



## **Voting Rights of Minority and Indigenous Communities in the United States**

American Civil Liberties Union Submission to the U.N. Forum on Minority Issues  
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## I. Introduction and Executive Summary

The U.S. government has consistently and repeatedly failed to protect the voting rights of people with felony convictions, residents of certain geographic territories, and the millions of voters who continue to be disfranchised in large part because of their race, ethnicity or economic conditions. Although the U.S. holds itself out as a model democratic society, the benefit of democracy continues to elude millions of Americans. Sadly, the U.S. has repeatedly failed to protect the voting rights of minority communities and has turned a blind eye to state actions that make it more difficult for minority citizens to participate in the political process.

This inaction has continued to allow for the disfranchisement of millions of people and must be addressed by the Obama Administration and Congress immediately. For example, Congress has made no attempt to expand the right to vote in presidential elections to American territories such as Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. In addition, to date the 600,000 residents of the District of Columbia, predominantly African American, have no voting delegate in the House of Representatives or representation in the Senate. As a result, millions of people living in the aforementioned areas, mostly people of color, continue to lack representation in government.

The Bush administration made matters worse through chronic neglect and under-enforcement of federal voting laws, and through the politicization of the Civil Rights Division of the Department of Justice (CRT), the nation's premier enforcer of civil rights laws. In the CRT Voting Section, since 2000, enforcement of the anti-discrimination provisions of the historic Voting Rights Act has been at a virtual standstill, and enforcement of the National Voter Registration Act has been used as a means of *reducing* the number of voters rather than *enfranchising* new voters. Between 2003 and 2007, 236 civil rights lawyers left the division which normally has about 350 lawyers.

Since January 2009, the Obama administration has made it a priority to enforce civil rights laws and restore the historic mandate of CRT by increasing its budget by 20%, which would allow the hiring of 100 additional lawyers. This is a first step in the right direction, but many other steps are critically needed in order to achieve full, equal, and effective participation of minority and indigenous communities in the political process.

This document addresses the particularly pernicious barriers to voting for two populations whose voting rights the U.S. government has consistently and repeatedly failed to protect: American Indians and those with criminal records, a disproportionate number of whom are people of color.

American Indians continue to face discriminatory policies and actions that deny them their constitutional right to vote. The recent ACLU *Voting Rights in Indian Country* which is attached to this submission documented a variety of discriminatory election practices, including: at-large elections; redistricting plans that diluted Indian voting strength; the failure to comply with one person, one vote; unfounded allegations of election fraud on Indian reservations; discriminatory voter registration procedures; onerous identification requirements for voting; the lack of minority language assistance in voting; and the refusal to comply with the preclearance provisions of Section 5 of the Voting Rights Act.<sup>1</sup>

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<sup>1</sup> ACLU Voting Rights Project, *Voting Rights in Indian Country* (September 2009), available at <http://www.aclu.org/files/pdfs/votingrights/indiancountryreport.pdf>.

Linguistic barriers to the ballot continue to be a problem for many minority and indigenous communities. For example, Alaska, until recently, administered “English-only” elections, despite federal legislation requiring it to offer minority language assistance. In the 2004 national elections, 24 Native Alaskan villages did not even have polling places.<sup>2</sup>

Harsh felony disfranchisement policies also represent a significant barrier to the franchise for minority communities, and make U.S. an anomaly among western democracies. A patchwork of state laws disfranchise over 5.3 million disproportionately minority Americans with criminal records, most of whom are no longer in prison, and many of whom have long-finished their sentences.<sup>3</sup>

The disfranchisement of minority communities in the United States is not a recent development; indeed, it is inextricably linked to the history of racial injustice in the U.S., and in particular to the continued subjugation of African Americans following their enfranchisement by the Fifteenth Amendment to the U.S. Constitution.<sup>4</sup> Although Congress passed the landmark Voting Rights Act in 1965 to ameliorate the blatant racism that barred millions of minority citizens from participating in the most basic civic engagement – the act of voting – all but two states impose restrictions on access to the polls for people with criminal records, severely restricting the political voice of minority individuals and communities across the country.

