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**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

# BILL OF RIGHTS AND VOTING COMMITTEE AGENDA

**DATE:** Thursday, October 9, 2014

**TIME:** 10:00 am

**ROOM:** Statehouse Room 116

- Call to Order
- Roll Call
- Approval of September 11, 2014 Minutes
- Article V, Section 4 (Exclusion from Franchise)

  Presenter:
  Douglas A. Berman, Professor of Law, Moritz College of Law
- Article V, Section 6 (Idiots or Insane Persons)
  - Follow up discussion
  - HB624 – Ward's Bill of Rights
- Future topics
  - Discussion
- Adjourn

77 S. High St., 24th Floor, Columbus, OH 43215
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# FELONY DISENFRANCHISEMENT: A PRIMER

A striking 5.85 million Americans are prohibited from voting due to laws that disenfranchise citizens convicted of felony offenses.[1] Felony disenfranchisement rates vary by state, as states institute a wide range of disenfranchisement policies.

The 12 most extreme states restrict voting rights even after a person has served his or her prison sentence and is no longer on probation or parole; such individuals in those states make up approximately 45 percent of the entire disenfranchised population.[2] Only two states, Maine and Vermont, do not restrict the voting rights of anyone with a felony conviction, including those in prison.

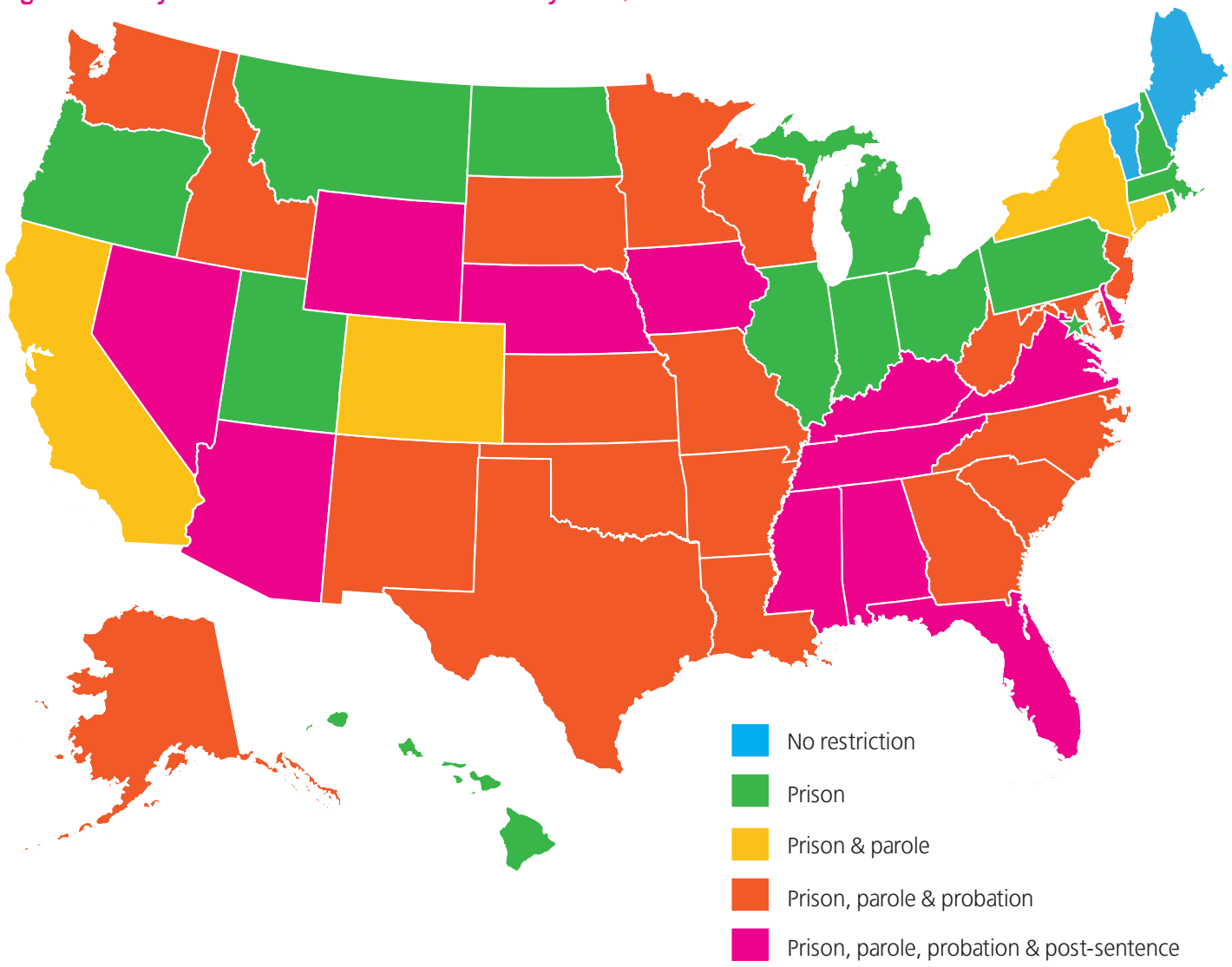
Persons currently in prison or jail represent a minority of the total disenfranchised population. In fact, 75 percent of disenfranchised voters live in their communities, either under probation or parole supervision or having completed their sentence.[5] An estimated 2.6 million people are disenfranchised in states that restrict voting rights even after completion of sentence.

## Table 1. Summary of Felony Disenfranchisement Restrictions in 2014[3,4]

| No restriction (2) | Prison (14) | Prison & parole (4) | Prison, parole & probation (19) | Prison, parole, probation & post-sentence – some or all (12) |
|---|---|---|---|---|
| Maine | District of Columbia | California | Alaska | Alabama[a] |
| Vermont | Hawaii | Colorado | Arkansas | Arizona[b] |
| | Illinois | Connecticut | Georgia | Delaware[c] |
| | Indiana | New York | Idaho | Florida[d] |
| | Massachusetts | | Kansas | Iowa[e] |
| | Michigan | | Louisiana | Kentucky |
| | Montana | | Maryland | Mississippi[a] |
| | New Hampshire | | Minnesota | Nebraska[f] |
| | North Dakota | | Missouri | Nevada[g] |
| | Ohio | | New Jersey | Tennessee[h] |
| | Oregon | | New Mexico | Virginia[i] |
| | Pennsylvania | | North Carolina | Wyoming[d] |
| | Rhode Island | | Oklahoma | |
| | Utah | | South Carolina | |
| | | | South Dakota | |
| | | | Texas | |
| | | | Washington | |
| | | | West Virginia | |
| | | | Wisconsin | |

[a] State disenfranchises post-sentence for certain offenses.
[b] Arizona disenfranchises post-sentence for a second felony conviction.
[c] Delaware requires a five-year waiting period for certain offenses.
[d] State requires a five-year waiting period.
[e] Governor Tom Vilsack restored voting rights to individuals with former felony convictions via executive order in 2005. Governor Terry Branstad reversed this executive order in 2011.
[f] Nebraska reduced its indefinite ban on voting to a two-year waiting period in 2005.
[g] Nevada disenfranchises post-sentence except for first-time non-violent offenses.
[h] Tennessee disenfranchises those convicted of felonies since 1981, in addition to those convicted of select offenses prior to 1973.
[i] Virginia requires a five-year waiting period for violent offenses and some drug offenses. As of July 15, 2013, the state will no longer require a two-year waiting period for non-violent offenses.

Figure A. Felony Disenfranchisement Restrictions by State, 2014




Rights restoration practices vary widely across states and are subject to the turns of political climate and leadership, which has led some states to vacillate between reform and regression. In Florida, the clemency board voted in 2007 to automatically restore voting rights for many persons with non-violent felony convictions. This decision was reversed in 2011, and individuals must now wait at least five years after completing their sentence to apply for rights restoration. In Iowa, then-Governor Vilsack issued an executive order in 2005 automatically restoring the voting rights of all persons who had completed their sentences, but this order was rescinded in 2011 by Governor Branstad.

Felony disenfranchisement policies have a disproportionate impact on communities of color. Black Americans of voting age are four times more likely to lose their voting rights than the rest of the adult population, with one of every 13 black adults disenfranchised nationally. In three states – Florida (23 percent), Kentucky (22 percent), and Virginia (20 percent) – more than one in five black adults is disenfranchised. In total, 2.2 million black citizens are banned from voting.[6]

## HISTORY OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES

English colonists brought to North America the common law practice of "civil death," a set of criminal penalties that included the revocation of voting rights. Early colonial laws limited the penalty of disenfranchisement to certain offenses related to voting or considered "egregious violations of the moral code."[7] After the American Revolution, states began

codifying disenfranchisement provisions and expanding the penalty to all felony offenses.[8] Many states instituted felony disenfranchisement policies in the wake of the Civil War, and by 1869, 29 states had enacted such laws.[9] Elliot argues that the elimination of the property test as a voting qualification may help to explain the popularity of felony disenfranchisement policies, as they served as an alternate means for wealthy elites to constrict the political power of the lower classes.[10]

In the post-Reconstruction period, several Southern states tailored their disenfranchisement laws in order to bar black male voters, targeting those offenses believed to be committed most frequently by the black population.[11] For example, party leaders in Mississippi called for disenfranchisement for offenses such as burglary, theft, and arson, but not for robbery or murder.[12] The author of Alabama's disenfranchisement provision "estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes," resulting in a policy that would disenfranchise a man for beating his wife, but not for killing her.[13] Such policies would endure for over a century. While it is debatable whether felony disenfranchisement laws today are intended to reduce the political clout of communities of color, this is their undeniable effect.

