

ALASKA LEGISLATURE COMMITTEE FILES 2007-2008 SJUD 1252

FISCAL NOTE

**STATE OF ALASKA
2007 LEGISLATIVE SESSION**

Fiscal Note Number: _____
 Bill Version: SB005-DOA-AS-1-23-07
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An Act relating to reporting certain crimes RDU Violent Crimes Compensation Board
 Component Violent Crimes Compensation Board
 Sponsor Senator McGuire
 Requester _____ Component No. 2694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL

Estimate of any current year (FY2007) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 A penalty for not reporting certain crimes will reasonably increase the number of violent crimes reported. An increase in reporting violent crimes will reasonably increase the number of crime victim compensation claims since all law enforcement statewide are statutorily required to provide information to potential Board claimants.
 * It is not possible to provide accurate estimates of increased costs.

Prepared by: Susan L. Browne Phone 907-465-5525
 Division Violent Crimes Compensation Board Date/Time 1/22/2007 9:00 a.m.
 Approved by: Kevin Brooks, Deputy Commissioner Date 1/23/2007
 Agency Department of Administration

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB005-Courts-1-23-07
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title Failure to report crimes RDU Alaska Court System
 Component Trial Courts
 Sponsor Senator McGuire
 Requester _____ Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
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Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of SB 5.

Prepared by: Doug Wooliver, Administrative Attorney Phone 463-4750
 Division: Alaska Court System Date/Time 1/23/2007 @ 8:30 a.m.
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date 1/23/2007
 Agency: Alaska Court System

SB

7

25-LS01000
Bullard
3/16/07

CS FOR SENATE BILL NO. 7(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR DAVIS

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the voting rights of felons."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1. AS 15.05.030 is repealed and reenacted to read:**

4 **Sec. 15.05.030. Loss and restoration of voting rights.** (a) A person convicted
5 of a felony involving moral turpitude and incarcerated for that crime may not vote in a
6 state, federal, or municipal election from the date of the conviction through the date of
7 the unconditional discharge of the person if

8 (1) the conviction was of an unclassified or class A offense under the
9 law of this state;

10 (2) the conviction was under the law of another jurisdiction of an
11 offense with elements similar to those of an unclassified or class A offense under the
12 law of this state; or

13 (3) the person has previously been convicted of a felony involving
14 moral turpitude.

15 (b) On the unconditional discharge of a person prohibited from voting under

1 (a) of this section, the commissioner of corrections shall provide the person with
2 written notice of the voter registration requirements and procedures. The person may
3 register to vote on the day after the day the person is discharged.

4 (c) A person not described in (a) of this section who is convicted of a felony
5 involving moral turpitude and incarcerated for that crime may not vote in a state,
6 federal, or municipal election until released from incarceration. On release of the
7 person from incarceration, the commissioner of corrections shall provide the person
8 with written notice of the voter registration requirements and procedures. The person
9 may register to vote on the day after the day the person is released.

10 (d) The commissioner of corrections shall notify the director of persons
11 unconditionally discharged or released from incarceration and entitled to register to
12 vote under (b) or (c) of this section.

13 * **Sec. 2.** AS 15.07.135 is amended to read:

14 **Sec. 15.07.135. Cancellation of registration of incarcerated**
15 **[CONVICTED] persons. (a) The commissioner of corrections shall notify the**
16 **director of [THE DIRECTOR SHALL MAKE REASONABLE EFFORTS TO**
17 **OBTAIN] the names of persons convicted of a felony involving moral turpitude and**
18 **incarcerated for that crime. Promptly after receipt of evidence satisfactory to the**
19 **director that a person has been convicted of a felony involving moral turpitude and**
20 **incarcerated for that crime, the director shall cancel the registration of the person.**

21 (b) Upon presenting proof that a person whose registration was canceled under
22 (a) of this section **is again eligible to vote** [HAS BEEN UNCONDITIONALLY
23 DISCHARGED FROM CUSTODY], the person may register. The director shall make
24 reasonable efforts to verify the unconditional discharge of persons **as described by**
25 **AS 15.05.030(b) or release from incarceration of persons as described by**
26 **AS 15.05.030(c)** applying for registration under this subsection.

27 * **Sec. 3.** AS 33.30.241(a) is amended to read:

28 (a) A person who is convicted of a felony involving moral turpitude as defined
29 in AS 15.60.010 is disqualified from voting in a **federal,** state, or municipal election
30 until the person's

31 **(1) unconditional discharge as described by AS 15.05.030(b); or**

1

(2) release from incarceration as described by AS 15.05.030(c).

Senator Hollis French

Capitol Room 504
465-3892
465-6595 fax



MEMORANDUM

Date: March 15, 2007

To: Leg Legal

From: Cindy Smith *C Smith*

RE: Senate Bill 7

Please amend the "L" version of LS0100 as follows:

On page 2, line 15 to delete "The director shall make reasonable efforts to obtain" and replace with "The commissioner of corrections shall notify the director of"

BW see
see
CS

Amend page 2, line 15 to delete "The director shall make reasonable efforts to obtain" and replace with "The commissioner of corrections shall notify the director of"

PURPOSE: to make this language consistent with the language immediately above in (D) – this is how the process actually works.

REQUESTED BY: Whitney Brewster, Division of Elections

Alaska State Legislature

Interim: (May - Dec.)
716 W. 4th Ave
Anchorage, AK 99501
Phone: (907) 269-0144
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Session: (Jan. - May)
State Capitol, Suite 30
Juneau, AK 99801-1182
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Toll free: (800) 770-3822

Senator [Bettye Davis](mailto:Bettye.Davis@legis.state.ak.us)
<http://www.akdemocrats.org>

Office of Senator Bettye Davis

DATE: January 28, 2008

Senator Hollis French, Chairman, Senate Judiciary Committee

RE: Request for Hearing – CSSB 7 25-LS0100L as amended – Voting Rights for Felons

Dear Senator French,

Senator Davis requests that CSSB 7, version "L" as amended be heard before the Senate Judiciary Committee. Per the minutes of the last hearing before the Senate Judiciary Committee on March 15, 2007, the "L" version of SB 7 was held to prepare amended language to reflect the request of the Division of Elections to place the onus for obtaining the names of persons convicted of a felony on the Department of Corrections (DOC) rather than on the Director of Elections, because DOC officials already have access to that information. Per the minutes the new provision under amendment #1 would read: "the Commissioner of Corrections shall notify the director of. . . ." The committee agreed to incorporate this provision in the bill and present it to the Committee in writing before making a final determination. The purpose of this hearing is to approve that amendment and hopefully move the bill out of committee.

Included in the bill package are:

1. Sponsor Statement
2. The most recent version of the bill, CCSB 7 - 25-LS0100L - to be amended per 3/15/07 Senate Judiciary hearing.
3. Minutes from March 15, 2007 hearing with decision to amend 25-LS0100L.
4. Minutes from the March 5 and February 22, 2007 hearings which provide background and professional testimony concerning this bill.

The ACLU has indicated an interest in testifying, if you have time or you think it would be useful for an update nation-wide. Passing SB 7 would give a refreshing message in an election year that the Alaska Department of Corrections welcomes changes in law to help rehabilitate prisoners, while it would cost nothing with a zero fiscal note. Please e-mail or post the amended "L" version when available and contact our office concerning a hearing date well in advance.

Sincerely,


Thomas S. Obermeyer

Legislative Administrative Assistant

25-LS0100L

Bullard

3/14/07

CS FOR SENATE BILL NO. 7(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:

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6 **state, federal, or municipal election from the date of the conviction through the date of**
7 **the unconditional discharge of the person if**

8 **(1) the conviction was of an unclassified or class A offense under the**
9 **law of this state;**

10 **(2) the conviction was under the law of another jurisdiction of an**
11 **offense with elements similar to those of an unclassified or class A offense under the**
12 **law of this state; or**

13 **(3) the person has previously been convicted of a felony involving**
14 **moral turpitude.**

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1 (a) of this section, the commissioner of corrections shall provide the person with
2 written notice of the voter registration requirements and procedures. The person may
3 register to vote on the day after the day the person is discharged.

4 (c) A person not described in (a) of this section who is convicted of a felony
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6 federal, or municipal election until released from incarceration. On release of the
7 person from incarceration, the commissioner of corrections shall provide the person
8 with written notice of the voter registration requirements and procedures. The person
9 may register to vote on the day after the day the person is released.

10 (d) The commissioner of corrections shall notify the director of persons
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12 vote under (b) or (c) of this section.

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16 names of persons convicted of a felony involving moral turpitude and incarcerated
17 for that crime. Promptly after receipt of evidence satisfactory to the director that a
18 person has been convicted of a felony involving moral turpitude and incarcerated for
19 that crime, the director shall cancel the registration of the person.

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21 (a) of this section is again eligible to vote [HAS BEEN UNCONDITIONALLY
22 DISCHARGED FROM CUSTODY], the person may register. The director shall make
23 reasonable efforts to verify the unconditional discharge of persons as described by
24 AS 15.05.030(b) or release from incarceration of persons as described by
25 AS 15.05.030(c) applying for registration under this subsection.

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27 (a) A person who is convicted of a felony involving moral turpitude as defined
28 in AS 15.60.010 is disqualified from voting in a federal, state, or municipal election
29 until the person's

30 (1) unconditional discharge as described by AS 15.05.030(b); or

31 (2) release from incarceration as described by AS 15.05.030(c).

Committee Minutes

Mar 15, 2007

SB 7-FELONS' RIGHT TO VOTE1:42:25 PM

CHAIR FRENCH announced the consideration of SB 7 and solicited a motion to adopt Version \L committee substitute (CS).

SENATOR MUGGINS motioned to adopt Version \L CS for SB 7, labeled 25-LS0100\L as the working document.

CHAIR FRENCH explained that the CS distinguishes among felons according to the category of crime for which they were incarcerated. The categories are broken out on page 1, lines 8-11. The idea is to continue under the existing system, which is to not restore the rights of released felons if they have been convicted of an unclassified felony or a class A felony. Also, voting rights would not be restored to repeat felons who are released from prison.

In summary the policy call is that someone is able to vote upon release from incarceration after having served time for a lower level felony. Someone who has been convicted of rape, robbery, or murder would have to complete the requirements for unconditional discharge before regaining the right to vote. The other sections are conforming amendments to make the changes work for the Division of Elections. Under the current draft there would be two classes of felons: one group that is restricted and another that is able to vote upon release.

CHAIR FRENCH drew attention to page 2, line 15 and said the director of the Division of Elections has asked the committee to consider amending subsection (a) so that the onus for obtaining the names of persons convicted of a felony is placed on the Department of Corrections (DOC) rather than on the director of elections. The argument is that DOC officials already have access to that information.

CHAIR FRENCH motioned to adopt Amendment 1. On page 2, line 15, delete "The director shall make reasonable efforts to obtain" and insert "The commissioner of corrections shall notify the director of".

1:51:35 PM

SENATOR WIELSCHOWSKI objected to ask if the intention is to say that "the commissioner of corrections shall notify the director and the director shall make reasonable efforts to obtain the names".

CHAIR FRENCH said the Division of Elections suggested the language.

1:54:08 PM

CINDY SMITH, Aide to Senator French, explained that both aren't needed: the Department of Corrections already electronically transmits names and other identifiers to the Division of Elections. The change is consistent with subsection (d) above.

DWAYNE PEEPLES, Deputy Commissioner, Department of Corrections stated that the department has the ability to provide the Division of Elections with names and identifiers of persons who were convicted and released. DOC provides similar information to the Permanent Fund Dividend Corporation for the purpose of mailing dividend checks from felons.

SENATOR WIELSCHOWSKI referenced page 3, line 17, and asked if everything else in subsection (a) remains the same.

MS. SMITH replied nothing else is changed.

SENATOR WIELECHOWSKI asked to see the provision incorporated in the bill before making a final determination.

