINN. CONST. art. 7, § 2; NEB. CONST. art. VI; NEV. CONST. art. II, § 1; N.H. CONST. pt. 1, art. II; N.D. CONST. art. V, § 127; N.D. CENT. CODE § 16–01–04 (1971 Replacement); S.D. CONST. art. VII, § 8; UTAH CONST. art. IV, § 6; W. VA. CONST. art. IV, § 1; W. VA. CODE ANN. § 3–1–13 (1971); WIS. CONST. art. III, § 2; WIS. STAT. ANN. § 6.03 (1967).

[223] COLO. CONST. art. III, § 10; COLO. REV. STAT. ANN. § 49–3–2 (Perm. Cum. Supp. 1971); FLA. STAT. ANN. § 940.05 (1973) (after having served maximum term of sentence or after having been granted final release by parole and probation commission); HAWAII REV. STAT. § 716–5 (Supp. 1971); ILL. ANN. STAT. ch. 38, § 124–2 (Smith-Hurd Supp. 1972) ILL. ANN. STAT. ch. 46, §§ 3–5, 29A–5 (Smith-Hurd Supp. 1972); KAN. STAT. ANN. § 22–3722 (Supp. 1972) (upon discharge from imprisonment or upon issuance of "certificate of discharge" from parole or probation); MINN. STAT. § 609.165 (1964) (on expiration of sentence); MONT. CONST. art. IV, § 2 (felons may vote upon release from confinement); NEB. REV. STAT. § 29–112.01 (1964) (upon satisfaction of judgment when sentence is other than confinement); NEB. REV. STAT. § 29–2264 (Cum. Supp. 1972) (upon satisfactory completion of probation); NEB. REV. STAT. § 83–1118 (1971) (upon satisfactory completion of sentence or parole); N.H. REV. STAT. § 607–A (Supp. 1972) (upon "discharge after completion of service of his sentence or after service under probation or parole"); N.J. REV. STAT. ANN. § 19:4–1 (Supp. 1972–1973) (upon completion of sentence, parole or probation); N.Y. ELECTION LAW § 152 (McKinney Supp. 1972–1973) (upon expiration of maximum sentence or discharge from parole); OHIO REV. CODE ANN. § 2967.16 (Supp. 1972) (upon completion of maximum term of sentence or final release by parole authority) [Legislation to allow suffrage during probation, parole and conditional pardon is in conference committee at press time.]; ORE. REV. STAT. § 137.250 (1969 Replacement) (upon final discharge from probation, parole, or imprisonment); S.D. CODE § 24–5–2 (1967) (upon discharge from penitentiary); S.D. CODE § 23–57–7 (1967) (upon expiration of time of disemeanant's suspended sentence); WASH. REV. CODE ANN. § 9.96.050 (Supp. 1972) (upon order of final discharge which shall not occur within a period of one year from the date of conditional discharge); 51 OP. W. VA. ATT'Y GEN. 182 (1965) (construing W. VA. CONST. IV, § 1 not to prohibit a convicted person from voting after completion of sentence); WIS. STAT. ANN. § 57.078 (Supp. 1972–1973) (by serving out term of imprisonment or otherwise satisfying the judgment against him); WYO. STAT. ANN. § 7–311 (1957) (certificate of discharge restores all rights).

[224] The states in this category restore the right to vote for all disenfranchised offenders after a determinate period of time. Thus, no offender in these states is disenfranchised permanently.

DEL. CODE ANN. tit. 11, § 4347 (Supp. 1970); D.C. CODE ANN. § 1–1102 (Supp. 1973) (five years after discharge from incarceration; three years after discharge if, upon application, the Superior Court of the District of Columbia certifies ex-offender's good conduct to Board of Election); IND. STAT. ANN. § 29–5964 (1969 Replacement) (persons convicted of felonies "shall be disenfranchised for any determinate period"); IND. STAT. ANN. § 29–5964 (1969 Replacement) (misdemeanants "shall be disenfranchised for any determinate period not to exceed five years"); ME. CONST. art. IX (enabling power to disenfranchise for up to 10 years); MASS. GEN. LAWS ch. 55, § 37 (1958) (disenfranchisement for three years following date of conviction); N.C. GEN. STAT. § 13–1 (Supp. 1971)(two years after release by Department of Corrections, if no intervening convictions); PA. CONST. art. VII, § 7 (conviction for election crime disenfranchises for election in question); PA. STAT. ANN. tit. 25, § 3552 (1963) (four years after conviction for election crime); VT. CONST. ch. II, § 51 (conviction for election crime disenfranchises for election in question).

[225] The states included in this category disenfranchise some offenders for determinate periods of time and others permanently. Listed below are the provisions which state the fixed time period for restoration of voting rights.

DEL. CONST. art. V, § 7; DEL. CODE ANN. tit. 15, § 1701 (Supp. 1970) (10 years after conviction and sentence for election crimes); IOWA CODE § 51.16 (1949) (judges and clerks convicted of election offenses are disenfranchised for five years); KY. REV. STAT. §§ 160.991, 432.350 (1971); MO. REV. STAT. § 129.920 (1966) (10 year disenfranchisement for "corrupt registration" of voters).