Human rights standards protecting the right to vote are robust because the right to vote is fundamental in every way. And yet the United States continues to fail to protect the voting rights of minority communities, in violation of the United States’ commitments under international treaties that enshrine the right to vote. Following is a partial accounting of voting rights violations in minority and indigenous communities in the United States, based upon information provided by ACLU national projects, the ACLU Washington Legislative Office, and state-based affiliates, focusing on barriers to voting for American Indians and people with criminal records.

## **II. Voting Rights under International Law**

### **a. Human Rights Protections of the Right to Vote**

International human rights law has long recognized the fundamental right to vote as an essential prerequisite for full and equal enjoyment of human rights. The Universal Declaration of Human Rights (UDHR), acknowledges the vital role that free, fair, and transparent elections have in guaranteeing this essential right of citizen engagement. Article 21(1) of the UDHR states that “[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives.” Article 21(3) further states: “The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press 2006).

<sup>4</sup> U.S. Const. amend. XV

<sup>5</sup> ACLU, *Human Rights Begin at Home: Celebrating the 60th Anniversary of the Universal Declaration of Human Rights* (December 2008), available at [http://www.udhr60.org/human\\_rights\\_full.pdf](http://www.udhr60.org/human_rights_full.pdf).

Similarly, Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR) requires that every citizen have the right and opportunity “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”<sup>6</sup> The United States ratified the ICCPR in 1992, and its obligations are binding on the federal, state and local governments.

The United States has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which protects the “political rights, in particular the right to participate in elections” of “everyone, without distinction as to race, color, or national or ethnic origin.”<sup>7</sup>

Other human rights documents and treaties that protect voting rights, especially for racial, ethnic and linguistic minority communities, include the American Declaration on the Rights and Duties of Man (ADRDM)<sup>8</sup>, the American Convention on Human Rights,<sup>9</sup> the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>10</sup> and the U.N.’s Standard Minimum Rules for the Treatment of Prisoners.<sup>11</sup>

Taken together, human rights law emphasizes principles of universal and equal suffrage, counsel against blanket voting bans (bans on entire classes of persons, *e.g.*, all felony probationers), and require any deprivation of voting rights to be objective, reasonable, and proportional to both offense and sentence. Additionally, any deprivation of voting rights may not disproportionately affect minority groups whether by purpose or by effect. More broadly, human rights law declares that people deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. It also underscores that the purpose of prison is rehabilitation, which, in their view, begins upon entry into a prison.

Under universal and regional human rights law, discriminatory conduct is considered unlawful where the *purpose or effect* of the alleged treatment is discriminatory in nature. This effects-based standard is incorporated in both the ICCPR and the ICERD. The United Nations Human Rights Committee (HRC) has elaborated on the ICCPR’s equal protection provision found in Article 26, including in its General Comments that Article 26 “[p]rohibits discrimination in law

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6 International Covenant on Civil and Political Rights (ICCPR), adopted December, 16 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States June 8, 1992, (hereinafter ICCPR), art. 25(b).

7 International Convention on the Elimination of Racial Discrimination (CERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by the United States October 21, 1994, (hereinafter CERD), art. 5(c).

8 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). Article XXXII: It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.

*See also*; Article XX: Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

9 American Convention on Human Rights, ETS 5, Protocol 1, Article 3: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions, which will ensure the free expression of the opinion of the people in the choice of their legislature.

10 U.N. General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992, A/RES/47/135, available at: <http://www.unhcr.org/refworld/docid/3ae6b38d0.html>.