CHAIR FRENCH found that to be fair and asked if he maintained his objection.

SENATOR WIELECHOWSKI removed his objection.

CHAIR FRENCH announced that Amendment 1 is adopted.

1:56:31 PM

MICHAEL MACLEOD-BALL, Executive Director, ACLU of Alaska, identified himself.

CHAIR FRENCH asked if he foresees any constitutional problems associated with stratifying and changing the rights of felons according to the seriousness of the offense for which they were convicted.

MR. MACLEOD-BALL said he did not. There isn't a lot of guiding case law, but generally the legislature and the courts have some authority to define terminology that is used in interpreting constitutional provisions. The intent in SB 7 is essentially no different than what is already in statute. To the extent that the current statute is constitutionally permissible, this should be as well.

CHAIR FRENCH asked if he has any other observations about the bill.

MR. MACLEOD-BALL articulated the view that the original version of the bill was preferable from a policy perspective because it would have allowed more felons onto the voting rolls. Nonetheless, this is a step in the right direction, he stated.

SENATOR HUGGINS asked where Alaska would stand in terms of voting rights relative to other states.

MR. MACLEOD-BALL summarized the statistical information that was given during the previous hearing and said this would place Alaska in the middle.

SENATOR HUGGINS asked if Alaska is currently in a group with 21 other states.

MR. MACLEOD-BALL said, "I believe that large number in the middle brings felons back onto the voting rolls at some time and there are a variety of distinctions in the states as to when they're brought back on the rolls or for what crimes they lose the voting rights in the first place. And so I viewed the change that's being proposed here as being just a variation within that group."

1:00:33 PM

CHAIR FRENCH announced he would hold SB 7 to prepare the amended language and for consideration by the full committee.

Committee Minutes

Mar 05, 2007

SB 7-FELONS' RIGHT TO VOTE

CHAIR FRENCH announced the consideration of SB 7.

1:14:24 PM

THOMAS OBERMEYER, aide to Senator Davis, read the sponsor statement into the record as follows:

It is essential to a democracy that every citizen who wishes to be a productive member of society be afforded the right to vote. Art. 1, Sec. 13 of the Alaska Constitution provides that criminal administration is based on the "principle of reformation" in addition to protecting the public, community condemnation of the offender, and the rights of victims. Political participation helps with rehabilitation and reintegration into the community.

SB 7 grants felons the right and opportunity to vote if they wish to exercise that right immediately after having served their time. In Alaska 5,000 Alaskans have lost their right to vote because of felony convictions. Current Alaska law bars the vote to persons convicted of felonies of moral turpitude until the expiration of a post-incarceration period of parole or probation, which is often years after they have reentered society as productive citizens and tax payers. While Vermont and Maine do not disenfranchise felons at all, other states are reforming their laws to allow felons to vote either after release (13 states), after release and completion of probation or parole (21 states including Alaska), or permanent disenfranchisement to certain felons (14 states).

Harsh sentencing laws over the past 30 years have allowed the prison population to burgeon, while reducing the rehabilitative model to an anachronism. Over 4.7 million Americans or 1 in 43 adults cannot vote due to felony convictions, with 1/3 or more of them due to alcohol and drug offenses. Of those incarcerated in Alaska 47 percent are white; 37 percent Alaska Native; 11 percent African American; 2 percent Hispanic; and 3 percent Asian/Pacific Islanders. Minority felons are disproportionately disenfranchised under current law and the harm of continued disenfranchisement after release is exacerbated by stigma and other forms of discrimination as they try to reenter society.

SB 7 will help rehabilitate released felons by welcoming them back into the voting community immediately after release and encouraging them to become good citizens. Studies show that felons who vote have a lower rate of recidivism. SB 7 will streamline the process by which the state restores voting rights to felons and thus will save money.

1:39:17 PM

SENATOR WIELICHOWSKI recapped that if someone is released from prison and is still on probation, that person is not eligible to vote. Under SB 7 that person would be entitled to vote upon release.

MR. OBERMEYER said correct and a primary reason for the bill is that enfranchisement is rehabilitative. Get them back into the

community because they are with us anyway, he said.

SENATOR WIELSEWOMSKI asked how house arrests would figure in.

MR. OBERMEYER replied the Department of Corrections and the Division of Elections would need to establish rules to handle such circumstances.

CHAIR FRENCH opened public testimony.

1:41:22 PM

MARGARET PUGH, Former Commissioner of the Department of Corrections and retired state employee, stated strong support for SB 7 and described the issue as emotional for some and political for others. Amendment 14 of the US Constitution gives each state the right to determine who votes and who does not vote and clearly there is not just one American way to restore voting rights, she stated.

Some states never restore the right; some restore the right upon petition of the governor for a pardon; some restore the right after incarceration regardless of probation or parole; and some states, like Alaska, restore the right after probation and parole have been served. She noted that in Alaska almost all felons have some period of probation and/or parole following release from incarceration.

MS. PUGH said American democracy is an evolving process. In the early days the elite governed and as a result disabilities were visited on women, slaves, illiterates, and non-property owners. These legal disqualifications continued for years and some states, notably in the south, instituted other disabilities such as the poll tax. Ms. Pugh relayed that her great-grandfather had to pay poll taxes and her great-grandmother could not buy her own sewing machine.

The purpose of these disabilities was clearly discriminatory and fortunately most of those practices have been overcome. She pointed out that today her great-grandmother could purchase a sewing machine on her own and she could vote. Today there is no more slavery, there are no more poll taxes, voters are not required to be literate, and vision or hearing is not a requirement. However, she said, a disability that many states have not revisited, is the one that is visited upon convicted felons.

MS. PUGH said she views SB 7 as a first step because all it does is restore voting rights to persons convicted of felonies upon release from custody; they could vote before probation and parole is complete. Because the Alaska constitution says that voting rights are surrendered by people convicted of felonies of moral turpitude, and because most felonies in Alaska are, by definition, considered to be crimes of moral turpitude, SB 7 would not restore voting rights to very many people, she stated.

SB 7 does not restore other forfeited civil rights. For example a convicted felon on probation and/or parole must submit to search of a person, home, or property of any sort without protection of a warrant; must provide urine samples; must continue treatment; can not work in certain fields; and can not bear arms.

MS. PUGH pointed out that restoring voting rights does not present a threat to any person, place or thing. This is a very small thing for the legislature to do, she said, but it's a huge leap for American democracy. In her view the current practice is blatant racial discrimination and it is time for change.

1:50:58 PM

SENATOR McGUIRE agreed with the previous testimony and said she has never understood why restoring a felon's right to vote would be problematic.

She asked Ms. Pugh to comment on testimony last year from the Department of Corrections suggesting that it would be difficult to maintain a registry of the different conditions of release to show the people who have their voting rights restored and those who do not.

MS. PUGH replied it is an issue, but the Department of Corrections (DOC) and the Permanent Fund Division already exchange data bases for forfeited permanent fund dividends so the technology is available for DOC and the Division of Elections to exchange data. There will always be a few issues, but there is no reason they can't be overcome, she said.

SENATOR McGUIRE asked if she believes that rehabilitation is still a tenet of the penal system. If so, how large a part does restoring voting rights play in the rehabilitation process.

MS. PUGH said the very definition of correction means to change and correct and not punish. "I believe that corrections should have treatment programs of all types and offenders should be able to vote when they are released from custody," she stated.

1:57:16 PM

NATALIE LANDRETH, Staff Attorney, Native American Rights Fund (NARF), stated strong support for SB 7. The most critical reason is that the current law disproportionately impacts Alaska Natives because they comprise a disproportionate part of the felon population. In 2004 a study by the Alaska Judicial Council concluded: that Alaska Natives were overrepresented in the felon population; that Alaska Natives receive longer sentences than non-Natives; that Alaska Natives typically have lower per capita incomes than non-Natives and can not afford private attorneys; and that people with private counsel generally served less time in prison and on parole and were generally more successful in getting reduced charges.

MS. LANDRETH said Alaska Judicial Council statistics highlight the following: 83 percent of all felons are male, almost 50 percent are under 30 years of age, 50 percent are Caucasian, 37 percent are Alaska Native, 63 percent have alcohol problems, 45 percent have drug problems, more than 33 percent have identifiable mental health problems, and almost 80 percent financially qualified for a public defender.

MS. LANDRETH, responding to a question from the state affairs hearing, relayed that "65 percent of felons were convicted of class C felonies with property crimes comprising 30 percent and drug crimes 20 percent. Murder and sexual assault by the way are only 2 percent and 12 percent of these felons respectively."

In conclusion she said that the people most likely to benefit from the bill are young men who need help reintegrating into society. Re-enfranchising these people after they have served their sentence is a positive and empowering way to achieve that.

2:02:16 PM

MICHAEL MACLEOD-BALL, Executive Director, American Civil Liberties Union of Alaska (ACLU), noted that he had submitted written testimony. He asked the committee to think of the issue of restoring voting rights in the larger context of the right to rehabilitation under the state constitution. The people who would benefit from this law are the ones that the court system has said are ready and worthy of reentering society. The scope and context of rehabilitation should encompass the notion of giving these people a vote of confidence to exercise a basic right of citizenship - the right to vote.

He suggested committee members refer to the December 2006 issue of the Alaska Law Review. It contains a relevant article by Christopher R. Murray titled "Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965."

2:55:24 PM

DANIEL LEVITAS, American Civil Liberties Union (ACLU), said he submitted written testimony. His work focuses on the issue of felon enfranchisement and in the last 10 years 16 states have taken positive steps in this direction. Of the 11,000 Alaskans who are disenfranchised as a result of felony convictions, roughly 54 percent would be re-enfranchised if SB 7 were to pass.

MR. LEVITAS said the issue enjoys bipartisan support because it is a fundamental issue of democratic participation, rights and community safety. It's axiomatic that giving former offenders a stake in society will make them feel less inclined to repeat their behavior. In fact, one study shows a clear link between voting behavior and lower re-arrest rates.

MR. LEVITAS echoed Ms. Pugh's point that SB 7 simply restores the right to vote in a narrow and specific context. It does not restore full civil rights to people on parole/probation or parole. In conclusion he said SB 7 will reduce risks to communities by promoting the reintegration of ex-offenders.

CHAIR FRENCH noted that Deputy Commissioner Peoples sent a letter dated March 1 responding to a question raised at the previous hearing. The data shows the numbers of probationers and parolees whose last conviction was a felony crime of moral turpitude. Unclassified felonies are the most serious and C felonies the least.

Unclassified Felony:	101
A Felony:	200
B Felony:	728
C Felony:	1,640

He asked Mr. Levitas if he is aware of any state that conditions the right to vote upon the severity of the crime.

MR. LEVITAS replied the majority of states use the simplest scheme of not distinguishing between particular crimes, but it is not unheard of to make a distinction and set aside enfranchising people who commit violent crimes or crimes against persons until release from probation or parole. The patchwork approach can be quite confusing and perhaps it contributes to the fact that most felons who are released from jail believe they can never vote again, he said.

2:15:47 PM

CHAIR FRENCH found no further public testimony and announced he would hold SB 7 in committee to look at possible modifications.

At ease

Committee Minutes

Feb 22, 2007

SB 7-FELONS' RIGHT TO VOTE

CHAIR McGUIRE announced the consideration of SB 7.

9:18:00 AM

SENATOR BETTYE DAVIS, Alaska State Legislature, said her side would introduce the bill.

THOMAS OBERMEYER, staff to Senator Bettye Davis, described the bill as an opportunity for a second chance to reenter society for felons. It is of great significance to Alaska because there are over 5,000 felons who have been disenfranchised and a great many are minorities, which should bring cause for alarm. He read a statement from Justice Marshall, as follows:

It is doubtful whether a state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. Ex-offenders have already paid their debt to society. They are as much affected by the actions of government as any other citizen and have as much of a right to participate in governmental decision making. Furthermore, the denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law abiding and productive citizens.