## LEGAL STATUS

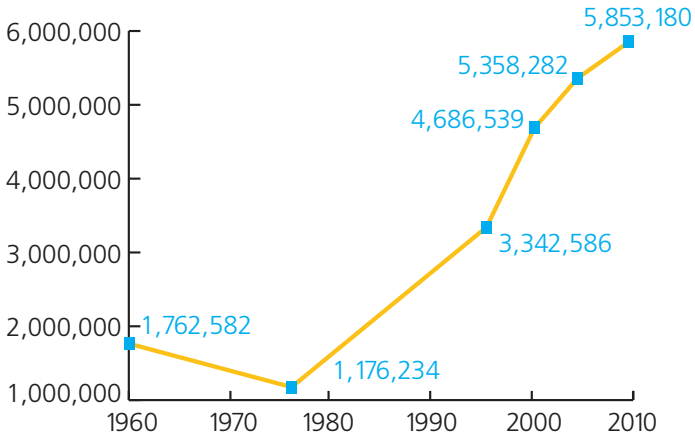
Disenfranchisement policies have met occasional legal challenges in the last century. In *Richardson v. Ramirez* 418 U.S. 24 (1974), three men from California who had served time for felony convictions sued for their right to vote, arguing that the state's felony disenfranchisement policies denied them the right to equal protection of the laws under the U.S. Constitution. Under Section 1 of the Fourteenth Amendment, a state cannot restrict voting rights unless it shows a compelling state interest. Nevertheless, the U.S. Supreme Court upheld California's felony disenfranchisement policies as constitutional, finding that Section 2 of the Fourteenth Amendment allows the denial of voting rights "for participation in rebellion, or other crime." In the majority opinion, Chief Justice Rehnquist found that Section 2 – which was arguably intended to protect the voting rights of freed slaves by sanctioning states that disenfranchised them – exempts from sanction disenfranchisement based on a felony conviction. By this logic, the Equal Protection Clause in the previous section could not have been intended to prohibit such disenfranchisement policies.

Critics argue that the language of the Fourteenth Amendment does not indicate that the exemptions established in Section 2 should prohibit the application of the Equal Protection Clause to voting rights cases.[14] Moreover, some contend that the Court's interpretation of the Equal Protection Clause in *Richardson* is inconsistent with its previous decisions on citizenship and voting rights, in which the Court has found that the scope of the Equal Protection Clause "is not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality."[15] Therefore, even if the framers of the Fourteenth Amendment seemingly accepted felony disenfranchisement, our interpretation of the Equal Protection Clause today should allow for the ways in which our concept of equality may have evolved since 1868.

## GROWTH OF THE DISENFRANCHISED POPULATION

As states began expanding voting rights in the civil rights era, the disenfranchisement rate dropped between 1960 and 1976. Although reform efforts have been substantial in recent years, the overall disenfranchisement rate has increased dramatically in conjunction with the growing U.S. prison population, rising from 1.17 million in 1976 to 5.85 million by 2010.

### Figure B. Number Disenfranchised for Selected Years, 1960-2010[16]



# POLICY REFORMS IN RECENT YEARS

Public opinion surveys report that eight in ten U.S. residents support voting rights for citizens who have completed their sentence, and nearly two-thirds support voting rights for those on probation or parole.[17] In recent years, heightened public awareness of felony disenfranchisement has resulted in successful state-level reform efforts, from legislative changes expanding voting rights to grassroots voter registration initiatives targeting individuals with felony convictions. Since 1997, 23 states have modified felony disenfranchisement provisions to expand voter eligibility.[18] Among these:

- Eight states either repealed or amended lifetime disenfranchisement laws
- Three states expanded voting rights to persons on probation or parole
- Ten states eased the restoration process for persons seeking to have their right to vote restored after the completion of their sentence
- Three states improved data and information sharing

As a result of successful reform efforts from 1997 to 2010, an estimated 800,000 citizens have regained the right to vote.

## Table 2. Felony Disenfranchisement Policy Changes, 1997-2013[19,20]

| State | Change |
|---|---|
| Alabama | Streamlined restoration for most persons upon completion of sentence (2003) |
| Connecticut | Restored voting rights to persons on probation (2001); repealed requirement to present proof of restoration in order to register (2006) |
| Delaware | Repealed lifetime disenfranchisement, replaced with five-year waiting period for persons convicted of most offenses (2000); repealed five-year waiting period for most offenses (2013) |
| Florida | Simplified clemency process (2004, 2007); adopted requirement for county jail officials to assist with restoration (2006); reversed modification in clemency process (2011) |
| Hawaii | Codified data sharing procedures for removal and restoration process (2006) |
| Iowa | Eliminated (2005) and reinstated (2011) lifetime disenfranchisement; simplified application process (2012) |
| Kentucky | Simplified restoration process (2001, 2008); restricted restoration process (2004, amended in 2008) |
| Louisiana | Required Department of Public Safety and Corrections to provide notification of rights restoration process (2008) |
| Maryland | Repealed lifetime disenfranchisement (2007) |
| Nebraska | Repealed lifetime disenfranchisement, replaced with two-year waiting period (2005) |
| Nevada | Repealed five-year waiting period (2001); restored voting rights to persons convicted of first-time non-violent offenses (2003) |
| New Jersey | Established procedures requiring state criminal justice agencies to notify persons of their voting rights when released (2010) |
| New Mexico | Repealed lifetime disenfranchisement (2001); codified data sharing procedures, certificate of completion provided after sentence (2005) |
| New York | Required criminal justice agencies to provide voting rights information to persons who are again eligible to vote after a felony conviction (2010) |
| North Carolina | Required state agencies to establish a process whereby individuals will be notified of their rights (2007) |
| Rhode Island | Restored voting rights to persons on probation and parole (2006) |
| South Dakota | Established new procedures to provide training and develop voter education curriculum to protect the voting rights of citizens with certain felony convictions (2010); revoked voting rights for persons on felony probation (2012) |
| Tennessee | Streamlined restoration process for most persons upon completion of sentence (2006) |
| Texas | Repealed two-year waiting period to restore rights (1997) |
| Utah | Clarified state law pertaining to federal and out-of-state convictions (2006) |
| Virginia | Required notification of rights and restoration process by Department of Corrections (2000); streamlined restoration process (2002); decreased waiting period for non-violent offenses from three years to two years and established a 60-day deadline to process voting rights restoration applications (2010); eliminated waiting period and application for non-violent offenses (2013) |
| Washington | Restored voting rights for persons who exit the criminal justice system but still have outstanding financial obligations (2009) |
| Wyoming | Restored voting rights to persons convicted of first-time non-violent offenses (2003) |

## DISENFRANCHISEMENT IN AN INTERNATIONAL CONTEXT

Although they are rooted in the "civil death" tradition of medieval Europe, disenfranchisement policies in the United States today are exceptional in their severity and the restriction of the voting rights of people who have completed their prison terms or were never incarcerated at all.[21] While only two states (Maine and Vermont) in the United States allow citizens to vote from prison, the European Court of Human Rights determined in 2005 that a blanket ban on voting from prison violates the European Convention on Human Rights, which guarantees the right to free and fair elections.[22] Indeed, almost half of European countries allow all incarcerated individuals to vote, facilitating voting within the prison or by absentee ballot.[23] In Canada, Israel, and South Africa, courts have ruled that any conviction-based restriction of voting rights is unconstitutional.

## IMPACT OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES

The political impact of the unprecedented disenfranchisement rate in recent years is not insignificant. One study found that disenfranchisement policies likely affected the results of seven U.S. Senate races from 1970 to 1998 as well as the hotly contested 2000 Bush-Gore presidential election.[24] Even if disenfranchised voters in Florida alone had been permitted to vote, Bush's narrow victory "would almost certainly have been reversed."[25]

Disenfranchisement policies likely affected the results of **7 U.S. Senate races** from 1970 to 1998 as well as the **2000 Bush-Gore presidential election.**

Furthermore, restoring the vote to persons leaving prison could aid their transition back into community life. The revocation of voting rights compounds the isolation of formerly incarcerated individuals from their communities, and civic participation has been linked with lower recidivism rates. In one study, among individuals who had been arrested previously, 27 percent of non-voters were rearrested, compared with 12 percent of voters.[26] Although the limitations of the data available preclude proof of direct causation, it is clear that "voting appears to be part of a package of pro-social behavior that is linked to desistance from crime."[27]

## CONCLUSION

The dramatic growth of the U.S. prison population in the last 40 years has led to record levels of disenfranchisement, with an estimated 5.85 million voters banned from the polls today. Disenfranchisement policies vary widely by state, ranging from no restrictions on voting to a lifetime ban upon conviction. Felony disenfranchisement has potentially affected the outcomes of U.S. elections, particularly as disenfranchisement policies disproportionately impact people of color. Nationwide, one in every 13 black adults cannot vote as the result of a felony conviction, and in three states – Florida, Kentucky, and Virginia – more than one in five black adults is disenfranchised.