[226] ALASKA CONST. art. III, § 21; ALASKA STAT. § 33.20.070 (1971); ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. § 31–443 (1956); ARK. CONST. art. 6, § 18; ARK. STAT. ANN. § 12–300(m) (1968); CAL. CONST. art. V, § 8 (no pardon may be granted to anyone twice convicted of a felony except on recommendation of California Supreme Court, four judges concurring); CAL. PENAL CODE §§ 4852.17, 4853 (West 1970); COLO. CONST. art. IV, § 8; DEL. CONST. art. VII, § 1 (upon recommendation of Board of Pardons); FLA. CONST. art. 4, § 8 (1968 Revision) (with approval of three members of cabinet); FLA. STAT. ANN. § 940.01 (Supp. 1973) (with approval of three members of cabinet); HAWAII CONST. art. IV, § 5 (Supp. 1971); IDAHO CODE § 20–240 (Supp. 1972); ILL. STAT. ANN. ch. 108, § 49 (1952); IND. CONST. art. V, § 17; IOWA CONST. art. 4, § 16; IOWA CODE ANN. § 248.12 (1969); KAN. CONST. art. 1, § 7; KAN. STAT. ANN. § 22–3701 (Supp. 1972); KY. CONST. §§ 77, 145; LA. CONST. art. 5, § 10 (upon written recommendation of lieutenant governor, attorney general, or presiding judge of court of conviction; written recommendation requirement waived for first felony offenders); ME. CONST. art. V, § 11 ("with the advice and consent of the Council. . . ."); MD. CONST. art. II, § 20; MD. REV. STAT. ANN. art. 41, § 118 (1971); MD. REV. STAT. ANN. art. 33, 3–4, as amended, ch. 667 Laws of Md. of 1972; MASS. CONST. pt. 2, ch. 2, § 1, art. 7 (with advice of council; general court may prescribe pardon terms in felony cases); MASS. GEN. LAWS ch. 127, § 152 (Supp. 1973) (public hearing required in felony cases); MICH. CONST. art. V, § 14; MINN. CONST. art. V, § 4 (in conjunction with Board of Pardons); MO. CONST. art. 4, § 7; MO. REV. STAT. § 222.030 (1962); MO. REV. STAT. § 560.610 (Supp. 1973); MONT. CONST. art. VII, § 9 (advised by Board of Pardons); NEV. CONST. art. V, § 13; NEV. CONST. art V, § 14 (in conjunction with Attorney General and justices of Supreme Court); N.J. REV. STAT. ANN. § 2A:167–5 (1971); N.M. CONST. art. V, § 6; N.M. STAT. ANN. §§ 40A–29–14, 21 (1964); N.Y. CONST. art. 4, § 4; N.C. CONST. art. III, § 5(6); N.D. CONST. art. III, § 76 (in conjunction with Board of Pardon); OHIO CONST. art. III, § 11; OKLA. CONST. art. 6, § 10 (upon recommendation of majority of Pardon and Parole Board); OKLA. STAT. ANN. tit. 57, §§ 332, 345 (1969); ORE. CONST. art. V, § 14; PA. CONST. art. IV, § 9 (only upon recommendation in writing of majority of Board of Pardons); PA. STAT. ANN. tit. 19, § 893 (1964) (fulfillment of sentence equivalent to pardon); R.I. CONST. amend. 2 (with advice and consent of Senate); S.D. CONST. art. IV, § 5; S.D. CODE § 23–59–1 (1967) ("only upon recommendation in writing of the board of pardons and paroles"); TENN. CONST. art. 3, § 6; TENN. CODE. ANN. § 40–3501 (1955); TEX. CONST. art. 4, § 11 (upon written recommendation of majority of Board of Pardons and Paroles); TEX. CODE CRIM. PROC. art. 48.01 (1966 Revision) (upon written recommendation of majority of Board of Pardons and Paroles); VT. CONST. ch. II, § 20; VA. CONST. art. V, § 12; WASH. CONST. art. 3, §§ 9, 11; WASH. REV. CODE ANN. §§ 9.95.160, 9.96.010 (1963); W. VA. CONST. art. VII, § 11; W. VA. CODE ANN. § 5–1–16 (1971); WIS. CONST. art. 5, § 6; WYO. CONST. art. 4, § 5; WYO. STAT. ANN. § 7–386 (1959).

[227] ALA. CONST. amend. 38; ALA. CODE tit. 42, § 1 (1958) (by State Board of Pardons and Paroles); ARIZ. REV. STAT. ANN. §§ 13–1742 to 1745 (Supp. 1972–1973) (within judicial discretion); CAL. PENAL CODE § 1203.4 (West 1970); CONN. GEN. STAT. ANN. §§ 9–47, 48 (by Commission on Forfeited Rights); D.C. CODE ANN. § 1–220 (Supp. V, 1972) (by Commissioners of the District of Columbia); FLA. STAT. ANN. § 940.05 (Supp. 1973) (by Board of Pardons); GA. CONST. § 2–3011 (by State Board of Pardons and Paroles); GA. CODE ANN. § 27–2701 (1972 Revision) (by State Board of Pardons and Paroles); GA. CODE ANN. § 77–528 (1964 Revision) (describes effect of pardon); IDAHO CONST. art. IV, § 7 (by Board of Paroles); MISS. CONST. art. 12, § 253 (by the legis-

lature); MISS. CODE § 2503.5 (1957) (if honorably discharged from certain military service); MO. REV. STAT. § 216.355 (1962) (by Board of Probation); NEB. CONST. art. IV, § 13 (by Board of Pardons); NEB. REV. STAT. § 29–112 (1964) (by Board of Pardons); NEV. REV. STAT. § 213.155 (1968) (Parole Board may restore citizenship upon expiration of parole); N.H. CONST. pt. 1, art. 11 (by Supreme Court); N.D. CENT. CODE §§ 12–55–05, 12–55–24 (1960) (by Board of Pardons); R.I. CONST. amend. 25, § 4 ("[no] person convicted of bribery, or of any crime deemed infamous at common law, [shall] be permitted to exercise [the franchise] until he be expressly restored thereto by act of the general assembly"); S.C. CONST. art. IV, § 11 (by Probation, Parole and Pardon Board); TENN. CODE ANN. § 40–3701 (1955) (by the Circuit Court); UTAH CONST. art. VII, § 12 (by Board of Pardons); UTAH CODE ANN. § 77–62–3 (1953) (duties of Board of Pardons).

[The pamphlet referred to at p. 31 follows:]

PART V

LOSS AND RESTORATION OF CIVIL RIGHTS

PART V COMMENTARY

The model acts in this part deal with civil and collateral disabilities attendant on conviction or imprisonment of offenders. They range from pronouncements on status through provision for restoration of rights and complete annulment of the conviction record. Their subject matter has assumed increasing importance through public understanding of the harmful effect of unwarranted disabilities on the rehabilitative adjustment and community reintegration of the ex-offender.

Present law on the status of convicted persons is uncertain and uneven. Some states retain concepts of "civil death" and loss of civil rights by statute, thus perpetuating punitive policies derived from early common law which made a convicted person an outcast of society. In other states, statutory provisions are not clear and how much of the old doctrines survive is left in doubt. Not only is there confusion as to what rights are lost or retained, but the duration of deprivation and the methods of restoration (or lack thereof) vary widely. Finally, the impact of a conviction in one state or in a federal court in another state is often unsettled.

The model acts reflect the trend toward maximum retention of civil rights, restoration of those suspended during periods of confinement or other correctional supervision, and mitigation of the adverse consequences of a criminal record for the returning offender.

Uniform Act on Status of Convicted Persons

The Uniform Act on Status of Convicted Persons seeks to discard common law concepts of civil death and disability, and in the absence of specific statutory disqualifications, affirms that the convicted offender retains "all of his rights, political, personal, civil or otherwise."

Promulgated in 1968 by the National Conference of Commissioners on Uniform State Laws, the Uniform Act first delineates rights forfeited as the result of a felony conviction and defines the duration of such forfeiture. The Act imposes and limits itself to two general disqualifications for felons – the right to vote in an election and the right to become a candidate for or hold public office. These deprivations are not absolute, however, since offenders whose sentence has been suspended, with or without probation, or who are placed on parole may exercise the right to vote. No other forfeiture or loss of rights is provided for – in fact, all other rights are specifically protected by the Act. Moreover, discharge effects a total restoration of rights and the Act provides for pro-

cedures which will specifically and officially certify to the restoration of rights to vote and to hold public office.

Those familiar with the difficulties ex-offenders encounter in returning to society have argued that the annulment or rescinding of a conviction record may be necessary to enable convicts fully to re-enter the community. The Uniform Act makes no provision of this kind and also specifies that the Act in no way limits (i) the activity of penal officials in dealing with prisoners, (ii) liabilities to third parties growing out of criminal conduct and (iii) perhaps most significantly, other statutes excluding convicted persons from designated professions, public offices, licenses, and citizenship activities. In this last respect, the Uniform Act must be read against other statutory disabilities in assessing the offender's true civil status and would seem, to that extent, handicapped as a restorative device.