MR. OBERMEYER said some states allow felons to always vote, but SB 7 just asks that felons be allowed to vote once they are released from prison instead of waiting until after probation and parole. It would require some change in the Department of Corrections (DOC) and the Division of Elections to recognize those affected by the bill. There are 5.5 million people prohibited from voting in the United States now. "These people are coming back to society! America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life." He noted that 47 percent of those incarcerated in Alaska are Alaska Native and 11 percent are African American. This is the last form of disenfranchisement in the United States. Alaska's laws weren't enacted in a discriminatory process so are likely constitutional, he said.

9:22:47 AM

CHAIR McGUIRE surmised that the bill doesn't allow a felon to vote while in prison. She asked what district they would vote in, and she assumed it would be wherever they took up residency.

MR. OBERMEYER spoke with the Division of Elections and the lieutenant governor and said it could be done simply and without added costs. Instructions could be put on a website.

CHAIR McGUIRE asked why the original law was nacted.

MR. OBERMEYER said Alaska likely followed what other states did. He said two states allow felons to vote all the time, some states use the language in SB 7, about 21 states have the same law Alaska has, and some never allow felons to vote. He said some felons in Alaska don't know they are allowed to vote after probation. He said 600,000 felons re-enter society every year.

9:26:32 AM

CHAIR McGUIRE made a comment about non-felons who don't vote. She said she couldn't see why those who have paid their debt to society shouldn't be allowed to vote.

MR. OBERMEYER said disenfranchisement has a long history, but society is now rejecting practices that were formally accepted.

1:27:33 AM

SENATOR GREEN said she can't support this at all. The sentence comprises probation and parole when the felon is still under certain obligations. The loss of the ability to vote is part of the conviction, and it isn't over when they walk out the door.

SENATOR FRENCH said this is difficult. He is a former prosecutor and knows it is not easy to get convicted of a felony. He asked about how it will work for Alaska, and where the statistic of 5,000 felons comes from.

MR. OBERMEYER said he wasn't sure but about 47% are Native and 11 percent are African American. He said the Division of Elections doesn't oppose the bill. In response to Senator Green that this is part of the sentence, "it's my understanding that in the past there was opposition by the Department of Corrections because so many of these people were recidivists and they didn't want to go through the aggravation of trying to reestablish them on the rolls." It will be simpler with electronic data use. He said recidivism is a problem because of drug use, and there needs to be rehabilitation in the medical community and not just in prison. This is just one step in encouraging people to get back in society.

CHAIR MCGUIRE asked if someone on probation would be a "bad voter." Some restrictions make sense, like contacting a victim or drinking, but encouraging positive things, like getting an education or voting-"I just can't see the other side of it."

1:32:32 AM

MR. OBERMEYER said a past argument is that felons would vote liberal.

CHAIR MCGUIRE said she is trying to understand the policy.

SENATOR DAVIS asked if Senator French wanted more information.

SENATOR FRENCH said he wants to hear from the DOC to learn how many people this will effect.

SENATOR DAVIS said the department was contacted.

1:34:32 AM

JASON WOOLEY, Special Assistant, Office of Lieutenant Governor, said he is testifying for Whitney Brewster, the director of the Division of Elections. He said the division is not opposed to the bill. He asked how the DOC intends to notify the division when a voter has been incarcerated for a felony of moral turpitude and when individuals are released from prison so they can restore voting rights. He explained, in detail, the current process and the difficulties of information exchange between the DOC and the division. He noted that the committee substitute makes an important change in Section 1, which specifies that the DOC should funnel all notifications through the director.

1:40:11 AM

SENATOR FRENCH made a motion to adopt the committee substitute labeled, 25-LS0100(M), Bullard, as the working document. Hearing no objection, version M was before the committee.

CHAIR MCGUIRE said it is disturbing that some who should be able to vote still don't have that right because the information is not transmitted in a timely manner.

MR. WOOLEY said that is disturbing to his division as well.

1:41:27 AM

SENATOR FRENCH said it seems that the division should be wildly enthusiastic about this bill because of the clear distinction of a person behind bars and one who is not.

SENATOR GREEN asked if a felony involving moral turpitude is the only one that is restored and not the lesser felonies.

MR. MOOLEY said the lesser felonies don't fall under the moral turpitude label and don't lose the right to vote.

SENATOR FRENCH asked for the list of the lesser felonies.

MR. MOOLEY said felonies of moral turpitude are felonies that are wrong in and of themselves--murder and assault for example.

9:41:33 AM

CHAIR McGUIRE asked the other testifiers to confine their remarks to those that have not yet been made.

9:44:21 AM

MICHAEL MACLEOD-BALL, Executive Director, American Civil Liberties Union of Alaska (ACLU), said he submitted testimony. He asked the committee to think about who would get the right to vote as a result of SB 7. The Alaska constitution has a specific right of reform, which the courts have interpreted to include a right to rehabilitation. Rehabilitation is what incarceration is attempting to do, he stated. Parole and probation comes when someone plays by the rules and they ought to get the small reward of voting. "That's all part of this grand scheme that we have to try to reintegrate these offenders into society." He added that "if it's deemed to be better for society that somebody is reintegrated into society at a particular point in the sentence, shouldn't we also include with that the right to participate in civil society through the franchise?"

9:48:51 AM

SENATOR FRENCH asked how many individuals have been released and are still on probation or parole in Alaska.

DWAYNE PEEPLES, Deputy Commissioner, Department of Corrections, said there are 5,566 as of February.

SENATOR FRENCH asked for the average length of probation or parole and what kind of felonies occurred.

MR. PEEPLES said he will get that information to him.

CHAIR McGUIRE said the felonies of moral turpitude matter most to this bill. The list includes rioting, possession of gambling records, and "all kinds of things." She asked for that information and for demographic information.

MR. PEEPLES said locations are tracked, and he will try to develop a matrix by the seriousness of the crimes.

9:51:26 AM

DENISE MORRIS, Alaska Native Justice Center, noted she would fax her memorandum. She said that Alaska's current restriction on felony voting is limited to felonies of moral turpitude; however, the definition is designed by statute and includes almost all felonies. The theft of something worth over \$499 is a felony. Most assault cases and misconduct involving a controlled substance are felonies. Many individuals don't commit crimes against people, but the crime is a felony nonetheless. Restrictions on voting rights impact Natives more. Alaska Natives constitute 16 percent of the state, but they account for 37 percent of the prisoners. Cultural factors make Natives more susceptible to felony disenfranchisement, she said. Restoring voting rights is an important element to an individual's reintegration back into the community. She said there is some indication that voting reduces recidivism. One study found that 27 percent of nonvoters were rearrested, compared with 12 percent of voters. A recent report by the Alaska Judicial Council showed that recidivism rates were greatly reduced for individuals who went through the therapeutic court. A condition of parole or probation should even require the registration to

vote. She concluded by saying that the Alaska Native Justice Center supports lessening the restrictions on felony disenfranchisement, specifically voting rights, which will bring Alaska into the modern national trend.

2:57:02 AM

ALONZO PATTERSON, Former Parole Board Chair, said he served on the parole board for 12 years and he is involved with the Baptist Church, NLK Foundation, and Alaska Black Leadership Conference. He supports SB 7, and he has been involved with issuing parole releases and probation recidivism. He has looked at the recidivism rates and the disparity in sentencing. The disparity begins long before the person is released from prison. When releasing people, the message is a restoration of their rights, but when the voting rights aren't included it is a farce. Those people can develop an attitude of hopelessness, and recidivism levels rise. It is difficult for these people to get jobs. Looking at the greatest number of people in the institution doesn't indicate discrimination, but "it is culturally impacting because if you have a greater number of minorities in the institution, then you have a greater number of people being impacted in that culture based on the fact that they are not able to have their voting rights." He encouraged the committee to strongly support SB 7.

MR. PATTERSON said the problem of going in and out of jail could mean that a person could spend 20 years trying to serve a 5-year term, "and that recycling process can put your voting rights off a long time." He added, "One's right to vote is one's right to vote whether one votes liberal or whatever. That is a part of their right as a citizen." Denying the right to vote creates an attitude that overcrowds the prison system. He said he works with some of these people as a chaplain, and allowing them to vote and fully participate as citizens of Alaska removes an obstacle from their intended rehabilitation.

10:01:47 AM

DR. WILLIAM GREENE, President, NAACP Alaska, said he has worked with Mr. Patterson for 25 years and has seen a lot of change in inmate life. The bill is part of making them whole and feel like they are a part of society once again. Voting rights give the indication that persons are accepted back into society and not outcasts. Passing the legislation will make the community better, he stated.

DANIEL LEVITAS, American Civil Liberties Union, ACLU, Atlanta, Georgia, said his work focuses specifically on voter disenfranchisement. He has submitted testimony. He said there are 11,132 Alaskans who are disenfranchised as a result of felony convictions. There is a distinction in the law between felonies and felonies of moral turpitude, but mostly everyone convicted of a felony in Alaska ends up being disenfranchised. He said he was pleasantly surprised that the Division of Election makes an effort to fully enfranchise those people who haven't committed so-called moral turpitude crimes, but that system isn't fully efficient. Data from 2004 show more than half of these people are out working in the community: 5,000 on felony probation and 927 on parole. These people would be enfranchised through SB 7. There are 20 states that treat felony offenders less harshly than Alaska, and 13 states are considering this same change. This bill will eliminate a tremendous amount of the bureaucratic paperwork complications that disenfranchise people because no one knows their status.

MR. LEVITAS said there have been few studies, but one shows a clear link between voting behavior and lower re-arrest rates. The problems in the notification system would be fixed by SB 7, he concluded. Registration instructions and eligibility can be handed to people as they walk out of prison.

10:08:59 AM

CAROL RAFLAN, National Association for the Advancement of

Colored People (NAACP). said the NAACP "logic is simple: by allowing individuals to invest in their community through the electoral process, they are more likely to feel a sense of ownership and become productive members of that society and less likely to return to anti-social destructive behavior that led to their previous incarceration."

CHAIR McQUIRE asked the will of the committee.

SENATOR FRENCH moved to report the CS for SB 7, labeled, 25-LS0100W, from committee with individual recommendations and attached fiscal note(s). There being no objection, CS SB 7(S7A) moved from committee.

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Senator Bettye Davis@legis.state.ak.us
<http://www.akdemocrats.org>

Senator Bettye Davis

DATE: 2-23-07

Senator Hollis French, Chairman
Senate Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

RE: Request for Hearing – SB 7 (CSSB 7) – Voting Rights for Felons

Dear Senator French,

As sponsor of CSSB 7 I respectfully request a hearing before Senate Finance Committee on this bill concerning voting rights for felons. Attached in order are the following:

1. Sponsor Statement
2. The most recent version of the bill, CCSB 7 - 25-LS0100M
3. The original SB 7
4. Sectional analysis
5. Additional Documentation

I will submit a complete list of people who may wish testify in Juneau in person and in Anchorage telephonically within a couple of days of the hearing.

Sincerely,

A handwritten signature in cursive script that reads "Bettye Davis".
Senator Bettye Davis

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Senator Bettye Davis

SB 7 "An Act relating to the voting rights of felons"

Sponsor Statement

It is essential to a democracy that every citizen who wishes to be a productive member of society be afforded the right to vote. Art. I, Sec. 12 of the Alaska Constitution provides that criminal administration is based on the "principle of reformation" in addition to protecting the public, community condemnation of the offender, and the rights of victims. Political participation helps with rehabilitation and reintegration into the community.