Denying the right to vote to an entire class of citizens is deeply problematic to a democratic society and counterproductive to effective reentry. Fortunately, many states are reconsidering their archaic disenfranchisement policies, with 23 states enacting reforms since 1997, but there is still much to be done before the United States will resemble comparable nations in allowing the full democratic participation of its citizens.

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1705 DeSales Street NW, 8th Floor
Washington, D.C. 20036
Tel: 202.628.0871
Fax: 202.628.1091
sentencingproject.org

This briefing paper was written by Jean Chung, Program Associate.

The Sentencing Project works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.

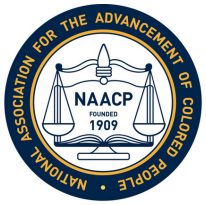
# DEMOCRACY IMPRISONED:
## A REVIEW OF THE PREVALENCE AND IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES

A Shadow Report Submitted to the United Nations Human Rights Committee in Preparation for the Fourth Periodic Review of the United States under the International Covenant on Civil and Political Rights

September 2013







## I. Reporting Organizations

This report has been authored by a coalition of non-profit organizations working on civil rights and criminal justice issues in the United States. The following organizations contributed to this report: the American Civil Liberties Union (ACLU), the ACLU of Florida, the Hip Hop Caucus, the Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil and Human Rights, the National Association for the Advancement of Colored People (NAACP), the NAACP Legal Defense and Educational Fund, Inc. and The Sentencing Project (collectively, the "Reporting Organizations"). Descriptions of each organization are attached as Appendix A.

## II. Introduction and Issue Summary

Some of the Reporting Organizations made List of Issues Submissions to the Human Rights Committee (the "Committee") in December 2012. This report updates items from those submissions and provides additional information to aid in the Committee's review of the United States' ("U.S." or "Government") felony disenfranchisement practices.[1] As a supplement to those Submissions, this report includes an overview of the history of and rationale for felony disenfranchisement laws in the United States, considers the U.S.' disenfranchisement practices in the context of other nations, and discusses recent state law developments.

After its review of the United States' second and third periodic report, the Committee expressed concern that the country's felony disenfranchisement practices have "significant racial implications." It also noted that "general deprivation of the right to vote for persons who have received a felony conviction, and in particular for those who are no longer deprived of liberty, do not meet the requirements of articles 25 and 26 of the Covenant, nor serves the rehabilitation goals of article 10(3)."[2] The Reporting Organizations are encouraged by the Committee's interest in felony disenfranchisement practices in the United States and share the Committee's concerns about the extent to which these laws and their impact are consistent with the critical human rights protections enshrined in the Convention.

The United States continues to lead the world in the rate of incarcerating its own citizens. The reach of the American correctional system has expanded over the course of the past half-century. In 1980, fewer than two million individuals were either incarcerated or on probation or parole; in 2011, that number was over seven million.[3] Despite a decrease in the prison population over the past three years and substantial reform efforts in some states, the overall disenfranchisement rate has increased dramatically in conjunction with the growing U.S. corrections population, rising from 1.17 million in 1976 to 5.85 million by 2010.[4] The growing incarceration rate has been mirrored by the disenfranchisement rate, which has increased by about 500% since 1980.[5] The fact that felony disenfranchisement is so wide-reaching is deeply disturbing, and indicates that these laws undermine the open, participatory nature of our democratic process.

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[1] The authors refer the Committee to the List of Issues Submissions from the ACLU of Florida, the Lawyers' Committee for Civil Rights Under Law and the Leadership Conference on Civil and Human Rights.

[2] Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, CCPR/C/USA/CO/3/Rev.1 (2006) 35.

[3] Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011,* BUREAU OF JUSTICE STATISTICS (Nov. 2012), http://www.bjs.gov/content/pub/pdf/cpus11.pdf.

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[5] Uggen et al., *supra* note 4.

### A. Disproportionate Impact of Felony Disenfranchisement Laws on Minorities

There is clear evidence that state felony disenfranchisement laws have a disparate impact on African Americans and other minority groups. At present, 7.7% of the adult African-American population, or one out of every thirteen, is disenfranchised. This rate is four times greater than the non-African- American population rate of 1.8%.[6] In three states, at least one out of every five African-American adults is disenfranchised: Florida (23%), Kentucky (22%), and Virginia (20%).[7] Nationwide, 2.2 million African-Americans are disenfranchised on the basis of involvement with the criminal justice system, more than 40% of whom have completed the terms of their sentences.[8]

Information on the disenfranchisement rates of other groups is extremely limited, but the available data suggests felony disenfranchisement laws may also disproportionately impact individuals of Hispanic origin and others. Hispanics are incarcerated in state and federal prisons at higher rates than non-Hispanics: about 2.4 times greater for Hispanic men and 1.5 times for Hispanic women.[9] If current incarceration trends hold, 17% of Hispanic men will be incarcerated during their lifetimes, in contrast to less than 6% of non-Hispanic white men.[10] Given these disparities, it is reasonable to assume that individuals of Hispanic origin are likely to be barred from voting under felony disenfranchisement laws at disproportionate rates.

### B. History and Rationale of Felony Disenfranchisement Laws

In one form or another, laws that disenfranchise individuals with felony convictions have existed in the United States since its founding. In fact, twenty-nine states had such laws on the books at the time of the ratification of the Constitution.[11] These laws were borne out of the concept of a punitive criminal justice system – those convicted of a crime had violated social norms, and, therefore, had proven themselves unfit to participate in the political process. Beginning around the end of Reconstruction – about 1870 – many southern states significantly broadened felony disenfranchisement and began focusing on crimes believed to be disproportionately committed by African Americans.[12] It was used along with a bevy of other measures as a means to circumvent the requirements of the Fifteenth Amendment, [13] which prohibited states from preventing individuals from voting on the basis of "race, color, or previous condition of servitude."[14] The justifications for disenfranchising individuals with felony convictions were ostensibly based on fears over the "purity of the ballot box" and concern that allowing certain current or even former inmates to vote would "pervert" the political process.[15] These laws were often upheld by reference to an exemption for felony disenfranchisement in Section 2 of the Fourteenth Amendment –

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[6] *Id.* at 1-2.
[7] Id.
[8] *Id.* at 17.
[9] Paul Guerino et al., *Prisoners in 2010*, BUREAU OF JUSTICE STATISTICS, 27 (Feb. 9, 2012), http://www.bjs.gov/content/pub/pdf/p10.pdf.
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[13] Angela Behrens, *Voting--Not quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).
[14] U.S. CONST. amend. XV, § 1.
[15] Washington v. State, 75 Ala. 582, 585 (Ala. 1884) (arguing that felony disenfranchisement is designed to "preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny.").

"participation in rebellion, or other crime."[16] Rather than punitive – focusing on the individual– these laws were deemed by the Supreme Court to be regulatory – focusing on the ballot and election itself.[17]

Over the course of the twentieth century, attitudes towards criminality have gradually come to include recognition of the possibility of the rehabilitation and reintegration of former prisoners into society upon their release.[18] However, there has not been a corresponding realignment of felony disenfranchisement laws to make them consistent with more contemporary goals of the criminal justice system – increasing public safety and reducing reoffending.

Proponents of felony disenfranchisement argue that such laws may deter crime,[19] though disenfranchisement has not been shown to actually accomplish the goal of deterrence. One commentator, for example, has observed that, "[r]ecent research suggests a negative correlation between voting and subsequent criminal activity among those with and without prior criminal history."[20] Disenfranchisement, on the other hand, is likely to have the opposite effect by further marginalizing and alienating formerly incarcerated individuals from civil society. Other arguments in support of felony disenfranchisement are unpersuasive, as well. For example, some suggest that, if allowed to vote, individuals with felony convictions would constitute a cohesive voting bloc, which would distort criminal law.[21] However, the fear that individuals with felony convictions may "distort" the law through voting is unfounded and certainly not an acceptable ground to prevent them from exercising that right.[22] The Supreme Court, for example, has previously held – although not in a felony disenfranchisement case – that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[23] In addition, little evidence exists to suggest that former inmates of any sort would cohere into a constituency, or that, if they did, any viable candidate would specifically court their votes.[24]

The arguments against felony disenfranchisement are strong. Felony disenfranchisement operates contrary to the goals of ensuring public safety and reducing reoffending by alienating from society those individuals that the criminal justice system is simultaneously attempting to reintegrate. Further, as the Committee has noted, state disenfranchisement laws are problematic not only due to the vast numbers of potential voters they affect, but also their disproportionate impact on racial minorities, particularly African Americans and Hispanics. Further, many of these laws extend punishment beyond the walls of the prison by continuing to disenfranchise individuals who are on probation, parole or have completed their full sentences. For this reason, it is particularly important that the Committee urge the United States to provide its rationale for continuing to deprive individuals with felony convictions of the right to vote after they are no longer incarcerated.