Model Penal Code–Article on Loss and Restoration of Rights Incident to Conviction or Imprisonment

The Model Penal Code article is somewhat more comprehensive than the Uniform Act. It too abandons common law disabilities and recognizes only those disqualifications imposed by constitution, criminal statute, or the judgment and sentence of the court (in the latter case, only when the crime is reasonably related to competency to exercise the deprived right or privilege).

There are specific provisions for forfeiture of public office (felony or malfeasance offenses, or special statutory disqualifications), voting rights (only while imprisoned), and jury duty (until satisfaction of sentence). Offender status while in confinement is spelled out in sections retaining capacity to testify in legal proceedings and the right to appointment of agents or trustees to safeguard economic and property interests.

Finally, and going beyond the Uniform Act, the Code permits courts to enter orders that the criminal judgment shall not constitute a conviction "for the purpose of any disqualification or disability imposed by law" (i) at time of sentencing for youthful offenders, (ii) after satisfaction of a suspended sentence or discharge from probation or parole, or (iii) on completion of an imprisonment sentence followed by two years of good conduct. This status, when granted, lasts so long as the ex-offender is not convicted of another crime. Orders removing disqualifications are stipulated as having prospective operation only, not affecting third party liabilities, not precluding proof of conviction for impeachment purposes, and not precluding consideration of the conviction in discretionary actions by official agencies assessing the offender's competency to exercise a particular right or privilege (apparently inclusive of trade licensing and public employment reviews). The order does not have an expungement effect, i.e., does not justify the offender in stating he was not convicted of a crime without referring to the order.

Model Act to Authorize Courts to Annul Records of Conviction

The National Council on Crime and Delinquency's model annulment act, released in 1962, goes beyond the Uniform Act and Model Penal Code provisions. Broad in scope and brief in language, it authorizes the court of conviction to annul, cancel and rescind a conviction record upon findings of rehabilitative value and consistency with public welfare. The annulment order operates to restore all civil rights lost or suspended by virtue of the conviction or sentence. No time limits are imposed and the court may act immediately on discharge from probation, parole or imprisonment or at any time thereafter on judicial discretion.

The NCCD annulment act has no provisions relating to civil rights or disabilities during imprisonment and thus should not be regarded as a substitute for Uniform Act or Model Penal Code provisions in that area.

National Commission on Reform of Federal Criminal Laws – Code Chapter on Disqualification from Office and Other Collateral Consequences of Conviction

Although relating to the federal criminal system only, certain alternatives presented in this model enactment were deemed worthy of comparison with the other acts on offender civil disabilities. These include (i) authority for the court, *at time of sentencing* (or any point thereafter), to explicitly order removal of disqualifications imposed by law effective upon satisfaction of sentence and (ii) provision for automatic termination of all disabilities after completion of sentence (assuming no intervening convictions).

Thus the pattern of the proposed Federal Code is limited forfeiture and disqualification from federal office and organizational functions (for specified crimes and mostly discretionary with the court), automatic restoration of rights after a specified period of years from the end of a sentence (if there is no conviction showing a return to crime), and discretionary restoration, either by decision at sentencing or upon application by the offender anytime thereafter. The reservations applicable to removal action (i.e., situations permitting referral to the original conviction) largely follow the provisions of the Model Penal Code.

* * *

The model acts in this section all stress the value of preserving – to the maximum feasible extent – civil rights and privileges during incarceration. They also provide, in varying degrees and ways, for the restoration of civil rights upon discharge. Their thrust is rehabilitative in nature, premised on the social value of facilitating an

offender's re-entry to normal life, and they should not be overlooked in general correctional code revision efforts. The next few years should show marked legislative activity in this area as well as the availability of new model enactments.[20]

---

[20]See, for example, model legislation and analyses emphasizing offender employment disabilities contained in *The Closed Door: The Effect of a Criminal Record on Employment with State and Local Agencies,* Georgetown University Institute of Criminal Law and Procedure, 252 pp. (1972), and *Removing Offender Employment Restrictions – A Handbook on Remedial Legislation and Other Techniques for Removing Formal Employment Restrictions Confronting Ex-Offenders,* American Bar Association National Clearinghouse on Offender Employment Restrictions, 19 pp. plus appendices (1972).

UNIFORM ACT
ON STATUS OF CONVICTED PERSONS

National Conference of Commissioners
on Uniform State Laws

1965

CONTENTS

UNIFORM ACT ON STATUS OF CONVICTED PERSONS

SECTION 1. [*Definition.*] In this Act, "felony" means:

(1) a crime committed against the laws of this state or of the federal government for which a sentence of [death or] imprisonment in a prison or penitentiary is imposed; or

(2) a crime committed against the laws of another state for which a sentence of death or imprisonment in a prison or penitentiary is imposed, if the act would permit a sentence of [death or] imprisonment in a prison or penitentiary in this state had it been committed in this state.

SECTION 2. [*Rights Lost.*] (a) A person sentenced for a felony, from the time of his sentence until his final discharge, may not:

(1) vote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole; or

(2) become a candidate for or hold public office.

(b) A public office held at the time of sentence is forfeited as of the date of the sentence if the sentence is in this state, or, if the sentence is in another state or in a federal court, as of the date a certification of the sentence from the sentencing court is filed in the office of [Secretary of State] who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section, but if the conviction is reversed the defendant shall be restored to any public office forfeited under this Act from the time of the reversal and shall be entitled to the emoluments thereof from the time of the forfeiture.

SECTION 3. [*Rights Retained by Convicted Person.*] Except as otherwise provided by this Act [or by the Constitution of this State], a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue and be sued, and to hold offices of private trust in accordance with law.

SECTION 4. [*Savings Provisions.*]

(a) This Act does not affect the power of a court, otherwise given by law to impose sentence or to suspend imposition or execution of sentence on any conditions, or to impose conditions of probation, or the power of the [paroling authority] to impose conditions of parole.

(b) This Act does not deprive or restrict the authority and powers of officials of a penal institution or other penal facility, otherwise provided by law, for the administration of the institution or facility or for the control of the conduct and conditions of confinement of a convicted person in their custody.

(c) This Act does not affect the qualifications or disqualifications otherwise required or imposed by law for a designated office, public or private, or to serve as a juror or to vote or for any designated profession, trust, or position, or for any designated license or privilege conferred by public authority.

(d) This Act does not affect the rights of others arising out of the conviction or out of the conduct on which the conviction is based and not dependent upon the doctrines of civil death, the loss of civil rights, the forfeiture of estate, or corruption of blood.

(e) This Act does not affect laws governing rights of inheritance of a murderer from his victim.

SECTION 5. [*Certificate of Discharge.*]

(a) If the sentence was in this state, the order, certificate, or other instrument of discharge, given to a person sentenced for a felony upon his discharge after completion of service of his sentence or after service under probation or parole, shall state that the defendant's rights to vote and to hold any future public office, of which he was deprived by this Act, are thereby restored and that he suffers no other disability by virtue of his conviction and sentence except as otherwise provided by this Act. A copy of the order or other instrument of discharge shall be filed with the clerk of the court of conviction.

(b) If the sentence was in another state or in a federal court and the convicted person has similarly been discharged by the appropriate authorities, the [Governor, Commissioner of Corrections, Adult Authority, etc.] of this state, upon application and proof of the discharge in such form as the [Governor, Commissioner of Corrections, Adult Authority, etc.] may require, shall issue a certificate stating that such rights have been restored to him under the laws of this state.