11 Standard Minimum Rule 61: The treatment of prisoners should emphasize not their exclusion from the community but their continuing part in it ... steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, their rights relating to civil interests, social security rights and other social benefits of prisoners.

or in fact in any field regulated or protected by public authorities.”<sup>12</sup> Similarly, the ICERD defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”<sup>13</sup>

### III. Voting Rights under U.S. Law: Voting Rights Act of 1965

When the United States was founded, nearly the only people who could vote were free white male property owners over the age of twenty-one.<sup>14</sup> Black men did not get the right to vote as a matter of federal law until passage of the Fifteenth Amendment in 1870. Women did not get the comparable right to vote until 1920 with enactment of the Nineteenth Amendment. American Indians did not get the general right to vote until passage of the Indian Citizenship Act of 1924. Blacks were excluded from voting in Democratic Party primary in the South until 1944.<sup>15</sup> Payment of a poll tax as a condition for voting was not abolished for federal elections until ratification of the Twenty-Fourth Amendment in 1964. It took another two years for the Supreme Court to invalidate the use of the poll tax in state elections.<sup>16</sup> Eighteen- to twenty-year-olds did not get the right to vote in federal elections until ratification of the Twenty-Sixth Amendment in 1971. It was not until 1975 that the Supreme Court finally ruled that ownership of property could not be required for voting in local elections.<sup>17</sup> The ban on literacy and other tests for voting was not made nationwide and permanent by Congress until amendments to the Voting Rights Act passed in 1975.<sup>18</sup> For much of our national life, we have been an aristocracy, not a democracy, of voters.

The landmark Voting Rights Act of 1965 is a complex, interlocking set of permanent provisions that apply nationwide, together with special provisions that apply only in jurisdictions with aggravated histories of discrimination.<sup>19</sup>

The permanent provisions include: (1) a nationwide ban on the use of any “test or device” for voting, such as literacy, understanding, or good character tests, or educational requirements; (2) Section 2, which prohibits the use of any voting practice or procedure that “results” in a denial or abridgement of the right to vote on account of race or membership in a language minority (defined as American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage); (3) the right of any voter to receive assistance in voting; and (4) civil and criminal penalties on those who interfere with the right to vote or commit voter fraud.<sup>20</sup>

#### a. Section 5 Preclearance

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12 Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

13 CERD, *supra* note. 7.

14 Chilton Williamson, *American Suffrage: From Property to Democracy* (Princeton University Press 1960).

15 *Smith v. Allwright*, 321 U.S. 649 (1944).

16 *Harper v. Virginia State Board of Elections*, 383 U.S. 145 (1966).

17 *Hill v. Stone*, 421 U.S. 289 (1975).

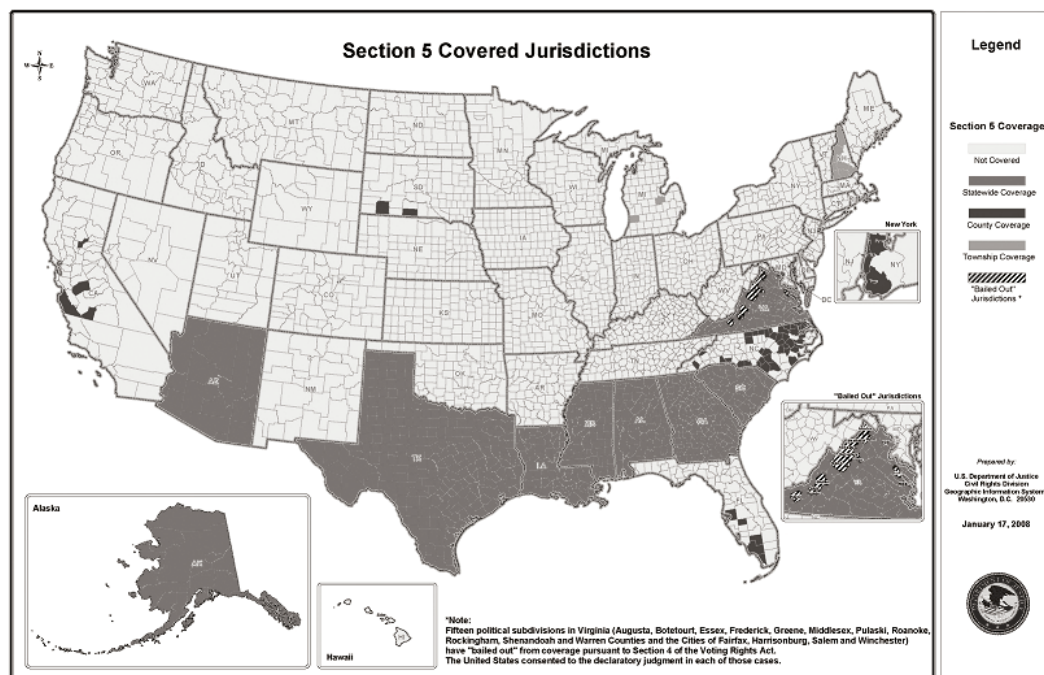
18 42 U.S.C. § 1973aa.