SB 7 grants felons the right and opportunity to vote if they wish to exercise that right immediately after having served their time. In Alaska 5,000 Alaskans have lost their right to vote because of felony convictions. Current Alaska law bars the vote to persons convicted of felonies of moral turpitude until the expiration of a post-incarceration period of parole or probation, which is often years after they have reentered society as productive citizens and tax payers. While Vermont and Maine do not disenfranchise felons at all, other states are reforming their laws to allow felons to vote either after release (13 states), after release and completion of probation or parole (21 states including Alaska), or permanent disenfranchisement to certain felons (14 states).

Harsh sentencing laws over the past 30 years have allowed the prison population to burgeon, while reducing the rehabilitative model to an anachronism. Over 4.7 million Americans or 1 in 43 adults cannot vote due to felony convictions, with 1/3 or more of them due to alcohol and drug offenses. Of those incarcerated in Alaska 47% are white; 37% Alaska Native; 11% African American; 2% Hispanic; and 3% Asian/Pacific Islanders. Minority felons are disproportionately disenfranchised under current law and the harm of continued disenfranchisement after release is exacerbated by stigma and other forms of discrimination as they try to reenter society.

SB 7 will help rehabilitate released felons by welcoming them back into the voting community immediately after release and encouraging them to become good citizens. Studies show that felons who vote have a lower rate of recidivism. CSSB 7 will streamline the process by which the state restores voting rights to felons and thus will save money. I urge your support of CSSB 7.

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SB 7 "An Act relating to the voting rights of felons"

Explanation of changes in CS for Senate Bill No. 7 ()

1. Section 1. AS 15.05.030(b) provides a cue to the Commissioner of Corrections of more specific procedures required of the Department of Corrections to advise persons of their restored right to vote upon release from incarceration, as well as providing notice to the Director of Elections of the same.

Note: These procedures are not exhaustive: In the latter case, for example, the Commissioner of Corrections may wish to establish policy and procedure for a reasonable number of days, e.g., 60 days, to advise the Director of Elections of released person's restored right to vote, as well as expedited procedures for prompt reapplication for participation in an up-coming election.

2. Section 2. AS 15.07.135(a) does not change the law, but only changes the title of the section to more accurately reflect the nature of the section.



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**STATEMENT OF MR. HILARY O. SHELTON
DIRECTOR OF THE NAACP WASHINGTON BUREAU
ON SB7,
AN ACT RELATING TO THE VOTING RIGHTS OF INDIVIDUALS
WITH FELONY CONVICTIONS**

before the
**ALASKA SENATE STATE OF AFFAIRS COMMITTEE
IN THE TWENTY-FIFTH LEGISLATURE – FIRST SESSION**

February 22, 2007

My name is Hilary Shelton and I am the Director of the Washington Bureau of the National Association for the Advancement of Colored People (NAACP). The NAACP is our nation's oldest, largest and best known civil rights organization in the United States. We are proud to have more than 2,200 membership units across the country, with 5 units at last count in the state of Alaska¹. The Washington Bureau is responsible for the federal legislative and national policy advocacy for the NAACP.

I would like to begin by thanking the Alaska Senate Committee on State Affairs for inviting me to testify here today. The NAACP strongly supports bills like SB7 that would allow ex-felons to register and vote immediately upon leaving prison, even if they are on probation or parole.

Our logic is simple: by allowing individuals to invest civic capitol in their community through the electoral process, they are more likely to feel a sense of ownership and become productive and constructive members of their communities and society while being less likely to return to the anti-social, destructive behavior that led to their previous

¹ There are active NAACP branches in Juneau, Fairbanks and Anchorage as well as youth councils in Anchorage and Fairbanks.

incarceration. Voting allows people to feel that they have a voice in and have made a commitment to their community, and it is a powerful deterrent to recidivism. People are more likely to help build and protect communities of which they feel a sense of ownership.

The NAACP is also concerned about the disparate impact disenfranchisement laws have on racial and ethnic minorities across the nation as well as in Alaska. Historically state disenfranchisement laws have been, in some instances, targeted to exclude racial and ethnic minorities, specifically African Americans. Although some of the more egregious laws have been struck down by the US Supreme Court², many others remain in place and, as a result, racial and ethnic minority Americans are disenfranchised at vastly disparate rates.

Currently 48 states including Alaska place varying limits on the voting rights of felons and ex-felony offenders. As a result of these laws, nationally about 13% of African American men cannot vote, with as many as 31% of African American men in two states – Florida and Alabama – essentially permanently disenfranchised.

Alaska's current laws, which are harsher in their treatment of offenders than at least 20 other states, continue to have a clear and indisputable disparate impact on who can and cannot vote in the state.

Although Alaska's largest minority group, Alaska Natives, comprise more than 14% of the state's general population³, they account for 37% of its prison population⁴. Similar disparity exists in the cases of other minorities, including African Americans, who account for over 10% of the prison population⁵ while representing less than 3.5% of the state's general population⁶.

It stands to reason that these disparities will persist once people are released from prison, whether on probation or parole. Thus, as a

² Hunter v. Underwood, 471 U.S. at 232-33

³ United States Census: 2005 American Community Survey Data Profile Highlights: Alaska

⁴ ALASKA DEPT. OF CORRECTIONS, 2003 OFFENDER PROFILE 11 (2004), available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2003.pdf>

⁵ Id.

⁶ United States Census: 2005 American Community Survey Data Profile Highlights: Alaska

result of Alaska's disenfranchisement of ex-felony offenders who may be out of jail on probation or parole, a disparate number of racial and ethnic minorities are not allowed to vote.

At last count, more than 11,000 Alaskans are disenfranchised; the majority of whom (54%) are not in prison or jail, but are in fact back in their communities on either probation or parole. In other words, these people have been deemed sufficiently rehabilitated so that they may reenter our community, but they are being told that they cannot be trusted enough to vote.

A convincing argument has been made that because of these racial and ethnic disparities Alaska's disenfranchisement laws violate the Voting Rights Act of 1965⁷. While some might argue against this, it is next to impossible, given the empirical evidence, that the state's disenfranchisement laws go against the very premise of the VRA, which is that state's shall make no laws that disparately infringe on the voting rights of certain groups of people.

I would be remiss if I didn't also point out that many states have taken, or are also considering, steps to ease ex-felon disenfranchisement laws. Within the past 10 years, 16 states have implemented policy reforms that have reduced the restrictiveness of these laws, and more than 600,000 people in seven states have regained their voting rights⁸.

Furthermore, just last November the voters in Rhode Island passed a ballot initiative allowing ex-prisoners to register and vote once they were released from prison, even if they were on probation or parole. Prior to the referendum's passage, more than 15,500 residents of Rhode Island could not vote due to a felony conviction. An overwhelming 86 percent of those individuals were no longer in prison.

Another reason for the NAACP's support of SB7 is that Alaska's current law can lead to confusion as well as an opening for abuse on

⁷ Christopher R. Murray, *Cited: 23 Alaska L. Rev. 28*, "Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965"

⁸ Ryan King, "A Decade of Reform: Felony disenfranchisement policy in the United States" October 2006

the part of unscrupulous, misdirected and / or insensitive election officials.

Election officials have no way of knowing, by sight, if an individual is on probation or parole. If the law says that an individual on probation or parole cannot vote, it is up to the election official to determine who falls into that category.

Experience has shown that in all too many cases, election officials with less than pure motives or through ignorance may target only people from particular racial or ethnic groups to ask if they have ever been convicted of a felony. This is not only blatantly unfair, it can also have a terribly demoralizing and potentially destabilizing effect on voters and whole communities.

Thus, the NAACP strongly supports reenfranchising initiatives like SB7 and hopes that you will act swiftly to address this crucial issue. I would again like to thank the chair of this committee, Senator McGuire, for holding this hearing as well as Senator Davis for her efforts on this issue. I would welcome any questions you may have.

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SB 7 - Voting Rights of Felons

Additional Issues Presented to Senate Judiciary Committee

1. **Constitutional Issue – Article 5, section 2- suggested bifurcation of restored voting rights**
2. **Restored voting rights for felons “collateral” to “unconditional discharge”**
3. **Bifurcating voting rights by classification of felony serves no legitimate state purpose and contradicts the intent of Article 1, Section 12 to rehabilitate prisoners**

1. **Article 5, Section 2 – Alaska Constitution – Disqualification of felon’s right to vote until restoration of “civil rights.”**

Article 5, Section 2 reads:

“No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored.”

Statutory interpretation of restoration of “civil rights” to felons for the purpose of voting under SB 7

All “civil rights” are not clearly defined in the Alaska Constitution, but restoration of civil rights to felons for the purpose of voting under Article 5, section 2 has been construed to mean that a felon convicted of a crime of “moral turpitude” was disqualified to vote until “unconditional discharge.” “Unconditional discharge” was defined in Code of Criminal Procedure AS 12.55.185 and codified in Election Code AS 15.05.030. SB 7 amends AS 15.05.030 to interpret restoration of “civil rights” under Article 5, section 2 to mean “release from incarceration.”

Bifurcation of voting rights between types of felonies is likely unconstitutional under Article 5, section 2, Alaska Constitution

The suggested bifurcation of restoring voting rights to felons by classification of felony may be unconstitutional. Legislative Legal Services has advised that “civil rights” under Article 5, section 2 can only be interpreted one way. Restoration of “civil rights” for ex-felons to vote after being convicted of crimes of “moral turpitude” cannot mean until “unconditional discharge” for Class A and Unclassified felonies, and “release from incarceration” for Class B and C felonies. Therefore, the suggestion to bifurcate restoration of voting rights between types of felonies may be unconstitutional, absent perhaps, a redefinition of crimes of “moral turpitude”—discussed below.

2. Restoration of felon's right to vote is "collateral" to "unconditional discharge"

The definition of "Unconditional Discharge" in subsection 39 of the Election Code, AS 15.60.010, is functionally identical to the definition of the same term set out in AS 12.55.285, Code of Criminal Procedure. Neither require unconditional discharge to restore collaterally affected rights or privileges, such as voting and carrying a gun. According to statutory definition, restriction on voting rights is not part of the punishment determined by judgment of conviction and sentencing by court.

AS 12.55.185 reads:

"The definition of "unconditional discharge" set forth in this section must be interpreted to require the completion of any sentence of imprisonment, discharge from parole or probation, and release from any other restriction directly imposed as part of the judgment of conviction; restoration of collaterally affected rights or privileges, such as to vote and to carry a gun, is not required. *Singleton v. State*, 921 P.2d 636 (Alaska Ct. App. 1996)."

In *Singleton*, Chief Judge Bryner wrote in his opinion:

"This definition conditions renewed eligibility for jury service upon release from all restrictions directly imposed "under a sentence," but not from collateral disabilities --such as loss of firearms or voting privileges--that flow from sources outside the judgment of conviction or sentencing order (emphasis added)." . . .

"[1] We conclude that the definition of "unconditional discharge" set forth in AS 12.55.185 must be interpreted in accordance with the statute's plain meaning. So interpreted, unconditional discharge requires completion of any sentence of imprisonment, discharge from parole or probation, and release from any other restriction directly imposed as part of the judgment of conviction. Restoration of collaterally affected rights or privileges is not required" (emphasis added).

FNI. In this connection it is worth noting that the Attorney General has interpreted "unconditional discharge" in the context of the voting rights statutes to require completion of probation or parole, but not formal restoration of collaterally affected civil rights. See 1985 Op. Att'y Gen. No. 103 (Alaska, Jan. 29, 1985).

The above definitions highlight that restoration of voting rights are "collateral" to "unconditional discharge," or "release from prison" because they are not part of the judgment of conviction or to the sentence.

3. Redefining "moral turpitude" to avoid a potential constitutional violation by bifurcating voting rights of ex-felons serves no legitimate state purpose and contradicts intent of Art. I, Sec.12

Rather than redefining crimes of "moral turpitude" to avoid the anticipated constitutional prohibition against bifurcating disqualification of voting rights between types of felonies, as suggested, it makes more sense to allow all ex-felons to vote upon release. Allowing all ex-felons to vote after release under SB 7 contradicts the intent of the Alaska Constitution to treat all similarly situated persons fairly, if not equally, and to rehabilitate prisoners under Art. I, Section 12. All released ex-felons have served their time and repaid their debt to society, regardless of the classification of their crimes; they are back in the

community, and restriction of collateral voting rights was never part of their sentences or judgments of conviction.