(c) If another state having a similar Act issues its certificate of discharge to a convicted person stating that the defendant's rights

have been restored, the rights of which he was deprived in this state under this Act are restored to him in this state.

SECTION 6. [*Uniformity of Interpretation.*] This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 7. [*Short Title.*] This Act may be cited as the Uniform Act on Status of Convicted Persons.

SECTION 8. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are severable.

SECTION 9. [*Repeal.*] The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 10. [*Time of Taking Effect.*] This Act takes effect —

_____.

MODEL PENAL CODE
--ARTICLE ON LOSS AND RESTORATION OF RIGHTS INCIDENT TO CONVICTION OR IMPRISONMENT

American Law Institute

1962

ARTICLE 306. LOSS AND RESTORATION OF RIGHTS INCIDENT TO CONVICTION OR IMPRISONMENT

ARTICLE 306. LOSS AND RESTORATION OF RIGHTS INCIDENT TO CONVICTION OR IMPRISONMENT

Section 306.1. Basis of Disqualification or Disability.

(1) No person shall suffer any legal disqualification or disability because of his conviction of a crime or his sentence on such conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is:

(a) necessarily incident to execution of the sentence of the Court; or

(b) provided by the Constitution or the Code; or

(c) provided by a statute other than the Code, when the conviction is of a crime defined by such statute; or

(d) provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

(2) Proof of a conviction as relevant evidence upon the trial or determination of any issue, or for the purpose of impeaching the convicted person as a witness is not a disqualification or disability within the meaning of this Article.

Section 306.2. Forfeiture of Public Office.

A person holding any public office who is convicted of a crime shall forfeit such office if:

(1) he is convicted under the laws of this State of a felony or under the laws of another jurisdiction of a crime which, if committed within this State, would be a felony; or

(2) he is convicted of a crime involving malfeasance in such office, or dishonesty; or

(3) the Constitution or a statute other than the Code so provides.

Section 306.3. Voting and Jury Service.

Notwithstanding any other provision of law, a person who is convicted of a crime shall be disqualified

(1) from voting in a primary or election if and only so long as he is committed under a sentence of imprisonment; and

(2) from serving as a juror until he has satisfied his sentence.

Section 306.4. Testimonial Capacity; Testimony of Prisoners.

(1) Notwithstanding any other provision of law, the fact that a person has been convicted of a crime or that he is under sentence therefor, whether of imprisonment or otherwise, does not render him incompetent to testify in a legal proceeding.

(2) Upon the order of the ———— Court, the Warden or other administrative head of an institution in which a prisoner is confined shall arrange for the production of the prisoner to testify at the place designated in the order. Such order shall be issued whenever the Court is satisfied that the testimony of the prisoner is required in a judicial or administrative proceeding and that the ends of justice can not be satisfied by taking his deposition at the institution where he is confined.

(3) Subject to regulations of the Department of Correction as to institutions subject to its jurisdiction, the Warden or other administrative head of an institution in which a prisoner is confined may, in his discretion, permit the prisoner to leave the institution, either alone or in the custody of an officer, for the purpose of testifying in a legal proceeding in which he is a party or has been called as a witness. In granting such permission, the Warden or administrative head may require that the prisoner or party calling him to testify defray the reasonable costs of providing for his custody while absent from the institution.

(4) Subject to regulations of the Department of Correction as to institutions subject to its jurisdiction, the Warden or other administrative head of an institution in which a prisoner is confined shall permit the prisoner to give testimony by deposition or in response to interrogatories, when such testimony is desired in a legal proceeding, and shall make suitable arrangements to facilitate the taking of such deposition in the institution.

Section 306.5. Appointment of Agent, Attorney-in-Fact or Trustee for Prisoner.

(1) A person confined under a sentence of imprisonment shall have the same right to appoint an agent, attorney-in-fact or trustee to act in his behalf with respect to his property or economic interests as if he were not so confined.

(2) Upon the application of a person confined or about to be confined under a sentence of imprisonment, the _____ Court [insert appropriate court of record] of the county where the prisoner resided at the time of sentence or where the sentence was imposed may appoint a trustee to safeguard his property and economic interests during the period of his commitment. The trustee shall

have such power and authority as the Court designates in the order of appointment but, unless the order otherwise provides, shall have all the power and authority conferred by a general power of attorney.

Section 306.6. Order Removing Disqualifications or Disabilities; Vacation of Conviction; Effect of Order of Removal or Vacation.

(1) In the cases specified in this Subsection the Court may order that so long as the defendant is not convicted of another crime, the judgment shall not thereafter constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime:

(a) in sentencing a young adult offender to the special term provided by Section 6.05(2) or to any sentence other than one of imprisonment; or

(b) when the Court has theretofore suspended sentence or has sentenced the defendant to be placed on probation and the defendant has fully complied with the requirements imposed as a condition of such order and has satisfied the sentence; or

(c) when the Court has theretofore sentenced the defendant to imprisonment and the defendant has been released on parole, has fully complied with the conditions of parole and has been discharged; or

(d) when the Court has theretofore sentenced the defendant, the defendant has fully satisfied the sentence and has since led a law-abiding life for at least [two] years.

(2) In the cases specified in this Subsection, the Court which sentenced a defendant may enter an order vacating the judgment of conviction:

(a) when an offender [a young adult offender] has been discharged from probation or parole before the expiration of the maximum term thereof[; or

(b) when a defendant has fully satisfied the sentence and has since led a law-abiding life for at least [five] years].

(3) An order entered under Subsection (1) or (2) of this Section:

(a) has only prospective operation and does not require the restoration of the defendant to any office, employment or position forfeited or lost in accordance with this Article; and

(b) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the determination of an issue involving the rights or liabilities of someone other than the defendant; and

(c) does not preclude consideration of the conviction for purposes of sentence if the defendant subsequently is convicted of another crime; and

(d) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order; and

(e) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, except that the issuance of the order may be adduced for the purpose of his rehabilitation; and

(f) does not justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order.

MODEL ACT TO AUTHORIZE COURTS TO ANNUL A RECORD OF CONVICTION

National Council on Crime and Delinquency

1962

AN ACT
TO AUTHORIZE COURTS TO ANNUL A RECORD OF CONVICTION FOR CERTAIN PURPOSES

Be it enacted [etc.]

The court in which a conviction of crime has been had may, at the time of discharge of a convicted person from its control, or upon his discharge from imprisonment or parole, or at any time thereafter, enter an order annulling, canceling, and rescinding the record of conviction and disposition, when in the opinion of the court the order would assist in rehabilitation and be consistent with the public welfare. Upon the entry of such order the person against whom the conviction had been entered shall be restored to all civil rights lost or suspended by virtue of the arrest, conviction, or sentence, unless otherwise provided in the order, and shall be treated in all respects as not having been convicted, except that upon conviction of any subsequent crime the prior conviction may be considered by the court in determining the sentence to be imposed.

In any application for employment, license, or other civil right or privilege, or any appearance as a witness, a person may be questioned about previous criminal record only in language such as the following: "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?"