19 ACLU Washington Legislative Office, *Promises to Keep the Impact of the Voting Rights Act in 2006* (March 2006), available at [http://www.aclu.org/files/images/asset\\_upload\\_file516\\_24396.pdf](http://www.aclu.org/files/images/asset_upload_file516_24396.pdf).

20 42 U.S.C. §§ 1973aa, 1973, 1973aa-6, 1973i & j.

The special provisions, scheduled to expire in 2031, include Section 5, which requires “covered” jurisdictions—defined as those that used a test or device for voting and in which voter participation was depressed—to preclear any changes in their voting practices or procedures and prove that they do not have a discriminatory purpose or effect.<sup>21</sup> Preclearance can be obtained from the U.S. Attorney General or the federal court in the District of Columbia. The purpose of this requirement, as explained by the Supreme Court, was “to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims.”<sup>22</sup> The majority of the Court acknowledged that Section 5 was an uncommon exercise of congressional power, but found it was justified by the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”<sup>23</sup>

The covered jurisdictions are: Alabama, Alaska, Arizona, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas, and Virginia. A court can require a non-covered jurisdiction to comply with Section 5 if it has found a violation of voting rights protected by the Fourteenth and or Fifteenth Amendments.<sup>24</sup> The Attorney General can also send federal observers to monitor elections in the covered jurisdictions.<sup>25</sup>



Since the Voting Rights Act was first adopted by Congress in 1965, Section 5 has been extended by Congress on four separate occasions. Most recently, overwhelming and bipartisan majorities

21 42 U.S.C. § 1973c.

22 *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1965).

23 *Id.* at 309.

24 42 U.S.C. § 1973a(c).

25 42 U.S.C. § 1973f.

in both the House and Senate voted in 2006 to extend Section 5, and the other expiring anti-discrimination provisions of the Voting Rights Act, for another 25 years after conducting extensive hearings on the ongoing problem of discrimination in voting.

### **b. Supreme Court Preserves Voting Rights Act Oversight Provision**

On June 22<sup>nd</sup>, 2009, in an 8-1 vote, the United States Supreme Court left in place the preclearance requirements of the Voting Rights Act.<sup>26</sup> Under Section 5 of the Act, jurisdictions with a history of voting discrimination must obtain approval from either the Justice Department or a federal court before implementing any changes in their voting practices or procedures.

The ACLU had intervened in the case, Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO), to defend Section 5 on behalf of an African American voter who lives in an Austin, Texas utility district that had asked for the preclearance provision to be declared unconstitutional.

The Voting Rights Act has been instrumental in reducing voting discrimination, increasing minority voter registration and multiplying the number of minority officeholders throughout the nation. As Congress recognized when it reauthorized Section 5 only three years ago, voting discrimination is not a relic of the past and Section 5 continues to play a vital role in ensuring that all citizens have an equal right to participate in the political process.<sup>27</sup>

It was widely expected that the Supreme Court would rule on the constitutionality of Section 5 in the NAMUDNO case. Instead, in an opinion written by Chief Justice G. Roberts, the Court declined to decide the constitutional question and resolved the case on narrower grounds.