Making only ex-felons who committed Unclassified and Class A felonies wait to vote under SB 7 until after probation/parole, instead of upon release, is like inflicting an additional form of punishment on them dissimilar to other ex-felons after they have served their time in prison. It is tantamount to saying, "the state has deemed it appropriate upon your release to flog you on last time as a reminder of the heinous nature of your crime." Moreover, the decision to refuse voting rights to ex-felons of only certain classes of felonies until after probation and parole would seem punitive, arbitrary, and unsupported by a compelling, or legitimate state interest or "rational policy" (Justice Marshall, in dissent in *Richardson v. Ramirez*, 418 U.S. 78 (1974)).

As Hilary O. Shelton, Director of the NAACP Washington Bureau, stated in a letter recently submitted in support of SB 7 before the Alaska Senate State Affairs Committee:

"At last count, more than 11,000 Alaskans are disenfranchised; the majority of whom (54%) are not in prison or jail, but are in fact back in their communities on either probation or parole. In other words, these people have been deemed sufficiently rehabilitated so that they may reenter our community, but they are being told that they cannot be trusted enough to vote." (emphasis added).

This is a true statement, whether ex-felons were convicted of more serious Unclassified or Class A felonies, or Class B or Class C felonies.

Conclusion

SB 7 will allow Alaska to join more than 16 states which in the last ten years have implemented policy reforms that have reduced restrictiveness in voting and have allowed more than 600,000 people in seven states to regain their voting rights. (Hilary Shelton, above, referencing Ryan King, "A Decade of Reform: Felony disenfranchisement policy in the United States," October 2006). Rhode Island last November, 2006 reportedly passed a ballot initiative allowing over 15,500 resident ex-felons to register and vote once they were released from prison, even if they were on probation or parole. 86% of those were no longer in prison. (Shelton). New Florida Republican Governor, Charles Crist, announced in February, 2007 that he intends to restore voting rights to an estimated 990,00 ex-felons. Alaska can add to this momentum by passing SB 7. Allowing all felons to vote immediately after release and informing them of their restored voting rights reduces the disparate racial impact on voting in Alaska, since so many prisoners are minorities. At the same time uniform application of SB 7 to all felons reduces administrative time and expense for the State Department of Corrections and the Division of Elections.

FELONY DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES



- Permanent disenfranchisement for all felony offenders, unless government approves individual rights restoration**
 FL, KY, VA

- Permanent disenfranchisement for at least some felony offenders, unless government approves individual rights restoration**
 AL, AZ, DE, MD, MS, NV, TN, WY

- Voting rights restored automatically after completion of sentence, including prison, parole and probation**
 AK, AR, GA, ID, IA, KS, LA, MN, MO, NE, NJ, NM, NC, OK, SC, TX, WA, WV, WI

- Voting rights restored automatically after release from prison and discharge from parole (probationers may vote)**
 CA, CO, CT, NY, SD

- Voting rights restored automatically after release from prison**
 DC, HI, IL, IN, MA, MI, MT, NH, ND, OH, OR, PA, RI, UT

- No disenfranchisement for felony convictions**
 ME, VT

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Senator Bettye Davis

Senate Bill SB 7 "An Act relating to the voting rights of felons."

Tentative list of people to testify in person and by teleconference

Persons to testify telephonically from Anchorage LIO:

1. Reverend Alonzo Patterson, pastor and former member of Parole Board
2. NAACP – Alaska (Anchorage)
3. Denise Morris, Pres./CEO AK Native Justice Center, Anchorage.

Call-in from out-of-state: 888-295-4546

1. Daniel Levitas, Representative, American Civil Liberties Union, Atlanta Georgia, State Legislative Strategist, Felon Disenfranchisement, Voters Right Project.
2. Hilary O. Shelton, Washington DC Bureau, NAACP
3. Wade Henderson, President/CEO (or representative), Leadership Conference on Civil Rights, Washington, DC

Persons in Juneau to testify in person

1. Margaret Pugh, former Commissioner, Dept. Corrections Dept. ✓
2. Mike Miller, former State Representative
3. Whitney Brewster, Alaska Director of Elections
4. Michael Macleod-Ball, Executive Director, Alaska ACLU ✓

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MEMORANDUM

March 13, 2007

SUBJECT: Voting rights of felons (CSSB 7(JUD))
(Work Order No. 25-LS0100\L)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Alpheus Bullard 
Legislative Counsel

Enclosed is the draft committee substitute you requested that would restore voting rights to persons convicted of felonies involving moral turpitude at different times, depending on which felony was committed or the repeat nature of the felony. Please be advised that this disparate treatment may invite a constitutional challenge based on two different theories:

Restoration of Civil Rights.

Article V, sec. 2 of the Alaska Constitution provides that "[n]o person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored." While the Alaska Supreme Court has not yet addressed what constitute "civil rights" for the purposes of this clause, conceivably "civil rights have been restored" could be equated to either (1) a person's release from incarceration or (2) a person's unconditional discharge from conditions of parole or probation. While arguments can be made as to whether "civil rights have been restored" should be interpreted in one manner or the other, it is unlikely, in my opinion that art. V, sec. 2 of the state constitution can be interpreted to permit both interpretations, as this draft would require.

Equal Protection.

In employing a bifurcated system that restores the right to vote at different times for different felons, the committee substitute may also invite an equal protection challenge. If the law is challenged, a court will ask: what is the governmental purpose behind having these two regimes? Is the unclassified, class A, or repeat felony conviction relevant to a reduced opportunity to vote? Since the right to vote is a fundamental right, a court may require that the state show that a compelling governmental purpose is served by restoring the right to vote effective on release from incarceration to some felons but not others.

If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:ljw
07-133.ljw

Enclosure

ATTORNEYS
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March 5, 2007

VIA FACSIMILE

Senator Hollis French
Chair, Senate Committee on the Judiciary
State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 7, the Voting Rights of Felons

Senator French:

The Native American Rights Fund was founded in 1970 and has been in Alaska since 1984. We have also been working on the voting rights of Alaskans since 1990. The Native American Rights Fund supports the passage of SB7, which would restore the voting rights of felons immediately upon release from prison. There are several reasons we support this bill, the most critical reason being that current law disproportionately impacts Alaska Natives because they comprise a disproportionately large part of the felon population.

In 2004, the Alaska Judicial Council released a study about the felony process in Alaska that considered whether there were a disproportionately large percentage of ethnic minorities in the criminal justice system and, if so, why. The study concluded that Alaska Natives were in fact overrepresented in the felon population. Although they are only 16% of the general population, Alaska Natives comprise more than 37% of those charged with felonies. The study also concluded that Alaska Natives received longer sentences than non-Natives for drug offenses. In addition, Natives outside of Anchorage also received longer sentences for drug offenses. Furthermore, many Alaska Natives have lower per capita incomes (some as low as \$8,000 per year) and this means they cannot afford private attorneys; this too is critical because the study also found that those with private counsel served less time in prison, served less time on parole or probation and were more successful at having their charges reduced. Overall, this study highlights the disparate treatment Alaska Natives receive in the criminal justice system.

One of the significant impacts of the Judicial Council's study is that it means Alaska Natives also represent a disproportionately high percentage of those disenfranchised under the current law. While this bill of course does not solve all of the problems in the current justice system, we believe it is an important first step in remedying the impacts of the system upon the Native population and returning them to society as proud productive members of their communities.

We would also like to briefly dispel some of the myths about who felons are in Alaska. Again according to the Alaska Judicial Council's 2004 report, 83% of all felons are male, almost half are under 30 years of age, half are Caucasian while 30% are Native, 63% have alcohol problems and 45% have drug problems, and more than one third have identifiable mental health problems. Almost 80% financially qualified for the assistance of a public defender. Sixty-five percent of these felons were convicted of Class C felonies, with property crimes comprising 30% and drug crimes comprising 20%. (Murder and sexual assault are only 2% and 12% of felons respectively.) Therefore, the average felon is a poor young man, Caucasian or Native, with an alcohol and/or drug problem, who was convicted of a Class C felony, most likely a property crime. This is the person who will most likely benefit from this bill. These are people who need alcohol and/or drug treatment and counseling – in other words they need help reintegrating into society and we believe re-enfranchising them after they have served their time is a positive and empowering way to achieve that.

We strongly encourage you to pass SB7. Thank you for considering our point of view.

Sincerely,

A handwritten signature in black ink, appearing to read 'Natalie A. Landreth', with a long horizontal line extending to the right.

Natalie A. Landreth
Staff Attorney

FELON DISENFRANCHISEMENT IN ALASKA AND THE VOTING RIGHTS ACT OF 1965

CHRISTOPHER R. MURRAY*

Alaska and forty-seven other states have provisions that limit the voting rights of felons. In many of these states, including Alaska, minority groups are disproportionately affected by these felon disenfranchisement laws. This Note examines the validity of these laws generally, and Alaska's laws in particular, under the the Voting Rights Act of 1965.

I. INTRODUCTION

Alaska limits the voting rights of felons.¹ Forty-seven other states have similar policies.² And, as in many of these other states, racial minorities in Alaska are disproportionately affected.³ Indeed, the state's largest minority group, Alaska Natives, is overrepresented in the state's prison population, indicating a greater likelihood of disenfranchisement.⁴ Because the right to vote is central to democratic government, any law that tends more frequently to disenfranchise racial minorities should be cause for

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* The author would like to thank Professor Erwin Chemerinsky and the ALR staff for valuable contributions.

1. ALASKA CONST. art. V, § 2 ("No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored.").

2. JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES pt. IV (1998), available at <http://www.hrw.org/reports98/vote>.

3. *Id.* pt. III.

4. Alaska Natives constituted approximately sixteen percent of Alaska's general population as of 2000, United States Census, available at <http://factfinder.census.gov> (under "get a Fact Sheet for your community" enter "Alaska" into "state" field; then follow "2000" link) [hereinafter U.S. Census], but represent over thirty-seven percent of the state's prison population, ALASKA DEPT. OF CORRECTIONS, 2003 OFFENDER PROFILE 11 (2004), available at <http://www.correct.state.ak.us/corrections/admin./ocs/profile2003.pdf> [hereinafter ALASKA OFFENDER PROFILE].

alarm. Nevertheless, because Alaska's felon disenfranchisement laws appear not to have been enacted with a discriminatory purpose, they likely do not violate the Federal Constitution.⁵

The laws may, however, run afoul of the Voting Rights Act of 1965 ("VRA"), which was amended in 1982 to invalidate state voting qualifications that have a racially disproportionate impact.⁶ Recent litigation has challenged state felon disenfranchisement laws on this basis.⁷ Though none of these challenges have succeeded—and two circuits have held that the VRA simply does not apply to felon disenfranchisement⁸—the Ninth Circuit recently allowed a VRA challenge to the State of Washington's felon disenfranchisement provision.⁹

To date, 1 case has been brought challenging felon disenfranchisement in Alaska. This Note is directed to that possibility. Part II puts Alaska's felon disenfranchisement laws into national context and explains why, even if they produce a racially discriminatory impact, they are likely not unconstitutional. Next, Part III assesses the circuit split over whether the VRA applies to felon disenfranchisement laws and the Ninth Circuit's decision that it does. Lastly, Part IV outlines the Ninth Circuit law that would govern a VRA challenge to Alaska's felon disenfranchisement laws in light of a recent similar challenge in Washington.