### C. The United States in International Context

Not only does the sheer number of individuals the United States imprisons set it apart from most nations, the United States has further distinguished itself from other countries through the widespread practice of depriving individuals with felony convictions of the right to vote. Disenfranchisement is a

[16] U.S. CONST. amend. XIV, § 2.
[17] Trop v. Dulles, 356 U.S. 86 (1958).
[18] Ziegler, *supra* note 12 at 203.
[19] Behrens, *supra* note 13 at 236.
[20] Ziegler, *supra* note 12 at 207.
[21] Guy Padraic Hamilton-Smith & Matt Vogel, *The Ballot as a Bulwark: The Impact of Felony Disenfranchisement on Recidivism*, 23 BERKELEY LA RAZA L.J. * (2013) (previous version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919617).
[22] *Id.*
[23] Carrington v. Rash, 380 U.S. 89, 94 (1965) (citing Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).
[24] Ziegler, *supra* note 12 at 206.

rarity in the democratic world, both for the incarcerated and for those released.[25] Under article 25, governments may impose reasonable restrictions on the right to vote, such as prohibiting voting by inmates. However, permanent disenfranchisement for a felony conviction—the policy in Florida, for example—fails to meet the requirements of article 25 of the ICCPR. Lifetime disenfranchisement does not satisfy the requirement that the grounds for the deprivation of voting rights be "objective and reasonable" or that the suspension of rights be "proportionate" to the offense and sentence.[26] This conclusion is consistent with the Committee's 2006 Concluding Observations after the U.S.' review.

The United States' status as an outlier is further affirmed by the growing reluctance of other nations to accept felony disenfranchisement. Even when such laws have been promulgated, they have often been struck down in the courts.[27] For example, in 1999, the South African high court struck down legislation disenfranchising all prisoners, noting that a republic is "founded on . . . universal adult suffrage" which is "one of the fundamental values of the constitutional order."[28] Likewise, the European Court of Human Rights has struck down similar laws in both the United Kingdom and Austria as incompatible with the European Convention on Human Rights.[29] This approach has been echoed by the Canadian Supreme Court, as well. Striking down a law providing for blanket disenfranchisement of prisoners, the Court held that the "universal franchise has become . . . an essential part of democracy."[30] It continued, "if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows."[31] Yet despite growing international consensus around the elimination or even limitation of felony disenfranchisement laws, these antiquated practices continue in the United States.

### D. State Felony Disenfranchisement Laws

Currently, individuals with felony convictions in the United States are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disenfranchisement, despite completion of one's full sentence. The Table in Appendix B provides an overview of the various state laws.

While some states provide only for the disenfranchisement of those currently serving their sentence, the vast majority of disenfranchised individuals have completed their prison term.[32] Of the estimated 5.85 million American adults barred from voting, only 25% are in prison. By contrast, 75% of disenfranchised individuals reside in their communities while on probation or parole or after having completed their sentences.[33] Approximately 2.6 million individuals who have completed their sentences remain disenfranchised due to restrictive state laws.[34] Although voting rights restoration is possible in many states, it is frequently a difficult process that varies widely across states. Individuals with felony

[25] For example, one scholar argues that "an identifiable global trajectory has emerged towards the expansion of felon suffrage. American jurisprudence lies outside of this global trajectory…." Ziegler, *supra* note 12 at 210.
[26] Human Rights Comm., 57th Sess., General Comment No. 25, The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service (Article 25), ¶14, U.N. Doc. CCPR/C/21/Rev.1/Add.7 available at http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb.
[27] Internationally, what is referred to in the United States as "felony disenfranchisement" is often termed "convict disenfranchisement." Although within the United States a "felon" is a particular subclass of convict, internationally this distinction is rarely made. Hamilton-Smith & Vogel, *supra* note 21.
[28] August v. Electoral Commission, 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).
[29] Ziegler, *supra* note 12 at 223.
[30] Sauve v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, paras. 31-33 (Can.).
[31] *Id.*
[32] Uggen et al., *supra* note 4.
[33] *Id.*
[34] *Id.*

convictions are typically unaware of their restoration rights or how to exercise them. Further, confusion among elections officials about state law contributes to the disenfranchisement of eligible voters.[35] Reliable information on the rate and number of individuals whose rights have been restored is difficult to obtain, but preliminary data suggests that in states that continue to disenfranchise after the completion of an individual's sentence, the percentage of restoration ranges from less than 1% to 16%. This data indicates that the vast majority of individuals in these states remain disenfranchised.[36]

### E. Recent Developments in State Felony Disenfranchisement Laws

In the past fifteen years there has been a general trend toward liberalization of felony disenfranchisement laws. Since 1997, twenty-three states have changed their felony disenfranchisement policies with the goal of expanding voter eligibility and reducing the restrictiveness of these laws.[37] In some states, this momentum has continued in recent years, while in others, lawmakers have moved in a more restrictive direction.

One of the most recent developments was in **Virginia**, which, historically, has had one of the most restrictive felony disenfranchisement laws in the country: persons convicted of felonies are barred from voting for life. Voting rights can be restored to individuals on a case-by-case basis, but this has required application to and affirmative intervention by the governor.[38] Virginia also has an extraordinarily high rate of disenfranchisement among adult African-Americans—at least 20%.[39] Given this historically restrictive policy and its disparate impact on communities of color, it is notable that Virginia's Governor Bob McDonnell announced positive changes to the voting rights restoration procedure. As of July 15, 2013, Virginia started automatically (albeit individually) restoring the voting rights of any person convicted of a non-violent felony who is no longer under state supervision, does not have pending felony charges, and has paid off any financial obligations imposed by the court.[40] As many as 100,000 people could be eligible to have their voting rights restored under Governor McDonnell's new policy.[41] While Virginia's new procedure will restore voting rights to a substantial number of people, the fact that the change was achieved through a gubernatorial policy means it may be revoked or revised by future administrations.

In April 2013, **Delaware** amended the state constitution to repeal a voter disenfranchisement provision. As a result, individuals convicted of most felonies will no longer have to wait five years after completion of their full sentences (including probation and parole) to regain their voting rights. Instead,

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[35] *The Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices on Minority Civic Participation in the United States* (2009); *Our Broken Voting System and How to Repair It: The 2012 Election Protection Report*, http://www.866ourvote.org/newsroom/publications/the-2012-election-protection-report-our-broken-voting-system-and-how-to-repair-it).

[36] See List of Issues Submission by the Leadership Conference on Civil and Human Rights at 6.

[37] Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010*, THE SENTENCING PROJECT, 1 (2010). Notable changes include the following: nine states eliminated or changed lifetime disenfranchisement laws; eight states simplified the rights restoration process for individuals who are no longer under state supervision; and two states extended voting rights to people on probation or parole.

[38] *Id.* at 28.

[39] Uggen et al., *supra* note 4 at 11.

[40] Press Release, *Governor McDonnell Announces Automatic Restoration of Voting and Civil Rights on Individualized Basis for Non-Violent Felons*, VIRGINIA.GOV (May 29, 2013), http://www.governor.virginia.gov/news/viewRelease.cfm?id=1829.

[41] Editorial, *Restoring the Vote in Virginia*, N.Y. TIMES (June 1, 2013), http://www.nytimes.com/2013/06/02/opinion/sunday/restoring-the-vote-in-virginia.html.

they will be automatically eligible to vote. However, some other felony convictions will result in permanent disqualification from voting, unless a pardon is secured from the governor.[42]

Other states have also relaxed felony disenfranchisement restrictions, but have seen the policy reversed by subsequent administrations. For example, in 2005 **Iowa** Governor Tom Vilsack issued an executive order that changed Iowa's felony disenfranchisement policy from lifetime disenfranchisement with the possibility of individualized gubernatorial pardon to a more moderate policy of automatic restoration of voting rights upon completion of a criminal sentence.[43] Governor Vilsack's action led to an 81% reduction in the number of people disenfranchised in Iowa and an estimated 100,000 individuals regained the right to vote.[44] In 2011, however, a new governor, Terry Branstad, reversed this policy and reinstated the former process of individualized executive review. Two years later, the Associated Press reported that although 8,000 individuals had completed their sentences since Governor Branstad took office, less than a dozen had successfully regained their voting rights.[45]

The state of **Florida** has also experienced both advances and setbacks in its felony disenfranchisement policy during the course of the last two decades. However, the net result is that Florida's disenfranchisement rate remains the highest and most racially disparate in the United States. Florida permanently disenfranchises all individuals with a felony conviction, unless they receive discretionary executive clemency. As described in the ACLU of Florida's List of Issues Submission, the United States singled out Florida's record on felony disenfranchisement as one of the most restrictive in the nation. As of 2010, Florida has disenfranchised 1,541,602 citizens due to a felony conviction. This amounts to the disenfranchisement of 10.42% of the state's voting age population and 23.3% of Florida's African-American voting age population. Compare that to the U.S. rates of 2.4% of the 238 million voting age Americans disenfranchised, and 7.7% of the nation's 29 million voting age African Americans, disenfranchised. As this data demonstrates, Florida's status as an outlier among the states is particularly pronounced in terms of the absolute number of disenfranchised citizens and racial disparities in rates of disenfranchisement.