Upon entry of the order of annulment of conviction, the court shall issue to the person in whose favor the order has been entered a certificate stating that his behavior after conviction has warranted the issuance of the order, and that its effect is to annul, cancel, and rescind the record of conviction and disposition.

Nothing in this act shall affect any right of the offender to appeal from his conviction or to rely on it in bar of any subsequent proceedings for the same offense.

PROPOSED NEW FEDERAL CODE SECTION ON DISQUALIFICATION FROM OFFICE AND OTHER COLLATERAL CONSEQUENCES OF A CONVICTION

National Commission
on Reform of Federal Criminal Laws

1971

CONTENTS

Chapter 35. Disqualification from Office and Other Collateral Consequences of Conviction

§ 3501. Disqualification From and Forfeiture of Federal Office.

(1) Disqualification. A person convicted of a crime listed below may, as part of the sentence, be disqualified from any, or a specified, federal position or category thereof for such period as the court may determine, but no longer than five years following completion of any other sentence imposed:

(a) treason (section 1101) and the crimes affecting national security defined in sections 1102 to 1105, 1107 and 1111 to 1117;

(b) bribery and other crimes of unlawful influence upon public affairs and betrayal of public office defined in sections 1356, 1361 to 1367, 1371 and 1372;

(c) unlawful acts under color of law (section 1521);

(d) felonious theft under sections 1732 to 1735 or felonious fraud under sections 1751 to 1753 and 1756, when the subject of the offense was deposited with, entrusted to or otherwise under the control of the defendant, in his capacity as a public servant or officer of a national credit institution; or

(e) a crime expressly made subject to this section by statute.

(2) Forfeiture. A person convicted of a crime listed in subsection (1)(a) or of bribery (section 1361) shall forfeit any federal position he then holds, and a person convicted of any other crime listed in subsection (1) may, as part of the sentence, be required to forfeit such position.

(3) "Federal Position" Defined. In this section "federal position" does not include any position for which qualifications or provisions with respect to length of term or procedures for removal are prescribed by the Constitution.

§ 3502. Disqualification From Exercising Organization Functions.

An executive officer or other manager of an organization convicted of an offense committed in furtherance of the affairs of the organization may, as part of the sentence, be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the scope or willfulness of his illegal actions make it dangerous for such functions to be entrusted to him.

§ 3503. Order Removing Disqualification or Disability.

The court may, in an order entered as provided in this section, relieve the defendant of any or all disqualifications and disabilities imposed by law as a consequence of conviction. The order may be made at the time of sentencing:

(a) to be effective at a specified time within five years if the sentence is unconditional discharge;

(b) to be effective otherwise upon the certification, or appropriate combination of certifications, of (i) the clerk of the court that a fine has been paid, (ii) the Probation Office that the defendant has satisfactorily completed his term of probation, (iii) the Board of Parole that the defendant has satisfactorily completed his parole, or (iv) the Bureau of Corrections that the defendant satisfactorily completed a term in prison on conviction of a misdemeanor for which parole is not authorized.

The order may be made at any time after sentence if the court is satisfied that the defendant has satisfactorily completed his sentence.

§ 3504. Termination of Disqualification After Five Years.

Any disqualification or disability imposed by law as a consequence of conviction terminates at the end of the first five-year period, commencing after completion of sentence, during which the defendant has not been convicted of another crime committed subsequent to the disqualifying or disabling conviction.

§ 3505. Effect of Removal of Disqualification.

Removal of a disqualification or disability under sections 3503 and 3504:

(a) has only prospective operation and does not require the restoration of the defendant to any office, employment or position forfeited or lost as a consequence of his conviction;

(b) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant to the determination of an issue involving the rights or liabilities of someone other than the defendant;

(c) does not preclude consideration of the conviction for purposes of sentence if the defendant subsequently is convicted of another offense;

(d) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or public servant authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or public servant is empowered to deny, but in such case the court, agency or public servant shall also give due weight to the issuance of the order under section 3503 or the applicability of section 3504, as the case may be;

(e) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, but the issuance of the order under section 3503 or the applicability of section 3504, as the case may be, may be adduced for the purpose of his rehabilitation.

(f) does not apply to the federal disqualification, if any, to receive, possess or supply a firearm, destructive device or ammunition.

[The information referred to at p. 17 follows:]

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, D.C., February 1, 1974.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: Please find enclosed a revised copy of my statement before your Subcommittee on Wednesday, January 30, regarding H.R. 9020. We will respond directly to Mr. Cohen in connection with his question about the racial implications of State statutory and constitutional provisions which disqualify ex-offenders.

As I mentioned in response to one of your questions, the Commission has recently begun a National Prison Project which will focus on the civil rights of minorities and women in State and selected Federal institutions. Nine of the Commission's State Advisory Committees (SACs) are presently conducting investigations utilizing a uniform study design. In addition, several other SACs have or will conduct related studies, geared to local situations.

We are planning in FY 1975 to conduct a study of the differential treatment in release and sentencing in the lower courts system. Our study will explore bail procedures and the equal availability of pretrial release for racial minorities and women. We will also explore the possibility of differential treatment of minorities and women with regard to sentencing and will examine the extent to which minority persons and women might be more likely to receive longer jail sentences or heavier fines for comparable offenses than others.

The Commission would be more than happy to keep you advised of our progress and to provide copies of the State Advisory Committee reports as they are published. If I can be of any further assistance, please let me know.

Sincerely,

JOHN A. BUGGS,
Staff Director.

Enclosure.

REMARKS OF JOHN A. BUGGS, STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE, HOUSE COMMITTEE ON THE JUDICIARY, JANUARY 30, 1974

Mr. Chairman, members of the committee, I am John A. Buggs, Staff Director of the U.S. Commission on Civil Rights. With me this morning is Lawrence B. Glick, Acting General Counsel of the Commission and William A. Blakey, Director of Congressional Liaison.

Among other duties, the Commission has statutory responsibility to ". . . study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or *in the administration of justice.*" I want to emphasize our jurisdiction with respect to the administration of justice because there are two significant issues I will address in my testimony today—first, the adverse affect of denying the franchise to ex-offenders, regardless of their race, and most particularly the effect of denying the franchise to minority ex-offenders. Let me indicate before moving into the body of my remarks that the Commission has always held that its jurisdiction in the area of the administration of justice was not limited to investigating or collecting information having to do with race, sex, color, religion and national origin. The administration of justice jurisdiction is broader and permits the Commission to look into problems which do not relate to race or sex or national origin. The Commission is, of course, concerned with H.R. 9020 because it addresses the issue of voting rights, with which we have been concerned since the Congress created the Commission in 1957.

The Commission on Civil Rights supports passage of H.R. 9020 which is being considered by this Subcommittee. H.R. 9020 is similar to H.R. 15049, which was introduced in the 92d Congress and supported by the Commission. H.R. 9020 would amend the Voting Rights Act of 1970 to prohibit the States from denying the right to vote in Federal elections to former criminal offenders who have not been convicted of an offense relating to voting or elections and who are not presently incarcerated.