II. ALASKA'S FELON DISENFRANCHISEMENT LAWS

A. National Context

Disenfranchisement of criminals is neither a unique nor a recent phenomenon. The United Kingdom, Canada, and Australia all, to some degree, have voting qualifications based on criminal status.¹⁰ The ancient Greeks and Romans disenfranchised those guilty of infamous crimes, and voting was among a range of civil

5. See discussion *infra* Part II.C.

6. See *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986).

7. See, e.g., *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005).

8. *Hayden*, 449 F.3d at 310; *Johnson*, 405 F.3d at 1234.

9. *Farrakhan v. Washington (Farrakhan I)*, 338 F.3d 1009, 1016 (9th Cir. 2003).

10. Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 73 (2003). Restrictions abroad, however, tend to be more mild than those found in the United States. *Id.*

rights denied in post-Renaissance Europe on the theory that criminals suffer a "civil death."¹¹

Today in the United States, disenfranchisement is among many collateral consequences of felony conviction such as exclusion from certain professions and restrictions on carrying a concealed weapon.¹² In a frequently quoted opinion, Judge Henry Friendly justified the practice on a Lockean social-contract theory by arguing that criminals, in breaking societal rules, waive their rights to participate in the rule-making.¹³ Other courts have expressed an interest in preserving the "purity of the ballot box" from infection by those who by their acts have proven themselves morally unfit.¹⁴

Nevertheless, the practice is not without critics.¹⁵ With respect to traditional justifications for criminal sanction—rehabilitation, retribution, and deterrence—felon disenfranchisement seems to fall short given the counter-productivity of keeping criminals from participating in civil society, the disproportionate application of, in some cases, lifetime disenfranchisement to a broad range of crimes, and the limited deterrent effect of the threat of disenfranchisement.¹⁶ Abroad, felon disenfranchisement laws have been judicially rejected on political and human-rights grounds.¹⁷

11. *Id.* at 73–74; Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (2002).

12. See Scott M. Bennett, Note, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1 (2004) (outlining the most common normative arguments for and against felon disenfranchisement).

13. *Green v. Bd. of Elections*, 380 F.2d 445, 451–52 (2d Cir. 1967) (Friendly, J.) ("A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.")

14. *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) (quoting TENN. CONST. art. IV, § 1).

15. See, e.g., Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109 (2004).

16. See Bennett, *supra* note 12, ¶¶ 29–45.

17. The Canadian Supreme Court recently struck down a law preventing prisoners from voting. *Suavé v. Canada*, [2002] S.C.R. 519. The European Court of Human Rights held that a United Kingdom felon disenfranchisement law violated the human rights of convicts. *Hirst v. United Kingdom* (No 2), 38 Eur. Ct. H.R. 40 (2005). For a detailed analysis of the Canadian decision, see Parkes, *supra* note 10, at 79–85. For an analysis of the ECHR decision as well as an assessment of a "growing international consensus," see Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 778–79 (2005).

The modern practice of felon disenfranchisement in the United States is primarily a function of state law.¹⁸ Forty-eight states and the District of Columbia have some form of felon disenfranchisement, generally consisting of constitutional provisions buttressed by statute.¹⁹ Felon disenfranchisement expanded after the nation's founding, with most such laws enacted during the mid- to late-nineteenth century.²⁰ At the time the Reconstruction Amendments were enacted, twenty-nine of the thirty-six states had some form of felon disenfranchisement.²¹

Modern practice varies by state. At the extreme, at least three states impose lifetime voting bans on felons.²² These jurisdictions go beyond the historical scope of felon disenfranchisement laws in the United States and the contemporary practice in other states and internationally.²³ The reach of these laws is striking—lifetime disenfranchisement may even be predicated upon crimes such as jaywalking, vagrancy, or breaking a water pipe.²⁴

Alaska's felon disenfranchisement law is not as severe. The state constitution provides that "[n]o person may vote who has

18. Although the United States Constitution generally grants states the authority to establish voter qualifications, *see* U.S. CONST. art. I, § 2, cl. 1, that authority is constrained, not only by other express constitutional provisions, *e.g.*, U.S. CONST. amend. XV (right to vote cannot be denied on account of race); U.S. CONST. amend. XIX (gender); U.S. CONST. amend. XXIV (poll taxes), but also by strict scrutiny under the Equal Protection Clause as interfering with the fundamental right of voting, *see* *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

19. *See* FELLNER & MAUER, *supra* note 2, pt. II (surveying severity of felon disenfranchisement laws by state). For a state-by-state summary of state felon disenfranchisement laws, *see* SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY (DOJ/OPA), CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996), http://www.usdoj.gov/pardon/forms/state_survey.pdf (last visited Oct. 2, 2006).

20. Angela Behrens, Christopher Uggens & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 563-67 (2003).

21. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 n.5 (11th Cir. 2005).

22. *See* FELLNER & MAUER, *supra* note 2, pt. II. Restoration of civil rights, including the franchise, is possible in some states upon pardon of the offense. *See id.*

23. For example, the United Kingdom, Canada, and Australia generally restore voting rights upon the completion of sentence. *See* Parkes, *supra* note 10, at 73.

24. *Richardson v. Ramirez*, 418 U.S. 24, 75-76 n.24 (1964) (Marshall, J., dissenting).

been convicted of a felony involving moral turpitude unless his civil rights have been restored."²⁵ The provision was adopted at Alaska's constitutional convention in 1956 and became law upon Alaska's admission to the union in 1959.²⁶ Congress approved Alaska's constitution, including the felon disenfranchisement provision, when it granted statehood.²⁷ The language mirrored that of contemporary provisions in other states' constitutions.²⁸

The contours of the constitutional provision are set by statute. The term "felony involving moral turpitude" is defined to include nearly all felonies.²⁹ Voting registration is automatically cancelled upon conviction.³⁰ Voting rights are restored, and felons may re-register to vote upon completion of their sentences including any terms of parole or probation.³¹ Felon disenfranchisement in Alaska, which is more lenient than the lifetime ban imposed in

25. ALASKA CONST. art. V, § 2.

26. GORDON HARRISON, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE, 3 (4th ed. 2003), available at http://w3.legis.state.ak.us/infodocs/constitution/citizens_guide.pdf [hereinafter CITIZEN'S GUIDE].

27. See *id.* at 3-4.

28. GERALD A. McBEATH, THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE 125 (1997). The voting qualifications in Alaska's original constitution included a literacy test. CITIZEN'S GUIDE, *supra* note 26, at 105.

29. ALASKA STAT. § 15.60.010(8) (2006). At present, crimes meriting disenfranchisement ("felon[ies] involving moral turpitude") include:

those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, promoting prostitution, criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography . . .

Id.

30. ALASKA STAT. § 15.07.135.

31. ALASKA STAT. § 15.05.030 ("Upon the unconditional discharge, the person may register under AS 15.07."). "Unconditional discharge" occurs when "a person is released from all disability arising under a conviction and sentence, including probation and parole." ALASKA STAT. § 15.60.010(38).

some states, is in line with the policies of a majority of other states.³²

B. Felon Disenfranchisement and Race

Though facially race-neutral, felon disenfranchisement laws were, historically, enacted with a discriminatory purpose. Authors have noted that many states enacted such laws in the aftermath of the Civil War as part of a larger defensive response to the Reconstruction Amendments' extension of the franchise to African-Americans.³³ This response included poll taxes, literacy tests, and other Jim Crow measures to suppress the voting power of African-Americans.³⁴ For example, a 1901 felon disenfranchisement provision to Alabama's state constitution was expressly intended to single out only those felonies believed to be more frequently committed by African-Americans.³⁵ In 1985, the Supreme Court struck down that provision in the case of *Hunter v. Underwood*.³⁶

To the extent felon disenfranchisement laws were tailored to maximize a racially disparate impact, they have enjoyed considerable success.³⁷ Nationally, an estimated thirteen percent of African-American men are disenfranchised, with as many as thirty-one percent of African-American men in two states—Alabama and Florida—permanently disenfranchised.³⁸ Following a review of voting in the United States, the National Commission on Federal Election Reform, chaired by former presidents Jimmy Carter and Gerald Ford, urged states to scale back felon disenfranchisement laws, citing that as many as one in six African-Americans were disenfranchised in many states.³⁹ Even where discriminatory intent

32. See FELLNER & MAUER, *supra* note 2, pt. III.

33. Behrens et al., *supra* note 20, at 563 (analyzing post-Civil War responses to extending the franchise to African-Americans and drawing on social science theories of race competition and criminal justice).

34. *Id.*

35. *Hunter v. Underwood*, 471 U.S. 222, 228–29 (1985). The Alabama statute at issue was not discriminatory on its face, but the Court nevertheless struck it down on the basis of discriminatory intent evidenced in the legislative history. See *id.* at 227–32; *Underwood v. Hunter*, 730 F.2d 614, 618–20 (11th Cir. 1984).

36. *Hunter v. Underwood*, 471 U.S. at 232–33.

37. See FELLNER & MAUER, *supra* note 2, pt. II (setting out the racially disproportionate impact of felon disenfranchisement laws).

38. *Id.* pt III.

39. THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 51 (August 2001), available at http://millercenter.virginia.edu/programs/natl_commissions/final_report.html.

has not been proven, discriminatory effect continues to be the reality.⁴⁰

Alaska's experience is comparable. Although comprehensive studies of racial disparity in felon disenfranchisement in Alaska are unavailable, incarceration statistics provide a useful proxy.⁴¹ Alaska's largest minority group, Alaska Natives, comprise approximately sixteen percent of the state's general population,⁴² but they account for thirty-seven percent of its prison population.⁴³ Similar disparity exists in the cases of other minorities, including African-Americans, who account for over ten percent of the prison population⁴⁴ while representing less than four percent of the general population.⁴⁵ It has been suggested that cultural factors may make Alaska Natives more susceptible to felon disenfranchisement.⁴⁶ The precise mechanism by which racial bias in the criminal justice system may result in disproportionate disenfranchisement, and indeed whether racial bias is the cause of the disparity, is unclear and would require further study.

C. Constitutionality of Alaska's Felon Disenfranchisement Law

Felon disenfranchisement laws come under constitutional scrutiny in two ways. First, as a restriction on voting, the laws interfere with a fundamental right and implicate the Equal

40. In Florida, the Eleventh Circuit denied an equal protection challenge to the state's felon disenfranchisement laws for lack of demonstrated racially discriminatory intent, *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005), even though nearly one in three African-American men in Florida is permanently disenfranchised, *see FELLNER & MAUER, supra* note 2, pt. III.

41. Incarceration rates are, at best, an imprecise proxy for felon disenfranchisement. They are over-inclusive in that they include those inmates who are ineligible to vote, as well as those incarcerated for misdemeanors, and they are under-inclusive in that they do not include parolees or Alaska felons incarcerated outside of the state who are also unable to vote.

42. U.S. Census, *supra* note 4.

43. ALASKA OFFENDER PROFILE, *supra* note 4.

44. *Id.*

45. U.S. Census, *supra* note 4.

46. *See, e.g.,* Dave Stephenson, *For Alaska Natives: Extermination by Incarceration?*, INDIAN COUNTRY TODAY, June 26, 2003, available at <http://www.indiancountry.com/content.cfm?id=1056628610> (advancing the argument that Alaska Natives may be more likely to confess to a crime upon arrest than are white arrestees, thereby reducing the likelihood of a plea agreement for a lesser charge or sentence). If true, such factors might make felony—as opposed to misdemeanor—conviction more likely, leading to longer incarceration periods and thereby exacerbating the impact of felon disenfranchisement.