Following a felony conviction, the clemency process provides the only route to rights restoration in Florida. Citizens' eligibility to apply for voting rights restoration ebbs and flows with changes in the state administration, leaving Floridians susceptible to political manipulation. For example, soon after Charlie Crist became governor in 2007, he amended the Clemency Board rules such that citizens convicted of non-violent offenses became eligible for voting rights restoration following release from incarceration. From the 2007 amendments through the end of Crist's term in 2010, 155,312 people had their rights restored. When Florida's next Governor, Rick Scott, took office in 2011, he amended the Clemency Board rules to severely restrict eligibility for rights restoration. The impact of Governor Scott's rollbacks has been striking. In 2011, Florida's Board of Executive Clemency restored the voting rights of only seventy-eight people, while in 2012 the voting rights of just 342 people were restored.[46]

### F. Legal Challenges to Felony Disenfranchisement Laws

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[42] Doug Denison, *Voter Rights will be Expanded for Felons in Delaware*, DELAWARE ONLINE.COM (Apr. 16, 2013, 5:50 PM), http://www.delawareonline.com/article/20130416/NEWS02/130416019/Voter-rights-will-expanded-felons-Delaware.

[43] Porter, *supra* note38, at 12.

[44] *Id.*

[45] Ryan J. Foley, *Iowa Felons' Voting Rights: Terry Branstad Executive Order Disenfranchises Thousands*, HUFFINGTONPOST.COM (June 24, 2012, 3:57 PM), http://www.huffingtonpost.com/2012/06/24/iowa-felons-voting-rights-terry-branstad_n_1622742.html.

[46] *Restoration of Civil Rights' Recidivism Report for 2011 and 2012*, FLA. PAROLE COMM'N, 5 (2013), https://fpc.state.fl.us/PDFs/2011-2012ClemencyReport.pdf.

Legal challenges to felony disenfranchisement laws in the United States have been mostly unsuccessful because courts have refused to apply the same legal principles regarding the fundamental right to vote to individuals with criminal convictions. As a result, there has not been an adequate judicial response to the disproportionate racial impact of felony disenfranchisement laws on minorities or the unreasonableness of state requirements regarding the restoration of voting rights - claims which fall squarely within the province of Section 1 of the Fourteenth Amendment which ensures equal protection under the law for all people.

The U.S. Supreme Court's decision in *Richardson v. Ramirez*, in which individuals with felony convictions who had completed their sentences argued that California's felony disenfranchisement law violated their equal protection rights, cemented this dichotomy.[47] The Court held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," which was not present in other cases involving restrictions on the franchise.[48] This ruling is especially difficult to reconcile because the Fourteenth Amendment's Equal Protection Clause has been successfully used to challenge laws that appear racially neutral on their face, but are racially discriminatory in practice. Despite this grim legal landscape, civil rights attorneys have tried to fight these laws by focusing on the misapplication of felony disenfranchisement laws[49], the ambiguity which exists in some state laws regarding which crimes are disenfranchising in the first place[50], and the racial disparities inherent in the criminal justice system that result in minorities being disproportionately prosecuted, convicted and, consequently, disenfranchised.[51]

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[47] 418 U.S. 24 (1974).

[48] *Id.* at 54.

[49] In South Dakota, for example, election officials removed hundreds of individuals with felony convictions from the voter rolls for the 2008 election without regard to their sentences. At the time, state law only disenfranchised individuals sentenced to prison. In 2009, two American Indian women serving sentences of probation were denied the right to vote in the 2008 election and successfully sued government officials. *Janis v. Nelson*, Civil Action No. 5:09-05019 (D. S.D Dec. 30, 2009). However, following the lawsuit, the South Dakota legislature amended law (SDCL § 12-4-18), and now anyone convicted of a felony on or after July 1, 2012 loses the right to vote until completion of his or her entire sentence, including probation and parole.

[50] Alabama and Georgia deny voting rights to anyone convicted of a "felony involving moral turpitude," but neither state has created an exhaustive or final list of which crimes fall under that umbrella category. Georgia's response to questions regarding the lack of uniformity in the application of the law was to issue an Attorney General's opinion, which concluded that, until the state legislature provides a more adequate response, "all felonies," are considered to involve moral turpitude and, therefore, are disenfranchising offenses. Alabama, on the other hand, was sued for the lack of uniformity in the application of the state's felony disenfranchisement law, but the case was dismissed on jurisdictional grounds. *Baker v. Chapman*, Civ. Action No. 03-cv-2008-900749.00 (Cir. Ct. Montgomery Co., Ala. Oct. 9, 2008).

[51] In Washington state, several minorities with felony convictions challenged the state's felony disenfranchisement law under the Fourteenth and Fifteenth Amendments of the U.S. Constitution, as well as Section 2 of the Voting Rights Act of 1965, which prohibits racial discrimination in voting. *Farrakhan v. Gregoire*, 523 F.3d 990, (9th Cir. 2010). After a long and expensive legal battle, the plaintiffs' constitutional claims were ultimately dismissed and the Ninth Circuit Court of Appeals ruled that plaintiffs could not prevail on their Voting Rights Act claim without proof of intentional discrimination in the state's criminal justice system - essentially incorporating an "intent" requirement into the statute, which Congress never intended. *Id.* at 994. This standard of intentional discrimination is generally very difficult to prove. Similar cases brought under Section 2 of the Voting Rights Act challenging various state felony disenfranchisement laws also have failed. *See Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009) (Massachusetts); *Hayden v. Pataki*, 449 F.3d 305, 323 (2d Cir. 2006) (en banc) (New York); *Baker v. Pataki*, 85 F.3d 919 (2nd Cir. 1996) (New York); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (Tennessee); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005).

Individuals with criminal convictions also have argued in court that state laws that condition the restoration of voting rights on the payment of legal financial obligations, namely court fines, fees and restitution, are a form of wealth-based discrimination in violation of not only the Fourteenth Amendment's Equal Protection Clause, but also the Twenty-Fourth Amendment to the U.S. Constitution. The Twenty-Fourth Amendment prohibits Congress and states from denying voting rights based on one's "failure to pay any poll tax or other tax."[52] Unfortunately, cases with this specific claim have been unsuccessful as well.

Overall, courts should examine the actual practice and operation of felony disenfranchisement laws and the unequal treatment they exact. However, until they do, federal legislation is still necessary to address the issue.

### G. Conclusion

The last few decades have been a time of movement toward relaxation of the restrictions surrounding felony disenfranchisement in many states. This is in keeping with American public opinion, as surveys show that eight of every ten Americans support the restoration of voting rights to persons convicted of felonies who are no longer under state supervision.[53] In addition, six of ten Americans support the restoration of voting rights to individuals on probation or parole.[54] There have been setbacks alongside the victories, however, both in the courts and at the state level. Furthermore, despite the relaxation of restrictions in some states, disenfranchisement policies in the United States are extreme by international standards, and an estimated 5.85 million Americans are still disenfranchised.[55] Additionally, the reforms to date have not eliminated the disparate impact that felony disenfranchisement policies have on minority communities.

## III. Relevant Question in List of Issues

This report focuses on Question 26(a) in the Committee's List of Issues, concerning felony disenfranchisement laws and article 25 of the Convention and the right to take part in the conduct of public affairs.

## IV. U.S. Government Response[56]

In its July 2013 response to the Committee's List of Issues, the U.S. Government failed to directly respond to the Committee's inquiries on felony disenfranchisement in Question 26(a). The Government failed to directly address the Committee's questions regarding the rationale for post-incarceration disenfranchisement, did not discuss steps it has taken to ensure states restore voting rights to

[52] In *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), the plaintiffs argued that Tennessee's law conditioning voting rights restoration on the payment of restitution, court fines, and child support was equivalent to a "poll tax or other tax," in violation of the Twenty-Fourth Amendment of the U.S. Constitution. The Sixth Circuit Court of Appeals affirmed the dismissal of the plaintiffs' claim reasoning that it was rational for Tennessee to require completion of one's sentence before restoring the right to vote, regardless of whether that sentence also included financial penalties. 624 F.3d at 751. *See also Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (upholding Arizona law that requires payment of restitution and court fines and fees), and *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1343 (S.D. Fla. 2002) (dismissing plaintiffs' poll tax claim related to Florida's restoration process).

[53] Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 283 (2004).

[54] Id.

[55] Uggen et al., *supra* note 4 at 1.

[56] Please see the List of Issues Submissions from the Reporting Organizations, referenced in note 1, for additional discussion of the Committee's 2006 Concluding Observations and the U.S.' responses in its Fourth Periodic Report.

individuals who have completed their sentences or have been released on parole, and did not provide information on the discriminatory impact of felony disenfranchisement laws on minority populations.[57]

The Government noted that under the U.S. Constitution, states generally determine eligibility to vote, and, while it recognized Congress' power to regulate elections for federal office and enact legislation under the anti-discrimination provisions of the Fourteenth and Fifteenth Amendments, the Government did not express support for Congressional legislation, such as the Democracy Restoration Act of 2011, previously introduced in both houses.