Under the Voting Rights Act, “political subdivisions” can “bail out” of the preclearance provision of Section 5 if they can demonstrate they have not discriminated against minority voters for a 10-year period. The Court held that the municipal district in this case was a political subdivision entitled to seek a bailout. By ruling that the municipal district was entitled to bail out of Section 5 coverage, the Court did not reach the question of the constitutionality of the preclearance requirements.

### **c. Special Provision, Language Assistance**

Section 203 of the Voting Rights Act requires certain states and political subdivisions to provide voting materials and oral assistance in languages other than English.<sup>28</sup> While there are several tests for “coverage,” the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national literacy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and more than four thousand local jurisdictions in twenty-seven other

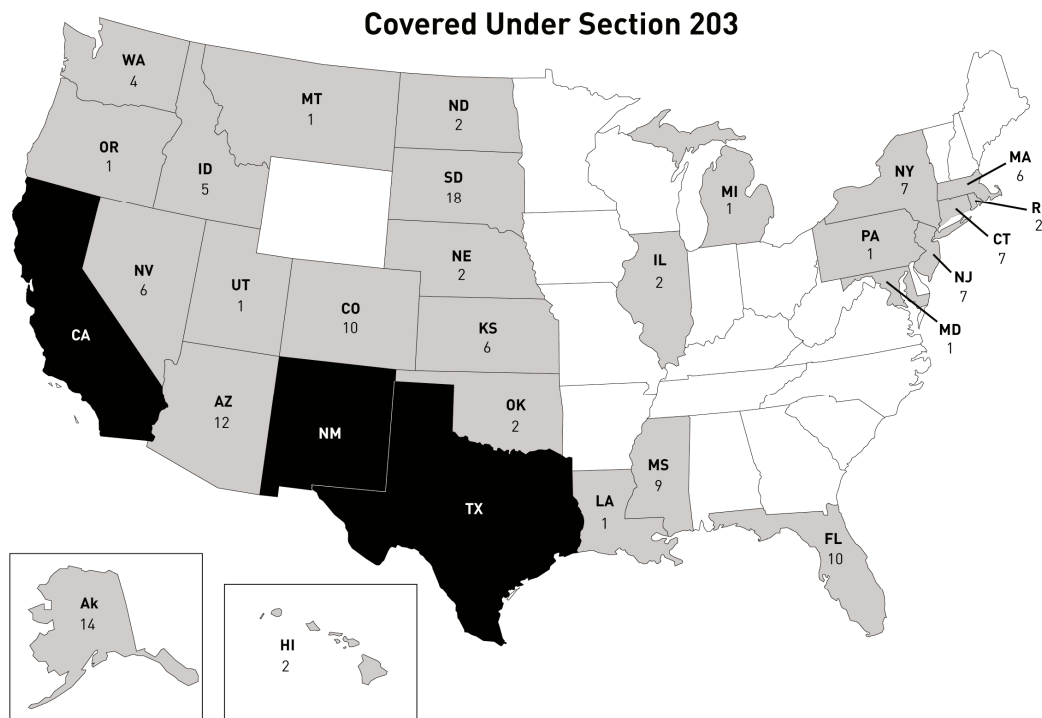
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26 Press Release, ACLU, Northwest Austin Municipal Utility District v. Mukasey-DECIDED, June 22, 2009, *available at* [www.aclu.org/scotus/2008term/39106res20090323/39106res20090323.html](http://www.aclu.org/scotus/2008term/39106res20090323/39106res20090323.html)

27 ACLU, Promises to Keep: The Impact of the Voting Rights Act in 2006 (March 2006), *available at* [http://www.aclu.org/files/images/asset\\_upload\\_file516\\_24396.pdf](http://www.aclu.org/files/images/asset_upload_file516_24396.pdf).

28 42 U.S.C. § 1973AA-1A.

states, from Alaska to Florida and New York to Arizona.<sup>29</sup> Eighty counties in seventeen states were covered because of their American Indian populations. The bilingual voting materials requirement, like Section 5, is scheduled to expire in 2031.