In H.R. 9020, Congress declares that depriving any citizen who is not confined in a correctional institution of the right to vote in a Federal election because that citizen has been convicted of a criminal offense not related to voting or elections: (1) denies the citizen the constitutional right to vote: (2) bears no reasonable relationship to the offense sufficient to warrant deprivation of the right to vote: (3) denies to such citizen the constitutional right to due process and the equal protection of the laws; and (4) bears no reasonable relationship to any compelling State interest. The bill prohibits such denials of the right to vote and directs the Attorney General to institute actions against States or their political subdivisions when needed to implement the purposes of the title.

We support HR 9020 because the denial of the right to vote to citizens who have been convicted of a criminal offense remains as one of the last major obstacles to the full enjoyment of that right by all citizens of the United States. Through passage of constitutional amendments subsequently ratified by the States, Congress has eliminated voter qualifications based on race, sex, and wealth and has extended the right to vote to all citizens 18 years old or older. Through passage of the Voting Rights Act of 1965 and the Voting Rights Amendments of 1970 the Congress has enacted legislation whose objective is the enforcement of these constitutionally protected rights. It is now most appropriate for Congress to end the denial of the right to vote to former criminal offenders.

Establishing a Uniform Standard for Granting the Franchise to Ex-Offenders in Federal Elections

The Commission on Civil Rights believes that it is necessary for Congress to act to guarantee the right to vote to former offenders. Clearly, the States have an important interest in insuring the integrity of their elections. But just as clearly the States cannot arbitrarily limit the right to vote, the most fundamental of all rights in a democratic society. The disqualification of a voter convicted of a crime is constitutionally permissable, if at all, only if the elements of the crime are such that it may reasonably be concluded that allowing a person convicted of that particular crime to vote would constitute a direct threat to the elective process. The Supreme Court is on record in several cases, including one recent decision in which they have barred the deprivation of the right to vote to a class of individuals because of some remote benefit to the State. It seems clear that an equitable, uniform standard is needed to ensure the right of ex-offenders to vote.

The adoption of such a standard would demonstrate the rational relationship between the crime committed and the continued denial of the franchise. It would also establish an exemplary standard for state legislatures to follow with respect to state and local elections. H.R. 9020 would come close to establishing a uniform standard for Federal elections by only permitting the disqualification of former offenders who have committed an offense related to voting or elections.

Discriminatory Effect of Varying State Standards

State provisions restricting the voting rights of citizens convicted of criminal offenses vary greatly. Many States restore full voting rights to former criminal offenders after they have completed their sentences. For example, Colorado and Oregon disqualify only convicted felons who are confined to correctional institutions at the time of an election. The ex-offenders right to vote is automatically restored upon release from prison. In addition, New York and Illinois have amended their disfranchising laws or State constitutions to automatically restore the right to vote to former offenders following completion of their sentence.

Many States have provisions which establish general categories of disfranchising offenses. These States generally establish the conviction of a felony or other "infamous crime" as the basis for withholding the right to vote.

Some States have established particularized lists of disqualifying crimes. The greatest majority of these listed crimes have no reasonable relationship to voting or the electoral process. For example, Article 2, Section 6, of the Constitution of South Carolina disqualifies persons from voting who have been convicted of burglary, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of the trust with fradulent intent, fornication, sodomy, indecent assault with intent to ravish, miscegenation, larceny, or crimes against the election laws. The fact that certain crimes are selected by the States and labelled "infamous" and that the criminal conduct involved bears no reasonable relationship to the electoral process and voting, operates indiscriminately to deprive the right to vote to all ex-offenders. Rehabilitated ex-offenders as a class have not been demonstrated to be unworthy of the ballot, nor is there any showing of a state interest in continuing to deny this basic constitutional right.

A second and more profound effect of varying State standards exists with respect to minority group persons. In the past, States have carefully selected disfranchising crimes in order to disqualify a disproportionate number of black voters. The list of South Carolina's disqualifying crimes noted previously, undoubtedly reflects such a discriminatory purpose. Such a purpose was clearly present in Mississippi. The Mississippi Constitution did not disqualify murderers or rapists from voting until 1968. Prior to that year, Article 12, Section 241 of the State constitution only disfranchised persons convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy. In 1896, the Mississippi Supreme Court described the intent behind the disfranchising provision in these words:

> By reason of its previous condition of servitude and dependence, this (the Negro) race had acquired or accentuated certain pecularities of habit, of temperament, and of character which clearly distinguished it as a race from that of the whites—a patient, docile people—but careless, landless, and migratory within limits, without forethought, and its criminal members given rather to furtive offenses than to robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.

The Commission would also point out that Blacks and other minority group Americans are arrested and convicted of serious crimes at rates disproprotionate to their representation in the Nation's total population. As early as 1965 The President's Commission on Law Enforcement and Administration of Justice stated that ". . . Negroes over 18 are arrested about 5 times as often as white for crimes of violence." A California Federal District Court in *Gregory* v. *Litton Systems* 316 F. Supp. 401, (1970), noted that:

> Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, negroes nationally comprise some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as "suspicion arrests."

The Court held that a substantial and disproportionate number of blacks are excluded from employment by the defendant's policy of denying employment to those with prior arrest records. The 1972 *Uniform Crime Reports* also support the fact that minority groups are arrested for violent crimes out of proportion to their numbers in society. This is particularly true for blacks and American Indians, who respectively account for 30.1% and 2.0% of arrests for all crimes and 39.2% and .7% of arrests for violent crimes—yet blacks constitute only 11% of the population and Native Americans only .37%. Although the Uniform Crime Reports do not record figures for Mexican-Americans, the Commission's investigation of *Mexican Americans and the Administration of Justice in the Southwest* (1970) shows a similarly high arrest rate among Chicanos in five southwestern States.

Although arrests do not always lead to convictions, if blacks and other minorities are disproportionately represented among those arrested, it is probably true that they are also disproportionately represented among those convicted. Taking the 1972 Uniform Crime Report figures which show about a 65% conviction rate (without race breakdown), one gets a rather shocking idea of how disfranchising prohibitions based on felony convictions affect minorities. The overrepresentation of minority groups in state prison populations is further evidence of the discriminatory impact of state disfranchising statutes.

While history and society clearly bear some of the responsibility for the higher crime rates among black, brown and red Americans, a socioeconomic condition which is exacerbated by the absence of adequate counsel and racism in the selection of jurors and pitifully few minority group jurists—the existence of voting barriers based on felony convictions has a debilitating effect on *all* ex-offenders, which falls particularly hard on those who are members of minority groups.

Thus, even in those States where the list of disqualifying crimes were not selected with the purpose of disfranchising blacks, the use of serious crimes unrelated to the electoral process to disqualify voters in effect established an invidious racial discrimination against minority citizens. We would suggest that the Subcommittee investigate whether State disfranchisement provisions have the effect of discriminating against minorities. Such an investigation might provide the statistical basis for broader Congressional action than is now contemplated in HR 9020.

State Election Procedures

As the Subcommittee is well aware HR 9020 only applies to primary and other elections for President, United States Senator, Representative in the Congress, or Delegate or Resident Commissioner to the Congress. The denial of the right to vote to former criminal offenders in State elections is equally deserving of Congressional remedial action. Therefore, the Commission recommends that the Committee on the Judiciary consider expanding the scope of HR 9020 to also prohibit the States from denying the right to vote in State and local elections to former criminal offenders.