The U.S. Government did note that the majority of the forty-eight states that restrict voting by individuals with felony convictions also have restoration processes for those that have completed their sentences or have been released on parole. However, it failed to acknowledge how burdensome, confusing and costly the restoration process can be in some states. Further, the Government did not mention what steps it plans to take to ensure that states are implementing fair, uniform processes for restoring voting rights.

## V. Recommended Questions

The Reporting Organizations recommend that the Committee ask the U.S. Government the same questions posed in Question 26(a) on its List of Issues. These questions capture our major concerns, as well as those raised in the U.S. review in connection with its second and third periodic report. The Reporting Organizations do not believe that the U.S. Government has provided a satisfactory response to these questions.

## VI. Suggested Recommendations

We ask the Committee to recommend the following:

1. That the U.S. Government publicly support the automatic restoration of voting rights to citizens upon their release from incarceration for felony convictions. This should include urging Congress to reintroduce and pass the Democracy Restoration Act, which would restore voting rights in federal elections to disenfranchised individuals upon their release from incarceration.

2. That the U.S. Government investigate the disproportionate impact of felony disenfranchisement laws on minority populations and issue a report of its findings.

3. That the U.S. Government encourage states to inform criminal defendants of the voting rights implications of their arrest or sentencing and to provide information on the voting rights restoration process upon release from prison and/or completion of criminal sentences.

[57] See United States Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the Unites States on the International Covenant on Civil and Political Rights (ICCPR).

## Appendix A – Reporting Organizations

The **American Civil Liberties Union** was founded in 1920 and is our nation's guardian of liberty. The ACLU works in the courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. The ACLU today is the nation's largest public interest law firm, with a 50-state network of staffed, autonomous affiliate offices. We appear before the United States Supreme Court more than any other organization except the U.S. Department of Justice. About 100 ACLU staff attorneys collaborate with about 2,000 volunteer attorneys in handling close to 6,000 cases annually. The ACLU of Florida, with headquarters in Miami, is the local affiliate of the national organization. Chartered in 1965, the **ACLU of Florida** operates with the help of 25 staff members and 18 volunteer-run chapters across the state. The organization's oldest chapter — the Greater Miami Chapter of the ACLU of Florida — was founded in 1955. The newest chapters — in Collier and Bay Counties – were chartered in May 2007.www.aclu.org; www.aclufl.org

The **Hip Hop Caucus** is a civil and human rights organization for the 21st Century. Our movement began in 2004. Our vision is to create a more just and sustainable world by engaging more people, particularly young people and people of color in the civic and policy making process. www.hiphopcaucus.org

Founded in 1963 at the request of President John Kennedy, the principal mission of the **Lawyers' Committee for Civil Rights Under Law** is to secure, through the rule of law, equal justice under law by marshaling the pro bono resources of the private bar for litigation, public policy advocacy and other forms of service to promote the cause of civil rights. Its primary focus is to represent the interests of racial and ethnic minorities and other victims of discrimination through programs that promote economic development of minority communities, and ensure voting rights, fair housing, equal access to education and employment, and environmental justice. The Lawyers' Committee is a national organization with 8 independent affiliates across the country. www.lawyerscommittee.org

**The Leadership Conference on Civil and Human Rights** is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. Since its inception, The Leadership Conference has worked to ensure that all persons in the United States are afforded civil and human rights protections under the U.S. Constitution and in accordance with international human rights obligations. www.civilrights.org

The mission of the **National Association for the Advancement of Colored People** is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The vision of the NAACP is to ensure a society in which all individuals have equal rights without discrimination based on race. Founded February 12, 1909, the NAACP is the nation's oldest, largest and most widely recognized grassroots based civil rights organization. Its more than half-million members and supporters throughout the United States and the world are the premier advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors. www.naacp.org

**The NAACP Legal Defense and Educational Fund, Inc.** is America's premier legal organization fighting for racial justice. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF also defends the gains and protections won over the past 70 years of civil rights struggle and works to improve the quality and diversity of judicial and executive appointments. www.naacpldf.org

Established in 1986, **The Sentencing Project** works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. The Sentencing Project was founded in 1986 to provide defense lawyers with sentencing advocacy training and to reduce the reliance on incarceration. Since that time, The Sentencing Project has become a leader in the effort to bring national attention to disturbing trends and inequities in the criminal justice system with a successful formula that includes the publication of groundbreaking research, aggressive media campaigns and strategic advocacy for policy reform. www.sentencingproject.org

## Appendix B—State Felony Disenfranchisement Laws

Table 1. Summary of Felony Disenfranchisement Restrictions in 2013[1,2]

| No restriction (2) | Prison (14) | Prison & parole (4) | Prison, parole & probation (20) | Prison, parole, probation & post-sentence – some or all (11) |
|---|---|---|---|---|
| Maine | District of Columbia | California | Alaska | Alabama[a] |
| Vermont | Hawaii | Colorado | Arkansas | Arizona[b] |
| | Illinois | Connecticut | Delaware | Florida[c] |
| | Indiana | New York | Georgia | Iowa[d] |
| | Massachusetts | | Idaho | Kentucky |
| | Michigan | | Kansas | Mississippi[a] |
| | Montana | | Louisiana | Nebraska[e] |
| | New Hampshire | | Maryland | Nevada[f] |
| | North Dakota | | Minnesota | Tennessee[g] |
| | Ohio | | Missouri | Virginia[h] |
| | Oregon | | New Jersey | Wyoming[c] |
| | Pennsylvania | | New Mexico | |
| | Rhode Island | | North Carolina | |
| | Utah | | Oklahoma | |
| | | | South Carolina | |
| | | | South Dakota | |
| | | | Texas | |
| | | | Washington | |
| | | | West Virginia | |
| | | | Wisconsin | |

Notes:
[a] State disenfranchises post-sentence for certain offenses.
[b] Arizona disenfranchises post-sentence for a second felony conviction.
[c] State requires a five-year waiting period.
[d] Governor Tom Vilsack restored voting rights to individuals with former felony convictions via executive order in 2005. Governor Terry Branstad reversed this executive order in 2011.
[e] Nebraska reduced its indefinite ban on voting to a two-year waiting period in 2005.
[f] Nevada disenfranchises post-sentence except for first-time non-violent offenses.
[g] Tennessee disenfranchises those convicted of felonies since 1981, in addition to those convicted of select offenses prior to 1973.
[h] Virginia requires a five-year waiting period for violent offenses and some drug offenses. As of July 15, 2013, the state will no longer require a two-year waiting period for non-violent offenses.

[1] Ibid.
[2] The Sentencing Project. (2010). *Felony disenfranchisement laws in the United States*. Washington, D.C.: The Sentencing Project. Retrieved from http://sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Nov2012.pdf

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MEMORANDUM**

**TO:** **Chairman Richard Saphire and Members of the Bill of Rights and Voting Committee**

**CC:** **Steven C. Hollon, Executive Director**

**FROM:** **Shari L. O'Neill, Counsel to the Commission**

**DATE:** **October 3, 2014**

**RE:** **History of Article V, Section 4 Felony Disenfranchisement**

As the Bill of Rights and Voting Committee considers Article V, Section 4, dealing with the disenfranchisement and ineligibility for public office of persons convicted of felony crimes, it may be helpful to review some of the background of this provision.

Article V, Section 4 of the Ohio Constitution provides:

> The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

This provision had its origins as Article IV, Section 4, of the 1802 Constitution, which stated:

> The Legislature shall have full power to exclude from the privilege of voting, or being elected, any person convicted of bribery, perjury, or any other infamous crime.

In the 1851 Constitution, the provision was revised as Article V, Section 4, stating that:

> The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

By the 1970s, it was recognized that the phrase "infamous crime" was vague and out-of-date, and that the term "felony" would bring the constitutional provision into line with the criminal statutes. The Elections and Suffrage Committee ("the 1970s Committee") of the Ohio Constitutional Revision Commission ("Revision Commission"), in attempting to discern the

definition of "infamous crime," noted that in some states the term is synonymous with "felony."[1] A "felony" generally is described as an offense for which more than a year's incarceration may be imposed, or an offense otherwise identified as a felony in the particular criminal statute. R.C. 2901.02 (E), (F).

The 1970s Committee also was influenced by the enactment in 1973 of the new Ohio Criminal Code (effective January 1, 1974), which created R.C. 2961.01, specifying that felons are disenfranchised only during their incarceration.[2] The 1970s Committee initially recommended no change to the provision's phrase "bribery, perjury, or other infamous crime," focusing instead on a proposal to eliminate Section 6 (disenfranchisement of mentally incompetent) and to add the phrase "and any person mentally incompetent for the purpose of voting" to the end of Section 4.[3]

However, on September 19, 1974, the 1970s Committee issued a revision of its recommendation, by which it indicated it was no longer recommending that disenfranchisement of the mentally

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[1] Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Research Study No. 25, page 2365.