Source: Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

#### IV. Barriers to Voting for American Indians

##### a. Voting Rights in Indian Country

Indian Americans<sup>30</sup> have been the victims of systematic discrimination in the past, which has included the taking of Indian land, the destruction of the bison herds and the Indian way of life, the denigration of Indian language and culture, the isolation of Indians on reservations, the denial of rights of citizenship, and efforts to remove or exterminate various tribes. The effects of this discrimination continue today. One consequence is a depressed socio-economic status that limits the ability of tribal members to participate effectively in local, state, and national elections and to enforce the anti-discrimination provisions of the Voting Rights Act and other federal laws protecting minority voting rights. Voting is significantly polarized along racial lines, and little meaningful interaction exists between the Indian and non-Indian communities, especially in the towns and communities that border the reservations. This lack of interaction and access to the majority community makes it very difficult for Indians to elect candidates of their choice to office in jurisdictions in which they are a numerical minority. Indian political participation is

<sup>29</sup> 67 Fed. Reg. 48872 (2002).

<sup>30</sup> The use of the terms Indian or American Indian instead of Native American was selected for several reasons. First, most Indian organizations including the National Congress of American Indians, the American Indian Movement and the National Indian Youth Council use Indian in their titles. Second, federal laws and agencies use the term Indian. Finally, Native Americans include Hawaiians, and only the voting rights of Indians are discussed here.



further diminished by the disproportionate number of tribal members disfranchised for commission of criminal offenses. There is a pattern of racial profiling of Indians by law enforcement officers, the targeting of Indians for prosecution of serious crimes, and the imposition of lengthier prison sentences upon Indian defendants. These injustices result in the higher incarceration of Indians and dilute the overall voting strength of Indian communities.

Despite these obstacles, and in large measure as a result of enforcement of the Voting Rights Act and increased Indian office holding, Indian political participation has advanced significantly in recent years.

American Indians continue to face discriminatory policies and actions that deny them their constitutional right to vote, according to the recent *ACLU Voting Rights in Indian Country*. The attached report provides a historical overview of systemic discrimination against American Indians limiting their ability to participate in local, state and national elections and highlights ACLU litigation challenging unlawful election practices on behalf of Indians in five western states: Colorado, Montana, Nebraska, South Dakota and Wyoming.

Multiple successful ACLU-initiated lawsuits over the last decade have documented and proved a long history of racial discrimination against Indian Americans in issues concerning voting and representation in South Dakota and in other states.<sup>31</sup> For example, in *Bone Shirt v. Nelson*, a South Dakota federal court found “substantial evidence that South Dakota officially prevented Indians from voting and holding office,” by law until the 1940s, and then in effect until 1980 in certain counties. Problems that have deterred Indian voting have included vote dilution, voter registration, access to polling places and redistricting.<sup>32</sup> More recently, there has also been discrimination against Indians by both the State of South Dakota and political subdivisions within South Dakota.<sup>33</sup> This history of discrimination in voting practices is so replete that South Dakota became one of the major focuses of the Voting Rights Reauthorization fight in Congress in 2006.

Though the movement for equal rights has led to dramatic gains for Indian voters and transformed elected bodies that serve Indian communities, well into the 20th century, American Indians’ status as U.S. citizens was questioned across the country. Moreover, Indians continue to struggle against ongoing disfranchisement and discriminatory election practices that prevent them from participating equally in the political process. Indian voters have faced the most extreme barriers to voting in this country and were denied the right to vote longer than any other community in the U.S. The report outlines still existing obstacles to Indian voting, including electoral systems that dilute Indian voting strength; discriminatory voter registration procedures; onerous voter identification requirements; lack of language assistance at the polls; and noncompliance with the Voting Rights Act. The report analyzes the history of these policies and others, including the refusal to recognize Indians as U.S. citizens.