We believe that the Congress has the constitutional authority to enact such an expanded prohibition. The Supreme Court's holding in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), establishes that Congress has the authority to set the qualifications for voters in Federal elections. The Court, however, declared unconstitutional Congress' attempt to require the States to lower the voting age to 18 in State and local elections. The Court held that the power to set voter qualifications for these elections was reserved to the States *except when such State powers have been curtailed by specific constitutional amendments.* Applying this exception, the Court held that Congress had the authority under the enforcement clauses of the Fourteenth and Fifteenth Amendments to ban the use of literacy tests after Congress found that those tests had been used to discriminate against the voting rights of minority citizens. We believe that Congress has the authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to prohibit the disqualification of former criminal offenders from voting in State and local elections if the Congress finds that State disfranchising provisions have the effect and, at least in some cases, were adopted with the purpose of discriminating against minority voters.

The Supreme Court recently heard arguments in *Richardson* v. *Ramirez* (Brown) No. 72–1058 on appeal from the California Supreme Court. *Ramirez* raises for the Court's consideration the question of the constitutionality, under the Fourteenth Amendment's Equal Protection Clause, of state constitutional prohibitions against voting by ex-offenders who were convicted of "infamous crimes" but who have completed their sentences and probationary period. Although we understand the Subcommittee's caution in taking any action while this issue is before the Court, the Commission believes that the adverse effect of these state prohibitions on minorities warrants Congressional consideration of some action regardless of the outcome in *Ramirez*.

The Voting Rights Act of 1965 establishes a clear precedent for action in this area, where there was a Congressional finding that voting practices in certain states were carried out to prevent blacks from exercising the right to vote, or that those devices had the effect of denying or abridging the right of any citizen to vote because of race or color. If a similar finding could be made regarding the reason for the selection of disqualifying crimes or the effect of utilizing certain crimes to to disqualify former felons—there may be room for remedial legislation. Such legislation would benefit all ex-offenders, even though it was premised on the discriminatory effect of disqualifying crimes on minority groups. The Commission, therefore, recommends that the Subcommittee investigate whether State disfranchising provisions were enacted for the purpose of discriminating against minorities or have that effect.

I would be more than happy to respond to any questions you may have at this time.

[The statement referred to at p. 20 follows:]

DEPARTMENT OF JUSTICE,
January 30, 1974.

TESTIMONY OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, ON ENFRANCHISING EX-OFFENDERS, H.R. 9020

Mr. Chairman, We find it somewhat awkward to testify with respect to H.R. 9020 at this time when the question to which it is addressed is pending before the Supreme Court, *Ramirez* v. *Richardson*, No. 73–324. The only recommendation that the Department of Justice can make with respect to the bill is that Congress withhold any action until the *Ramirez* case is decided and the state of the law becomes clearer.

H.R. 9020 would prohibit States from denying the right to vote in federal elections to persons convicted of criminal offenses, except offenses relating to voting or elections, unless the convicted person is currently incarcerated. It recites as the premises for federal action in this area that (1) the exclusion of convicted persons from the franchise by the States abridges an inherent constitutional right to vote, (2) bears no reasonable relationship to criminal offenses, (3) denies due process and equal protection, and (4) bears no reasonable relationship to any compelling State interest. The bill would authorize the Attorney General to bring suit to enforce its provisions before three-judge federal courts.

While we consider it inappropriate for the Department to take a position with respect to the constitutional authority of Congress to enact this proposal while the question of the constitutionality of disenfranchising ex-felons is before the Court, the following description of past case law may be of some assistance to the Committee.

The practice of barring convicted persons from the vote dates from the earliest days of this country but it was rarely challenged in the courts until quite recently. In 1967 the Second Circuit considered the issue in connection with the dismissal of a suit and refusal to convene a three-judge court to hear a challenge that the New York law barring ex-felons from the vote constituted a Bill of Attainder and violated the Eighth Amendment prohibition on cruel and unusual punishment. The court dealt rather summarily with these contentions, citing the historic practice of excluding ex-felons from the vote and the recognition of this practice in section 2 of the Fourteenth Amendment—

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. (Emphasis added.)

The court then concluded that the lack of substance in the claim of unconstitutionality of the New York law was "sufficiently obvious" that there was no need to convene a three-judge court.

A three-judge court was convened in *Beacham* v. *Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), where the Florida law was challenged on the ground that denying the franchise to some ex-felons while permitting those granted a discretionary pardon the right to vote violated the inherent rights of citizenship, equal protection of the laws and due process. The court rejected the various contentions again relying on the historic practice, earlier court decisions, and section 2 of the Fourteenth Amendment. This decision was summarily affirmed by the Supreme Court, 396 U.S. 12.

Similarly, in *Fincher* v. *Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), a three-judge court rejected the contention that the North Carolina ban against voting by ex-felons violated the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. With respect to the latter contention, the court cited section 2 of the Fourteenth Amendment and the cases relating thereto and observed:

> "We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusions can pass muster under the equal protection clause."

The decision was also summarily affirmed by the Supreme Court, 411 U.S. 961.

This same equal protection challenge to the exclusion of ex-felons is the question on which certiorari was granted in *Ramirez* v. *Richardson*, 9 Cal. 3d 199, 507 P. 2d 1345 (1973). The case has been argued and is now awaiting decision. In our view it would be unwise to proceed with legislation such as H.R. 9020, which is premised in large part on section 1 of the Fourteenth Amendment, until the Supreme Court decides *Ramirez* and provides additional insight into the legal issues involved, perhaps clarifying the impact of its summary affirmances of *Beacham* and *Fincher*. Since *Ramirez* has already been argued the delay should not prove substantial.

[The statement referred to at p. 28 follows:]

AMERICAN BAR ASSOCIATION,
COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES,
Washington, D.C., January 30, 1974.

STATEMENT OF SENATOR JOHN R. DUNNE, MEMBER OF AMERICAN BAR ASSOCIATION, COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES BEFORE SUBCOMMITTEE ON COURTS, HOUSE JUDICIARY COMMITTEE ON H.R. 9020, A BILL TO AMEND THE VOTING RIGHTS ACT OF 1970 TO SECURE VOTING RIGHTS FOR EXOFFENDERS

I sincerely appreciate this opportunity to testify before your committee on behalf of the American Bar Association Commission on Correctional Facilities and Services in support of the principles underlying H.R. 9020. This kind of legislation represents a significant step in eliminating one of the most basic restrictions placed on former offenders—the loss of the right to vote.

Once a person has "paid his debt to society," there is no justification for shutting him out from full citizenship. The American Bar Association supports measures like H.R. 9020 which seek to overcome these irrational restrictions. We view this as an important component of the overall correctional program our Commission and Association have been supporting. The most directly related element of that program is our work to remove unreasonable job restrictions confronting ex-offenders. To develop and disseminate information about these barriers and techniques for overcoming them, the Commission on Correctional Facilities and Services, in 1971 and with cosponsorship of the ABA Criminal Justice Section created the National Clearinghouse on Offender Employment Restrictions. I am submitting for the Committee's information a short pamphlet which describes this effort more fully.