Protection Clause of the Fourteenth Amendment. Second, because the laws affect the voting rights of racial minorities, they also implicate the Fifteenth Amendment's prohibition on disenfranchisement "on account of race."⁴⁷ Supreme Court decisions addressing both theories have concluded that felon disenfranchisement laws are constitutional unless it can be proved they were enacted with racially discriminatory intent.⁴⁸

Ordinarily, a state law affecting a fundamental right, such as voting, would be subject to strict scrutiny.⁴⁹ However, in the 1974 case of *Richardson v. Ramirez*, the Supreme Court held that felon disenfranchisement laws are not subject to heightened scrutiny under Section 1 of the Fourteenth Amendment because Section 2 of that Amendment includes an "affirmative sanction" of such laws.⁵⁰ Section 2 of the Fourteenth Amendment, which reduces a state's representation in Congress in proportion to its disenfranchisement of otherwise qualified voters, provides an exception for disenfranchisement based on "participation in rebellion, or other crime."⁵¹ Chief Justice Rehnquist, writing for a divided court, reasoned that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment."⁵² Put another way, the voting

47. See U.S. CONST. amend. XV.

48. The Court has also heard and rejected Eighth Amendment challenges to felon disenfranchisement. See *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (felon disenfranchisement is not punitive and merely designates a grounds for voting eligibility). For an in-depth treatment of felon disenfranchisement as punishment in the context of the Eighth Amendment, see Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85 (2005).

49. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627-28 (1969) (applying strict scrutiny to voting restrictions); *Reynolds v. Sims*, 377 U.S. 533, 551-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter. . ."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise . . . is regarded as a fundamental political right . . .").

50. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

51. U.S. CONST. amend. XIV, § 2. The Amendment provides in pertinent part that "when the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation [in Congress] shall be reduced . . ." *Id.* (emphasis added).

52. *Richardson*, 418 U.S. at 43.

rights of felons are not protected as "fundamental" under the Equal Protection Clause.

Nevertheless, even if *Richardson* shields felon disenfranchisement laws from strict scrutiny under the Equal Protection Clause,⁵⁴ Section 1 of the Fourteenth Amendment still operates independently to prevent purposeful racial discrimination. In *Hunter v. Underwood*,⁵⁵ the Supreme Court struck down a provision in Alabama's constitution disenfranchising those convicted of certain enumerated felonies.⁵⁶ The provision was enacted in 1901 with the purpose of disenfranchising on the basis of race and applied only to felonies believed committed more frequently by African-Americans.⁵⁷ Chief Justice Rehnquist, writing for the Court as he did in *Richardson*, explained that "[w]ithout again considering the implicit authorization of [felon disenfranchisement under § 2 of the Fourteenth Amendment], we are confident that § 2 was not designed to permit the purposeful

53. At least one circuit has framed the law in this way. See *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983).

54. *Richardson's* reading of Section 2 of the Fourteenth Amendment has been widely criticized. See, e.g., Carlos M. Portugal, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317, 1325-26 (2003); John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1195 (2001). Dissenting, Justice Marshall argued in *Richardson* that Section 2 merely established a system of punitive reduction in representation for disenfranchisement as a compromise because wholesale enfranchisement of African-Americans would have been unpalatable and, therefore, that the scope of the language of Section 2 is limited to the operation of its punitive sanction and not to the entirety of the Fourteenth Amendment. *Richardson*, 418 U.S. at 73-74 (Marshall, J., dissenting).

For an argument that the Fifteenth Amendment effectively repealed Section 2 of the Fourteenth Amendment and, therefore, that the latter cannot shield felon disenfranchisement laws from equal protection scrutiny, see Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004).

Richardson preempts the question of whether, without a Section 2 shield, felon disenfranchisement would survive strict scrutiny. For an argument that felon disenfranchisement fails strict scrutiny because it is over-inclusive and only tenuously related to the most commonly cited state interests, see Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 98 MINN. L. REV. 231, 259-72 (2004).

55. 471 U.S. 222, 232 (1985).

56. *Id.* at 232.

57. *Id.* at 227-28; see discussion *supra* note 35.

racial discrimination attending the enactment and operation of [a law] which otherwise violates § 1 of the Fourteenth Amendment."⁵⁸

Independently of the Fourteenth Amendment, the Fifteenth Amendment prohibits the denial of the right to vote "on account of race."⁵⁹ The Supreme Court has construed this prohibition to apply only to intentional discrimination.⁶⁰ In *City of Mobile v. Bolden*, the Supreme Court held that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."⁶¹

Alaska's felon disenfranchisement laws are facially neutral and would, therefore, be unconstitutional only if enacted with a discriminatory purpose. Because the laws do not appear to have been adopted with racially discriminatory intent,⁶² they are subject to legal challenge, if at all, only under federal legislation.⁶³

III. THE VOTING RIGHTS ACT OF 1965

A. The Voting Rights Act of 1965 and the 1982 Amendments

Though the Fifteenth Amendment was ratified in 1870, it took nearly one hundred years before Congress systematically addressed disenfranchisement of racial minorities.⁶⁴ The Voting Rights Act of 1965⁶⁵ was enacted by Congress to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."⁶⁶ Congress was prompted to act after case-by-case litigation under previous legislation, including the Civil Rights Act of 1957, failed to

58. *Id.* at 233.

59. U.S. CONST. amend. XV.

60. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

61. *Id.*

62. This Note assumes, for the purpose of analysis, that discriminatory intent did not drive enactment of Alaska's felon disenfranchisement laws—or, at the very least, that discriminatory purpose likely could not be proven in the context of a constitutional challenge.

63. Of course, less countermajoritarian methods of legal reform remain available to Alaskans, such as constitutional amendment and the state legislative process.

64. Portugal, *supra* note 54, at 1328.

65. 42 U.S.C. §§ 1971–1973 (2000), as amended in 1970, Pub. L. 91-285, 84 Stat. 314 (1970), and in 1982, Pub. L. 97-205, 96 Stat. 131 (1982). The VRA has been reauthorized and amended by Congress on several occasions, including in 1970, 1975, and 1982 and was reauthorized by the President in July 2006. *Bush Signs Extension of Voting Rights Act*, N.Y. TIMES, July 28, 2006, at A22.

66. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

adequately prevent disenfranchisement on account of race.⁶⁷ The VRA imposed bold measures, including section 5, which prohibited the use of discriminatory tests or devices, such as literacy tests, and required that any state making use of such devices would thereafter have to apply for pre-clearance from the U.S. Attorney General or a federal circuit judge in Washington, D.C. for any future changes to voting laws.⁶⁸ At the time of the VRA's enactment, Alaska employed a literacy test and was, therefore, designated a "covered jurisdiction" for these purposes.⁶⁹ Federal supervision of the voting laws of "covered jurisdictions," most of which are in the South, continues today.⁷⁰

In 1966, the Supreme Court upheld the VRA as a valid exercise of Congress's enforcement powers under Section 2 of the Fifteenth Amendment.⁷¹ In 1980, however, the Court narrowed the effect of the VRA in *City of Mobile v. Bolden*.⁷² There, the Court held that section 2 of the VRA⁷³ had "an effect no different from that of the Fifteenth Amendment itself" and that a voting qualification law would only be struck down under the Act if it were proved that the law was enacted with a racially discriminatory purpose.⁷⁴ In so doing, the Court overruled the then-applicable "effects test" for voting qualifications.⁷⁵

In 1982, Congress responded to *City of Mobile* by adding a "totality of the circumstances" test to section 2 of the VRA.⁷⁶

67. *Id.* at 313.

68. See Voting Rights Act of 1965, 89 Pub. L. 110, 79 Stat. 437 (1965).

69. See Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 45-46 (2004); CITIZEN'S GUIDE, *supra* note 26, at 107.

70. Congressional representatives from southern states covered the VRA's section 5 pre-clearance provisions sought to remove those provisions during the reauthorization of the VRA in 2006. See Raymond Hernandez, *After Challenges, House Approves Renewal of Voting Act*, N.Y. TIMES, July 14, 2006, at A13.

71. *Katzenbach*, 383 U.S. at 337.

72. 446 U.S. 55 (1980) (plurality opinion).

73. The original text of the section read, "No voting qualification or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, 89 Pub. L. 11, 79 Stat. 437 (1965).

74. *City of Mobile*, 446 U.S. at 61-62.

75. See, e.g., *White v. Regester*, 412 U.S. 755, 769 (1973) (totality of the circumstances test applied to vote dilution case brought under section 2 of the VRA).

76. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986). The amended section 2 provides, in pertinent part:

Under the amended VRA, "plaintiffs [can] prevail by showing that, under the totality of the circumstances, a challenged election law or procedure [has] the effect of denying a protected minority an equal chance to participate in the electoral process."⁷⁷ As the Court later explained, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions" to cause unequal voting power.⁷⁸

B. Applicability of the VRA to Felon Disenfranchisement Laws

Since the 1982 amendments to the VRA, several plaintiffs have sought to use it to invalidate felon disenfranchisement laws on the basis of their racially disproportionate effects.⁷⁹ Circuits have split over whether the VRA does, in fact, apply to felon disenfranchisement laws. The Second Circuit in *Hayden v. Pataki* and the Tenth Circuit in *Johnson v. Governor of Florida* both held the VRA inapplicable to felon disenfranchisement laws.⁸⁰ In contrast, in *Farrakhan v. Washington*,⁸¹ the Ninth Circuit held that "[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA."⁸² Therefore, a claim against Alaska's felon disenfranchisement laws would be

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

(b) A violation of subsection (a) of this section is established if, based on the *totality of the circumstances*, it is shown that . . . members of [protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973 (2000) (emphasis added).

77. *Gingles*, 478 U.S. at 44 n.8.

78. *Id.* at 47.

79. *Id.*; *see, e.g.*, *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005).

80. *Hayden*, 449 F.3d at 310; *see Johnson*, 405 F.3d at 1234.

81. *Farrakhan v. Washington (Farrakhan I)*, 338 F.3d 1009, 1016 (9th Cir. 2003).

82. *Id.* The Sixth Circuit also considered a VRA challenge to Tennessee's felon disenfranchisement law in *Wesley v. Collins*, 791 F.2d 1255 (2d Cir. 1986). The court did not directly consider whether the VRA applies to felon disenfranchisement but appears to have assumed that it did. *See id.* at 1262 (affirming dismissal of the VRA claim on summary judgment).

"cognizable under Section 2 of the VRA" under Ninth Circuit precedent.⁸³

The Second and Tenth Circuit opinions concluding that the VRA does not apply to felon disenfranchisement laws rely on three arguments: (1) that the Fourteenth Amendment authorizes felon disenfranchisement laws (the "affirmative sanction" argument); (2) that application of the VRA to felon disenfranchisement would be an unconstitutional exercise of Congress's enforcement power; and (3) that canons of statutory construction support construing the VRA not to apply to felon disenfranchisement laws. The relative merits of each argument are assessed in turn.

1. *The "Affirmative Sanction" Argument.* As discussed previously, the *Richardson* case established that felon disenfranchisement laws enacted without racially discriminatory intent do not violate the Equal Protection Clause.⁸⁴ This is because Section 2 of the Fourteenth Amendment's enforcement mechanism—that a state's representation in Congress will be reduced in proportion to the disenfranchisement of otherwise qualified voters—carries an express exception for disenfranchisement based on "participation in rebellion, or other crime."⁸⁵

The Eleventh Circuit, in *Johnson*, seized on language in *Richardson* describing Section 2 of the Fourteenth Amendment as an "affirmative sanction" of felon disenfranchisement and cited it for the proposition that states have discretion to deny the vote to convicted felons.⁸⁶ The court argued that applying the VRA to Florida's felon disenfranchisement law would allow "a congressional statute to override the text of the Constitution."⁸⁷ More recently, the Second Circuit, in *Hayden*, cited Section 2 of the Fourteenth Amendment as the "starting point" in the analysis of the VRA's applicability to New York's felon disenfranchisement law.⁸⁸ The Second Circuit, while noting that felon

83. *Farrakhan I*, 338 F.3d at 1016.