The landmark Voting Rights Act of 1965 played a central role in tearing down barriers to

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<sup>31</sup> *Buckanaga v. Sisseton Independent School District*, 804 F.2d 469, 474 (8th Cir. 1986) (noting evidence of South Dakota's history of discrimination against Indians in matters related to voting); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1019-23 (D.S.D. 2004), aff'd, 461 F.3d 1011 (8th Cir. 2006) (detailing the lengthy history of official discrimination by the State of South Dakota against Indians in the areas of voting and representation).

<sup>32</sup> *Bone Shirt v. Hazeltine*, *supra* note 31.

<sup>33</sup> *Id.* at 1023-26.

American Indian political participation, particularly Sections 2 and 5, which, as discussed above, prohibit voting policies and procedures that deprive minorities of equal opportunity in the political process and require certain jurisdictions to “pre-clear” any changes in voting processes. The report also offers recommendations on voter education, enhanced registration efforts and assistance, fair election systems, redistricting that does not dilute Indian voting strength and compliance with the Voting Rights Act.

To ensure that these gains continue, the ACLU calls upon local and state jurisdictions to remove barriers to equal political participation, including at-large voting, to encourage and facilitate Indian registration and voting, to conduct redistricting in a way that allows meaningful participation by the Indian community and avoids the dilution of Indian voting strength, to provide language assistance in voting, and to comply with Section 5 of the Voting Rights Act.

### **b. Yup'ik-Speaking Voters Language Assistance**

Measures providing additional language assistance for Yup'ik speakers at municipal elections in Bethel, Alaska were agreed upon as part of a settlement among the city of Bethel, Native American Rights Fund (NARF), the ACLU and two local Alaska Natives. Yup'ik is the primary language of a majority of citizens in the Bethel region. The settlement agreement follows a lawsuit filed against the city by NARF and the ACLU on behalf of the two local Alaska Natives. The lawsuit *Nick, et al. v. Bethel, et al.*, remains pending in the federal district court for the District of Alaska against the State of Alaska. The lawsuit was brought on behalf of the same Alaska Natives who agreed to the current settlement as well as two other Alaska Natives and four tribal governments.

Under the settlement agreement, the city of Bethel will provide enhanced language assistance to Yup'ik voters, including trained poll workers who are bilingual in English and Yup'ik; sample ballots for election measures in written Yup'ik; a written Yup'ik glossary of election terms; advance notice of translator services; election announcements on the radio; and pre- and post-election reports to the Federal District Court for Alaska tracking the city's efforts.

The ACLU and NARF continue to litigate against the State of Alaska so that all Yup'ik speaking voters in the state can be fully included in the political process.

Alaska is one of just five states covered in its entirety by the language assistance provisions of the Voting Rights Act. Those provisions, sections 4(f)(4) and 203, apply to areas that meet certain threshold requirements for numbers of citizens with limited English proficiency. Section 208 has nationwide applicability and gives “any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write” a right to receive “assistance by a person of the voter’s choice.” The temporary provisions of the Voting Rights Act, including sections 4(f)(4) and 203, were reauthorized by Congress in 2006 for an additional 25 years.<sup>34</sup>

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34 Press Release, ACLU, *Yup'ik-Speaking Voters To Receive Additional Language Assistance In The City Of Bethel, Alaska*, July 13, 2009, available at <http://72.3.233.244/votingrights/minority/40283prs20090713.html>.

**TABLE 1: AMERICAN INDIAN LANGUAGES:** Currently there are 80 local jurisdictions across 17 states required to provide minority language assistance in voting pursuant to Section 203 because of their American Indian populations.