Section 401 of this bill declares that depriving an ex-offender of his right to vote represents a violation of the United States Constitution. Only a few weeks ago, the American Bar Association argued this same issue as *amicus curiae* in the Supreme Court case of *Richardson v. Ramirez*. The ABA brief was prepared by our Resource Center on Correctional Law and Legal Services, another of the Commission's programs. We look forward to a clear decision by the Court abolishing such blanket restrictions once and for all. I am submitting a copy of the brief for the record.

Not only is the practice of disenfranchising ex-offenders questionable from a constitutional standpoint; it also violates sound correctional practice. Each year over 100,000 people are released from correctional facilities across the country. Additional thousands successfully complete parole terms. Although they have endured the punishment imposed by the sentencing court, many states deny them the full rights of other citizens. This punishes a man during his entire life or a mistake he has long since come to regret.

Civil disabilities—of which the right to vote is but one—originated at a time when the philosophy of crime and punishment was much different from what it is today. Retribution and deterrence were the two most important elements of crime control. It was thought that by severely punishing anyone convicted of a crime, the offender would get his "just desserts" and others would be deterred. The most common penalty was death. In England in the Middle Ages, there were 350 offenses for which a person could be executed. Minor offenses such as petty theft were punished by cutting off a person's hand or nose. At at time when relatively few people could exercise the franchise and other citizenship rights, their denial was an important way to punish the criminal and set him apart from the rest of society.

Our approach is different today. Thankfully, we no longer use the death penalty for every possible offense; nor do we rely upon mutiliation. Experts agree that the retribution and deterrence models of punishment do little to combat crime. As a consequence, we now emphasize helping offenders so they can return to society as useful and productive citizens. Millions of dollars are spent annually in institutions on vocational training, educational programs, and drug rehabilitation. Hopefully these efforts will contribute to a decrease in recidivism and an increase in the successful reintegration of former offenders to society.

Even as these clearly defined efforts toward rehabilitation are expanded, many states persist in the counterproductive stigmatization of ex-offenders by denying them basic rights. Perhaps the most fundamental is the right to vote since this is the basis of ordered, representative government in a democratic society. Denial of this right only serves to fence these people out of society and convince them

that no matter what they do, they can never be treated as anything but an "ex-con". As the prestigious National Advisory Commission on Criminal Justice Standards and Goals concluded in its Report on Corrections—released just last October—

> Loss of citizenship rights—the right to vote, hold public office, and serve on juries—inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest. [Standard 16.17, p. 593]

There appears to be little justification for disenfranchising persons for past crimes which are in no way connected with the balloting process. Not only does it harm rehabilitative efforts, it also fails to accomplish any positive goals. The most common reason given for denying the right to vote to former offenders is that it "protects the purity of the ballot box". This justification assumes that previous criminals are more likely to commit election frauds than any other member of the public. There is no credible evidence to support this assumption.

At one time, there may have been a valid reason to fear such fraud. Voting was commonly conducted in an open room without benefit of voting booths. Balloting was commonly done on different colored sheets of papers which could be obtained from party headquarters. Registration was nonexistent and the ballot box was often nothing more than an old shipping crate. In those days, it was not uncommon for party leaders to round up drunks and vagabonds and take them from polling place to polling place to vote.

Over the years, voting practices have drastically changed. All voters are now required to register prior to the election and balloting takes place in precincts under the supervision of poll watchers. Most places use voting machines, but even those which do not, use numbered ballots with special watermarks. These precautions make it almost impossible to commit voting frauds, at least in the balloting process. This is well illustrated by the fact that between 1962 and 1970 there were only 19 convictions for federal election code violations and the statistics available fail to indicate whether those convictions were for vote buying or such esoteric crimes as keeping troops at the polls (18 U.S.C. § 592) or soliciting political contributions from persons on relief (18 U.S.C. § 604). In California, the last reported case of vote buying occurred in 1908.

Even should an election code violation occur, the states are well prepared to take care of them. Every state has laws making it a criminal offense to commit election fraud. The prohibitions cover everything from vote-buying to campaigning too close to the ballot box. California, for example, has 76 different acts dealing with voting listed as felonies and 60 more as misdemeanors. In our view, imposing criminal penalties on actual violators is a more acceptable and efficient way of protecting against election fraud than blanketing out an entire class of citizens from the electoral process. It achieves the result of deterring voting fraud, while not assuming the guilt of everyone who has ever been in trouble with the law.

In the past several years, a number of nationally prominent groups and two prestigious commissions have recommended that these restrictions be abolished. The President's Commission on Law Enforcement and Administration of Justice stated,

> . . . there seems to be no justification for permanently depriving all convicted felons of the vote, as the laws in most states provide. The convicted person may have no strong personal interest in voting, but to be deprived of the right is an important symbol. Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote. [Task Force Report: Corrections, p. 90]

As I already mentioned, the National Advisory Commission on Criminal Justice Standards and Goals had a similar view. It specifically suggested that all states should enact legislation repealing mandatory provisions depriving convicted persons of their civil rights.

National Commissions are not the only ones who favor the right to vote for ex-felons. In a recent survey taken by the Education Fund of the League of Women Voters, 16 categories of community organizations were asked whether persons convicted of a felony and released from prison should be eligible to vote. At least two-thirds of every group surveyed approved of granting ex-felons the right to vote. Significantly, 80% of the Democratic Party Chairmen and 65% of the Republican Party Chairmen approved. In the 1972 Democratic Party Platform, there is a plank calling for the reform under consideration here. Other groups have expressed their sentiments in the form of model legislation. The

National Conference on Commissioners of Uniform State Laws has proposed a Uniform Act on the Status of Convicted Persons. This Act—which the American Bar Association approved in 1964—would restore an offender's rights upon final discharge from his sentence or upon his release from incarceration on either parole or probation. It delineates the specific policy of our Association in this matter. This Act has been passed by New Hampshire and Hawaii. Like H.R. 9020, the Uniform Act, (which generally abrogates all common law "civil death" penalties) forfeits the right to vote only for felons whose confinement sentences have not expired. It specifically permits felons on suspended sentence, probation or parole to continue to vote. On completion of sentence, the felon is to be given an "order, certificate or other instrument" which explicitly states, among other things, that the offender's "rights to vote . . . are thereby restored . . ."

The American Law Institute has taken a similar position in § 306.3 of the Model Penal Code. This section states,

> Notwithstanding any other provision of law, a person who is convicted of a crime shall be disqualified from voting in a primary or election if and only so long as he is committed under a sentence of imprisonment.

This Committee can thus be assured that the bill before it squares with a long line of distinguished and carefully considered legislative and national commission proposals on the subject. A substantial number of states in the last few years have eliminated voting restrictions previously placed on ex-offenders. Four states—Arkansas, Maine, Michigan and Tennessee—have no disenfranchisement provisions. Twenty-five other jurisdictions automatically restore voting rights at the end of the sentence, upon release on parole, or at some stated period after final discharge. There is no evidence from any of these jurisdictions that the purity of their election process has been endangered.

The trend in penology is clear. The purpose of corrections has shifted from one of blind retaliation, to preparing the offender for lawful participation in society. Numerous organizations and commissions have voiced their support for an end to these needless restrictions. Many states have recognized the need to drop these restrictions and have done so with no adverse effects. The American Bar Association supports these efforts and those like H.R. 9020 to restore the right to vote to ex-offenders who are no longer confined in a correctional facility at the time of the election.

○