[2] Ohio Constitutional Revision Commission (1970-77), Article V, Elective Franchise Recommendations, page 2513. For an in-depth discussion of the 1973 enactment of the Criminal Code, see Lehman & Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 Clev.St.L.Rev. 8 (1974).

In its current form, R.C. 2961.01 reads, in pertinent part:

> (A)(1) A person who pleads guilty to a felony under the laws of this or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned, unless the plea, verdict, or finding is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.
>
> (2) When any person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release control sanction, the person is competent to be an elector during the period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge.

[3] *Id.*, at 2513-16.

impaired be included in the provision.[4] The 1970s Committee further recommended that reference to eligibility for public office be severed from the provision, instead suggesting that the General Assembly could enact laws to preclude felons from holding public office even after the conclusion of their incarceration. Most importantly, the 1970s Committee recommended a change that would substitute the word "felony" for "bribery, perjury, or other infamous crime."[5]

The Revision Commission did not approve the 1970s Committee's revised recommendation in full, ultimately only recommending the substitution of the word "felony" for "bribery, perjury, or other infamous crime." In so recommending, the Revision Commission articulated its desire "to preserve the flexibility now available to the General Assembly to expand or restrict the franchise in relation to felons in accordance with social and related trends."[6] Thus, the Revision Commission recognized that the constitutional provision needed to track the statutory enactment under the criminal code, which the Revision Commission recognized as providing that "when a convicted felon is granted probation, parole, or conditional pardon, he is competent to be an elector during such time and until his full obligation has been performed and thereafter following his final discharge."[7]

The Revision Commission recommendation, that Article V, Section 4, read that "The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony," was presented by resolution pursuant to Am. Sen. J.R. No 16, submitted by ballot and approved by voters, with an effective date of June 8, 1976.

[4] Ohio Constitutional Revision Commission (1970-77), Elections and Suffrage Committee Revision of Recommendation, page 2586.

[5] *Id.*

[6] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, March 15, 1975, page 22, and at page 264 of Appendix G of the Final Report.

[7] *Id.*

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MEMORANDUM**

**TO:** **Chairman Richard Saphire and Members of the Bill of Rights and Voting Committee**

**CC:** **Steven C. Hollon, Executive Director**

**FROM:** **Shari L. O'Neill, Counsel to the Commission**

**DATE:** **September 26, 2014**

**RE:** **Additional Options for Revising Article V, Section 6 Disenfranchisement of Mentally Incompetent Persons**

Here are some questions for the committee to consider as well as additional options in relation to a possible revision of Article V, Section 6 of the Ohio Constitution.

Article V, Section 6 currently reads:

> "No idiot, or insane person, shall be entitled to the privileges of an elector."

In considering how to formulate a new provision, the committee may want to discuss whether to include various individual elements, as suggested by the following questions:

1) Should a replacement provision include language expressly authorizing the General Assembly to enact laws relating to the disenfranchisement of mentally impaired persons?

   - Including some version of the phrase "The General Assembly has the power to enact laws," enables legislative action in the form of statutory enactments.

   - Such a phrase would allow the provision to mirror the language in Article V, Section 4 ("The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.")

2) A replacement provision would expressly exclude mentally incompetent persons from voting (or, alternately, only qualify those who are mentally competent). Should the provision be phrased so as to:

   - Deny voting "privileges" or to deny voting "rights"?

- In other words, does the committee believe voting should be termed a right, or a privilege?

- What are the "privileges of an elector"? Does that phrase have a meaning different from "voting privileges" or "voting rights"?

- Note: Article V, Section 1 refers to the "qualifications of an elector," while Article V, Section 7 references "electors," rather than "voters."

- Also, Article V, Section 4, references the "privilege of voting."

3) How should a replacement provision refer to a person who is mentally incompetent?

   - This would be a substitute for the words "idiot" and "insane person" in the current provision.

   - Examples: "mentally incompetent," "mental disability," "lacking mental capacity."

4) Should the provision clarify that only a mental disability related to voting would disqualify a voter?

   - Such a provision would indicate that the mental incompetence must be for the purpose of voting, or describes that the person "lacks ability to understand the act of voting."

5) Should the provision clarify who is authorized to determine whether a person should be disenfranchised?

   - If so, does the committee have a preference for how the court is described? Examples: by a court of competent jurisdiction, "judicially declared," or "judicially determined."

6) Should the provision indicate how disenfranchisement must occur?

   - After a "hearing," "evidentiary hearing," "adjudication"?

7) Should the provision include that the disenfranchisement only occurs during the period of mental incompetence?

   - Examples: the person continues to be disenfranchised "unless restored to voting rights," "unless civil rights restored," "unless restored to mental capacity," or "unless" or "until" "the disability is removed."

   - Indicates that the disqualification is not permanent and may be removed.

8) Should other possible statements be included?

- Right to counsel.

The right to counsel may be relevant, but is inherent in the concept of voting being a fundamental right that may not be eliminated without due process.

- Burden of proof.

The burden of proof could be (or may already be) addressed by statute and common law.

**The Original Six Options**

For the committee's convenience, here are the original six options proposed in the Memorandum dated August 25, 2014:

***Option One--Adopt the Recommendation of the Ohio Constitutional Revision Commission***

One option would be to adopt the prior recommendation of the Revision Commission. (See Attached.) Thus, a revised enactment would read as follows:

> "The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency."

The benefit of this option would be that its language already has been subjected to committee and commission review in the 1970s. Further, it may meet equal protection standards, would provide for legislative authority to limit enfranchisement, and does not affect current statutory law, all while eliminating the objectionable references. However, this revision was not approved by the General Assembly in the 1970s for submission to the voters, although the reason is unclear.

***Option Two--Substitute "Idiot" and "Insane Person" with More Suitable Terms***

Another option would be to simply remove or change the pejorative references, matching the constitutional provision with the statutory language adopted in Am. Sub. H.B. 53 (127th General Assembly). Thus, a revised enactment would read:

> "No ~~idiot, or insane~~ person who is incompetent for the purposes of voting~~,~~ shall be entitled to the privileges of an elector."

This option would keep the meaning of the original section intact, would not affect statutory law, and would eliminate the objectionable references. At the same time, however, this option does not indicate how incompetency is determined, and it does not acknowledge that statutory law addresses the specific procedure for disqualifying a mentally incompetent voter.

***Option Three--Change the Terms and Add that Incompetency Must Be Adjudicated***

Taking the previous option a step further, another option would eliminate the pejorative references and indicate that the determination of incompetency for purposes of voting must occur by adjudication. Thus:

> "No ~~idiot, or insane~~ person who is adjudicated incompetent for the purposes of voting~~,~~ shall be entitled to the privileges of an elector."

The benefit of this option is that it indicates incompetency is determined by adjudication, it keeps the original meaning of the section intact, and it does not affect statutory law, all while eliminating the objectionable references. However, this option does not explain that competency is directly tied to ability of the elector to understand the act of voting.

***Option Four--Remove Objectionable Terms; Specify Adjudication of Incompetency for the Purposes of Voting***

If the Committee wishes to cover all the bases, a revision could go one step further by eliminating the pejorative references and specifying that the determination of incompetency must be for the purposes of voting, must occur by adjudication, and must be based upon a finding that the person lacks the capacity to understand the act of voting. This option would look something like this:

> "No ~~idiot, or insane~~ person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting~~,~~ shall be entitled to the privileges of an elector."

While this option certainly would address all possible concerns, it does not provide for the General Assembly to enact specific laws on the voting rights of the mentally impaired, and may leave room for the rejection of existing statutes as being unconstitutional.

***Option Five--Give General Assembly Authority to Enact Voter Competency Laws***

Another option would abandon all aspects of the current constitutional provision by directly referencing applicable statutory law and the ability of the General Assembly to enact statutes addressing the voting rights of the mentally impaired. Such an option might read:

> "The General Assembly may establish laws allowing for the rights of suffrage, registration of voters, and qualifications for the elective franchise [or disqualification of persons adjudicated incompetent for the purposes of voting]."

Under this option, the Ohio Constitution would leave regulation of voting to the General Assembly, with any argument alleging the unconstitutionality of statutory law to be based upon the U.S. Constitution.

***Option Six--Eliminate All Reference to Disenfranchisement of Mentally Incompetent Persons***

A final option would be to eliminate Section 6 altogether, leaving the matter to legislative enactment. Because Ohio already has a statutory scheme for disenfranchising persons found to be incompetent for the purpose of voting, removing the constitutional provision would not result in any change in current law and practice. Like the previous option, under this option any argument of unconstitutionality of a statutory enactment would have to be based upon the U.S. Constitution.

**Five Additional Options**

***Option Seven--Affirms Right to Vote Unless Adjudicated Incompetent and Only During Period of Incompetence***

Commissioner Karla L. Bell submits the following language as an additional option:

"Except as otherwise provided in Article V, Section 4, no elector shall be denied the right to vote unless adjudicated incompetent to vote; the disqualification so imposed shall last only during the period of incompetence."