84. See *Richardson v. Ramirez*, 418 U.S. 24, 54–55 (1974); *supra* notes 50–58 and accompanying text.

85. U.S. CONST. amend. XIV, § 2.

86. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228–29 (11th Cir. 2005) (quoting *Richardson*, 418 U.S. at 54).

87. *Id.* at 1229.

88. *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006); accord *Muntaqim v. Coombe*, 366 F.3d 102, 122 (2d Cir. 2004). *Hayden* is the *en banc* rehearing of the *Muntaqim* decision, which is incorporated by reference. *Hayden*, 449 F.3d at 313–14.

disenfranchisement provisions are not entirely immune from constitutional or congressional scrutiny, found that the Fourteenth Amendment provided "explicit approval" of those types of laws.⁸⁹ Dissenting from the Ninth Circuit's denial of an *en banc* rehearing of the *Farrakhan* case, Judge Alex Kozinski argued that felon disenfranchisement laws were presumptively valid due to the Fourteenth Amendment's textual endorsement of such laws.⁹⁰

Interestingly, neither the Second Circuit nor Judge Kozinski addressed the fact that the VRA was enacted to enforce the Fifteenth Amendment, not the Fourteenth. The Eleventh Circuit brushed off the distinction in a footnote.⁹¹ The distinction is, however, the key weakness to the "affirmative sanction" argument because the Fifteenth Amendment grants its own protections that are not hindered by purported limitations to the scope of the Fourteenth Amendment.

Judge Barrington Daniels Parker, Jr. of the Second Circuit made this point in his dissent in *Hayden*. Pointing out that *Richardson's* "affirmative sanction" came in the context of a claim that felon disenfranchisement was a *per se* violation of the Fourteenth Amendment, Judge Parker noted that "*Richardson* did not grant felon disenfranchisement immunity against any other ground of invalidity. . . ."⁹² As a textual matter, Section 2 of the Fourteenth Amendment at most "*declines to prohibit*" felon disenfranchisement and does not affirmatively immunize the practice relative to other constitutional protections.⁹³ As Judge Parker reasoned:

The Constitution does not endorse felon disenfranchisement when it declines to prohibit the practice, any more than the Constitution endorses felon enslavement when the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States" Declining to prohibit something is not the same as protecting it.⁹⁴

Nor does Section 2 of the Fourteenth Amendment *require* states to disenfranchise felons. If states can choose not to disenfranchise felons without running afoul of the Fourteenth Amendment, then Congress, acting pursuant to its power to

89. *Hayden*, 449 F.3d at 316.

90. *Farrakhan v. Washington (Farrakhan II)*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting).

91. *Johnson*, 405 F.3d at 1228-29 n.29.

92. *Hayden*, 449 F.3d at 349 (Parker, J., dissenting).

93. *Id.* (citation omitted) (emphasis added).

94. *Id.* (citation omitted).

enforce the Fifteenth Amendment, can compel the same result. Indeed, the "affirmative sanction" argument is more of a rhetorical device than an independent constitutional limitation on the VRA.

2. *Arguments on the Constitutionality of the VRA as Enforcement Legislation.* Enforcement legislation under the Fourteenth and Fifteenth Amendments is valid only to the extent that it remedies or prevents actual constitutional violations.⁹⁵ The Eleventh Circuit, Chief Judge John M. Walker, Jr.'s concurrence to the Second Circuit's *Hayden* opinion, and Judge Kozinski's dissent in the Ninth Circuit have all argued that the VRA would be unconstitutional as applied to felon disenfranchisement laws.⁹⁶

The enforcement power is limited by two independent requirements. The first is that enforcement legislation must be supported by a history of constitutional violations.⁹⁷ The second is that the measures must be narrowly tailored to the constitutional ill sought to be avoided.⁹⁸ In his *Hayden* concurrence, Chief Judge Walker found no congressional record establishing that felon disenfranchisement laws have been used to discriminate against minority voters.⁹⁹ In *Johnson*, the petitioners had argued that specific examples of violations should not be required because Congress could not envision every possible means of racial discrimination.¹⁰⁰ The Eleventh Circuit rejected this argument, citing the widespread use of felon disenfranchisement laws at the time that the VRA was enacted.¹⁰¹ Lastly, Judge Kozinski emphasized in his dissent from the Ninth Circuit's denial of a rehearing in *Farrakhan* that "[t]he theoretical, undocumented threat of unconstitutional felon disenfranchisement laws simply doesn't justify" application of section 2 to those state laws.¹⁰²

95. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

96. See *Hayden*, 449 F.3d at 330 (Walker, C.J., concurring); *Johnson*, 405 F.3d at 1231-32; *Farrakhan v. Washington (Farrakhan I)*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting).

97. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000); *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (holding the amendment to VRA lowering the voting age to eighteen invalid because Congress made no findings that an age limit of twenty-one was used to discriminate on race).

98. See *City of Boerne*, 521 U.S. at 520.

99. *Hayden*, 449 F.3d at 330-31 (Walker, C.J., concurring).

100. *Johnson*, 405 F.3d at 1231 n.33.

101. *Id.*

102. *Farrakhan v. Washington (Farrakhan II)*, 359 F.3d 1116, 1123 (9th Cir. 2004) (Kozinski, J., dissenting).

Lack of congressional findings of a pattern of historical discrimination through felon disenfranchisement laws¹⁰³ informs the analysis of the proportionality and congruence of the purported remedial measure at issue. Although the Supreme Court has repeatedly emphasized the importance that enforcement legislation be geographically targeted,¹⁰⁴ the VRA applies to all states regardless of their individual histories.¹⁰⁵ To the extent the VRA is either inadequately supported by findings of a pattern of discrimination or not narrowly tailored, application of the VRA to felon disenfranchisement would be unconstitutional.

The Ninth Circuit did not consider this issue in *Farrakhan* when it allowed a VRA challenge to Washington's felon disenfranchisement law to proceed.¹⁰⁶ On remand, the *Farrakhan* case was dismissed on summary judgment, mooted for now the question of constitutionality of the VRA as applied to felon disenfranchisement laws.¹⁰⁷ Indeed, the narrow issue of as-applied constitutionality of the VRA as enforcement legislation relative to felon disenfranchisement laws would not be ripe until such a law is actually invalidated. Rather, the constitutional doubt associated with application of the VRA to felon disenfranchisement serves primarily as a predicate for the statutory construction arguments discussed next.

3. *Statutory Interpretation Arguments.* The Ninth Circuit's interpretation of the VRA was the same as that pointedly expressed in a dissent by Judge Sonia Sotomayor of the Second Circuit: "[i]t is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].'"¹⁰⁸ The majority in the

103. This is not to say that there is not an actual record of state use of felon disenfranchisement laws to discriminate on race. That states used felon disenfranchisement laws in order to discriminate is well documented. See *supra* notes 33-37 and accompanying text. Rather, that history is not part of the congressional findings made at the time of the enactment of the VRA and its relevant amendments. See *Hayden*, 449 F.3d at 330-31 (Walker, C.J., concurring).

104. *Farrakhan II*, 359 F.3d at 1124 (Kozinski, J., dissenting) (noting that a purported enforcement legislation was not geographically targeted and was therefore struck down in *United States v. Morrison*, 529 U.S. 598 (2000)).

105. Geographic targetedness is particularly relevant to the present analysis of Alaska and is addressed in Part IV.

106. See *Farrakhan v. Washington (Farrakhan I)*, 338 F.3d 1009, 1016 (9th Cir. 2003).

107. See *Farrakhan v. Gregoire (Farrakhan III)*, No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987, at *2 (E.D. Wash. July 7, 2006).

108. *Hayden*, 449 F.3d at 367-68 (Sotomayor, J., dissenting) (second alteration in original); *Farrakhan I*, 338 F.3d at 1016.

Second Circuit, though admitting that “[t]here is no question that the language of [section 2] is extremely broad . . . and could be read to include felon disenfranchisement provisions,” nevertheless stressed the importance of interpretation in light of congressional intent, cryptically citing dated authority for the proposition that “[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend the words of common meaning to have their literal effect.”¹⁰⁹

Two canons of construction have been deployed to interpret the VRA away from felon disenfranchisement provisions: the avoidance canon and the clear statement rule. The Eleventh Circuit relied upon the avoidance canon, which counsels that, in the case of an ambiguous statute, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”¹¹⁰

The Second Circuit—both sitting *en banc* in *Hayden* and through the three-judge panel that decided *Muntaqim v. Coombe*, the predecessor to *Hayden*—distanced itself from the Eleventh Circuit’s reliance on the avoidance canon.¹¹¹ The reason expressed in *Muntaqim* is that the clarity of the text of section 2 of the VRA is impossible to reconcile with the avoidance canon’s ambiguity requirement.¹¹² Indeed, a concurring judge on the Eleventh Circuit conceded that the majority “overstates the case for constitutional avoidance” because “[a]s a purely textual matter, a voting

109. *Hayden*, 449 F.3d at 315 (quoting *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

110. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

111. See 366 F.3d 102, 128 n.22 (2d Cir. 2004) (“[Section 2], while vague, does not seem ambiguous.”), *aff’d en banc*, *Hayden*, 449 F.3d 305. The *Hayden* court barely mentioned the avoidance canon and made only passing reference to the Eleventh Circuit’s reliance on it. 449 F.3d at 313, 328 n.24.

112. See *Muntaqim*, 366 F.3d at 128 n.22. The *Johnson* court, ironically, turned to the *Muntaqim* decision for the proposition that section 2 is ambiguous, citing that court’s assessment that the meaning of section 2 is “exceedingly difficult to discern.” *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1229 n.30 (11th Cir. 2005) (quoting *Muntaqim*, 366 F.3d at 116). In the quoted passage, however, the *Muntaqim* court referred to ambiguity in the degree of intent required to establish a violation of section 2, not the scope of the Act’s coverage relative to felon disenfranchisement laws. *Johnson*, 405 F.3d at 1229 n.30; *Muntaqim*, 366 F.3d at 116–18.

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qualification based on felony status . . . falls within the scope of the VRA."¹¹³

A stronger statutory construction argument, and the one adopted by the majority in *Hayden*, is premised on the so-called clear statement rule. The rule provides that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"¹¹⁴ The *Hayden* court held that the clear statement rule does not require ambiguity but only a lack of a clear statement, explaining that "we will apply the clear statement rule when a statute admits of an interpretation that would alter the federal balance but there is reason to believe . . . that Congress may not have intended such an alteration of the federal balance."¹¹⁵ The rule is intended to prevent a statute from inadvertently affecting the federal-state balance of power. The Supreme Court has held, in another context, that "clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation."¹¹⁶ Given that sweeping language alone may not satisfy the clear statement rule, the question becomes one of congressional intent.

Considerable evidence suggests that Congress did not intend the VRA to apply to felon disenfranchisement laws.¹¹⁷ For example, though Congress expressly identified common forms of discriminatory voter qualifications, including literacy, educational, and moral character tests, it never mentioned felon disenfranchisement in the text of the VRA.¹¹⁸ In fact, as noted by the *Hayden* court, the only reference to felon disenfranchisement in the legislative history of the VRA was to clarify that the VRA's character test provisions "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability."¹¹⁹ Indeed, the *Hayden*

113. *Johnson*, 405 F.3d at 1239-40 (Wilson, J., concurring in part).

114. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Will v. Mich.*, 491 U.S. 58, 65 (1989) (internal citation omitted)).

115. *Hayden*, 449 F.3d at 325.

116. *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 139 (2005) (addressing a presumption against applying statutes to the internal affairs of foreign vessels).

117. *See, e.g., Hayden*, 449 F.3d at 315.

118. *See* 42 U.S.C. § 1973b(c) (2000).

119. *Hayden*, 449 F.3d at 318 (quoting S. Rep. No. 89-162, at 24 (1965), reprinted in 1965 U.S.C.C.A.N. 2508, 2562); *see also* H.R. Rep. No. 89-439, at 19