***Option Eight--Affirms Right to Vote Unless Adjudicated Incompetent by Clear and Convincing Evidence, Includes that Person Does Not Understanding Voting and Only During Period of Incompetence***

Commissioner Karla L. Bell submits the following modification of Option Seven as an additional option:

"Except as otherwise provided in Article V, Section 4, no elector shall be denied the right to vote unless adjudicated incompetent to vote based on clear and convincing evidence the elector does not understand the elective system or the meaning of casting a vote. This disqualification shall last only during the period of incompetence, and the right to vote may be restored upon an adjudication the disqualified elector is competent to vote."

***Option Nine--Grants General Assembly the Power to Disenfranchise Persons Adjudicated Mentally Incompetent for the Purposes of Voting Through Adjudication by Competent Court and During Period of Incompetence***

Senior Policy Advisor Steven H. Steinglass submits the following option:

"The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting by a court of competent jurisdiction but only during the period of such incompetency."

***Option Ten--Grants General Assembly the Power to Disenfranchise, Alters Prior Option by Using the Active Voice***

This option, provided by Commission Counsel Shari L. O'Neill, slightly modifies Steven Steinglass' version by substituting the active voice:

"The General Assembly shall have power to deny the privileges of an elector to any person that a court of competent jurisdiction adjudicates to be mentally incompetent for the purpose of voting but only during the period of such incompetency."

***Option Eleven--References "Voting Rights" and "Judicially Determined" Instead of "Privileges of an Elector" and "Adjudicated"***

This option, also provided by Shari O'Neill, further modifies Steven Steinglass' version by substituting the phrase "privileges of an elector" with "voting rights," as well as substituting "adjudicated … by a court of competent jurisdiction" with "judicially determined." While using the phrase "voting rights" makes sense legally and is perhaps clearer, other parts of the Ohio Constitution refer to voting as a "privilege" and voters as "electors;" thus, this change may not be possible. "Judicially determined" is more succinct and utilizes the active voice; however, the committee may wish to emphasize that the court must be "of competent jurisdiction."

"The General Assembly shall have power to deny voting rights to any person judicially determined to be mentally incompetent for the purpose of voting but only during the period of such incompetency."

To: Commission Members of the Bill of Rights Committee

From: Karla Bell

Attached please find a memo which proposes an order for the consideration of the multiple issues raised regarding the "idiots and insane" language. I thought it might speed things up. (As for me, I think the present language should be repealed; new language should be added; the new language could conform to other language in the constitution, or not; I don't have a strong preference on the "right" and "privilege" issue; we should specify it is a judicial adjudication; upon reflection, I agree there is no necessity to specify the right to counsel and the burden of proof is an issue for the legislature).

The only issue I remain concerned about is the language describing what we are seeking to ban. If, as I understood, we only mean to bar those who do not understand the voting process, I think we should be very clear about that. I include a section (Question 8) about the definition of "mental capacity" in various statutes and constitutions that might lead to confusion.

I don't think I will have time to prepare the second memo, but my research has also convinced me that the existing provisions regarding a separate adjudication will not clarify the matter. The disqualification of voters, and the guarantee of rights without an adjudication only refer to those who are "hospitalized or otherwise in custody." I'm not sure of the range of "otherwise in custody" but those who are hospitalized have already been found to have a "mental illness" and be "subject to court order." Again, I don't think we mean to have those as a requirement.[1]

I will not be able to attend on Thursday and starting tomorrow I will not have regular internet access. If there are questions regarding what I have cited I will have to address them in a later meeting.

[1] Ohio Rev. Code 5122.301, specifically requiring an adjudication of incompetence before the removal of a civil right, including the right to vote, is directed to the civil rights *of patients*, limited in application to persons "*admitted to a hospital or otherwise taken into custody voluntarily or involuntarily."*

The code section pertaining to cancellation of voter registration, Section 3503.21 states that a voter's registration will be cancelled upon, upon an adjudication of incompetence provided in the section relating to patients or those in custody. The term "mentally ill," for the purposes of voluntary and involuntary hospitalization, is: "[A] substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."

Not all persons who are mentally ill can be hospitalized—only those persons who are a "mentally ill person subject to court order," which requires a further finding of risk to self or others. Ohio Rev. Code 5122.01

Shari did a wonderful job in her memo, providing a lot of detail, thoughtful reasoning and research. I have given some consideration to the order in which the Committee should address the propositions. A simple up/down vote could be taken on several of them, in order to move things expeditiously.

## Proposed Outcome

**1) Should the present language of Article 6 be removed?**

A. Pro: The terms are antiquated, offensive and not meaningfully employed in Ohio statutory law. Moreover, the prior commission received expert testimony that the provision is probably unconstitutional as violative of both the equal protection and due process clauses of the 14th Amendment.
B. Con: None articulated so far, except a general preference not to disturb the constitution.

**2) Should there be new language?**

A. Pro: Both Senator Skindell and Dean Steinglass believe the broad language of entitlement in Article V, Section 1 arguably precludes the legislature from acting on its own to limit the right or privilege to vote.
B. Con: None articulated so far.

## The basic phrasing of the proposed provision

**3) Should the language be phrased as a limit on legislative power or as a right of the voter?**

Example 1: " The General Assembly shall have the power…"

A. Pro: This aligns with the language of the prior section regarding felons, producing consistency in the document.

Example 2: "Except as provided in , an elector's right to vote shall not be.."

B. Pro: This arguably is a stronger expression of support for an individual's right to vote, and implicitly puts the burden of proof upon those seeking to deny that right.

**4) Should voting be referred to as a "right" or a "privilege"?**

A. Argument for right: The Supreme Court has recognized voting as a fundamental right.
B. Argument for privilege: Consistency in language in the Ohio constitution. As Shari pointed out, Article V, Section 4 regarding felonies refers to "the privilege of voting."

## Possible Additions to the Constitutional Provision

**5) Should the constitutional provision provide for a heightened burden of proof?**

A. Pro: This would help ensure electors would retain the right to vote. A showing of "clear and convincing evidence" is required in other court hearings removing a person's rights.
B. Con: This is a policy matter which should be determined by the legislature.

**6) Should the constitutional provision specify a right to counsel?**

A. Pro: Enumeration of this right will insure it is provided in a hearing that may strip an elector of the right to vote.
B. Con: Because the right to vote is fundamental, due process will require this anyway, so there is no need to specify this. *Bell* v. *Marinko*, 235 F. Supp.2d 772, citing *Doe v. Rowe*. (I can't give a pin cite because the search engine I am using doesn't show page numbers; sorry.)

**7) Should the constitutional provision require a judicial adjudication?**

A. Pro: This would insure that no administrative agency or department could make a finding removing an elector's right to vote.
B. Con: The prior objection was wordiness, but Shari's excellent suggestion of simply adding the word "judicial "really handles this.

**8) Should the statute specify what it means to be "mentally incompetent to vote" or clarify that only a mental disability related to voting would disqualify a voter**?(See Shari's memo at Question 4. Page 2:

This is an issue that was not part of an extended discussion in the last session, but after doing some research, my answer to these questions is an emphatic, "Yes." I would ask the Committee to consider the Ohio and federal statutes discussed when drafting the constitutional provision.

The statutory definition of "incompetent" and "mentally incompetent" appears in Chapter 21 of the Ohio Revised Code pertaining to Guardians & Conservatorships :

> "[A] any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state."

See: Ohio Rev. Code Section 2111.01 (D), specifying that this definition will be used in Revised Code Chapters 2101 to 2131; Ohio Rev. Code Section 2135.01 stating that, as used in Sections 2135.01 to 2145, "incompetent" has the same meaning as in section 2111.01.

In addition to the problems potentially created by the by the state code, federal law specifically reserves to the states the right to disenfranchise electors, "by reason of…mental incapacity." 42 U.S.C. Section 1973gg-6 (a) (3) (B). Consistent with this, multiple state constitutions bar any person who is "not mentally competent" from voting. See, e.g., Minnesota, Article VII, Section 1; Michigan, Article 1, Section 2; Georgia Article II, Section 1; Louisiana, Article 1, Section 10 (A) . This is not my understanding of what the committee seeks to do.

## Recommendation

Because we would be adopting a meaning of "mental capacity" different than that referenced in state and federal law, and use it in a way that is not the most popular in state constitutions, I think we need to make it clear**:** We need to plainly state what it means to be "mentally competent to vote."

The Committee could use the definition, or at least some part of the definition employed in *Doe v. Rowe*, 156 F. Supp. 35, 51 (the one circulated by Shari).The court in that case described "mental capacity to vote" as **"the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself**." Id. at 51 This could be pared down to" **mental capacity to understand the nature and effect of voting**" or modified slightly to, **"mental capacity [ability?] to understand the purpose and effect of voting."**

Another phrasing proposed by Shari, in under Question 4 at page 2 of her memo is also excellent, and shorter: **the elector "lacks the ability to understand the act of voting."** This might be modified to **"lacks the mental capacity to understand the act of voting,"** or **"lacks the mental ability to understand the act of voting."** Using "ability" would also employ a term not already defined in the Code.