<u>State</u>	<u>Jurisdiction Covered by Sec. 203</u>
1. Alaska	6 census areas or boroughs (Bethel, Dillingham, Kenai, North Slope, Wade Hampton, Yukon Koyukuk)
2. Arizona	9 counties (Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, Yuma)
3. California	2 counties (Imperial and Riverside)
4. Colorado	2 counties (La Plata, Montezuma)
5. Florida	3 counties (Broward, Collier, Glades)
6. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)
7. Louisiana	1 parish (Allen)
8. Mississippi	9 counties (Attala, Jackson, Jones, Kemper, Leake, Neshoba, Newton, Scott, Winston)
9. Montana	2 counties (Big Horn and Rosebud)
10. Nebraska	1 county (Sheridan)
11. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)
12. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)
13. North Dakota	2 counties (Richland and Sargent)
14. Oregon	1 county (Malheur)
15. South Dakota	18 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, Ziebach)
16. Texas	2 counties (El Paso and Maverick)
17. Utah	1 county (San Juan)

## V. Felony Disfranchisement and Minority Communities

Felony disfranchisement is the set of policies and practices that bar millions of American citizens with felony convictions (and a smaller number of those with misdemeanor convictions) from voting. Approximately 5.3 million Americans, or one in 40 adults, are legally barred from voting as a result of these laws.<sup>35</sup> Four million of these Americans are out of prison, working and paying taxes, but are without a political voice. Countless more with past convictions suffer from the mistaken belief that they remain permanently ineligible to vote, making the number of Americans impacted by felony disfranchisement far greater.

The astonishing rate at which the United States incarcerates its residents makes felony disfranchisement a significant and pervasive problem for our democracy. With more than 2.3 million people – or 1 in 99 adults – in prisons and jails across the country, the U.S. has both the largest raw number of people behind bars and the highest incarceration rate in the world.<sup>36</sup> An

<sup>35</sup> Jeff Manza and Christopher Uggen, *supra* note 3.

<sup>36</sup> The Pew Center on the States, *One in 100: Behind Bars in America 2008* (February 2008).

additional 5.1 million Americans – or 1 in 45 adults – are on parole or probation or some other form of community supervision.<sup>37</sup>

Because people of color are disproportionately represented in the criminal justice system, they also are an overrepresented portion of the disfranchised population. Incarcerated at the highest rates are black men between the ages of 20 and 34, who are incarcerated at a rate of 1 in 9. Black women are incarcerated at lower rates (1 in 100 for black women ages 35-39), though these rates are significantly higher than those of white women of comparable ages (who are incarcerated at a rate of 1 in 355).<sup>38</sup> In general, African Americans are held behind bars at a rate of 5.6 times their white counterparts,<sup>39</sup> and Latinos are incarcerated at a rate that is almost twice that of their white counterparts.<sup>40</sup>

As a result, the rate of disfranchisement for African Americans is far greater than the nationwide disfranchisement rate. Across the country, 8.25% of the African American voting-age population is barred from voting due to felony disfranchisement laws, compared to only 2.42% of the general voting age population.<sup>41</sup> In states with the greatest levels of African American disfranchisement, those rates rise to more than 20%.<sup>42</sup>

The impact of felony disfranchisement policies is particularly devastating not only for minority individuals, but also for entire minority communities. Since incarcerated individuals tend to come from – and return to – a relatively small number of neighborhoods (often low-income, under-resourced communities of color),<sup>43</sup> entire communities suffer the consequences of fewer eligible voters and reduced political power.

Barring people with convictions from voting also eliminates an important mechanism for helping formerly incarcerated people rejoin their communities; indeed, research has shown that people who vote are less likely to be re-arrested.<sup>44</sup>

Felony disfranchisement policies constitute a serious barrier to political participation for minorities in the United States.

### **a. *De Jure* Disfranchisement**

Each U.S. state maintains its own distinct disfranchisement law, forming a “patchwork” of policies that vary in restrictiveness across the country. The map below illustrates the diversity of policies, which range in severity from least restrictive (people with felony convictions in Maine, Vermont and Puerto Rico suffer no loss of voting rights, even while they are incarcerated) to most restrictive (people with felony convictions in Kentucky and Virginia remain permanently

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<sup>37</sup> The Pew Center on the States, *One in 31: The Long Reach of American Corrections* (March 2009).

<sup>38</sup> The Pew Center on the States, *One in 100: Behind Bars in America 2008* (February 2008).

<sup>39</sup> The Sentencing Project, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 3 (2007).

<sup>40</sup> *Id.*

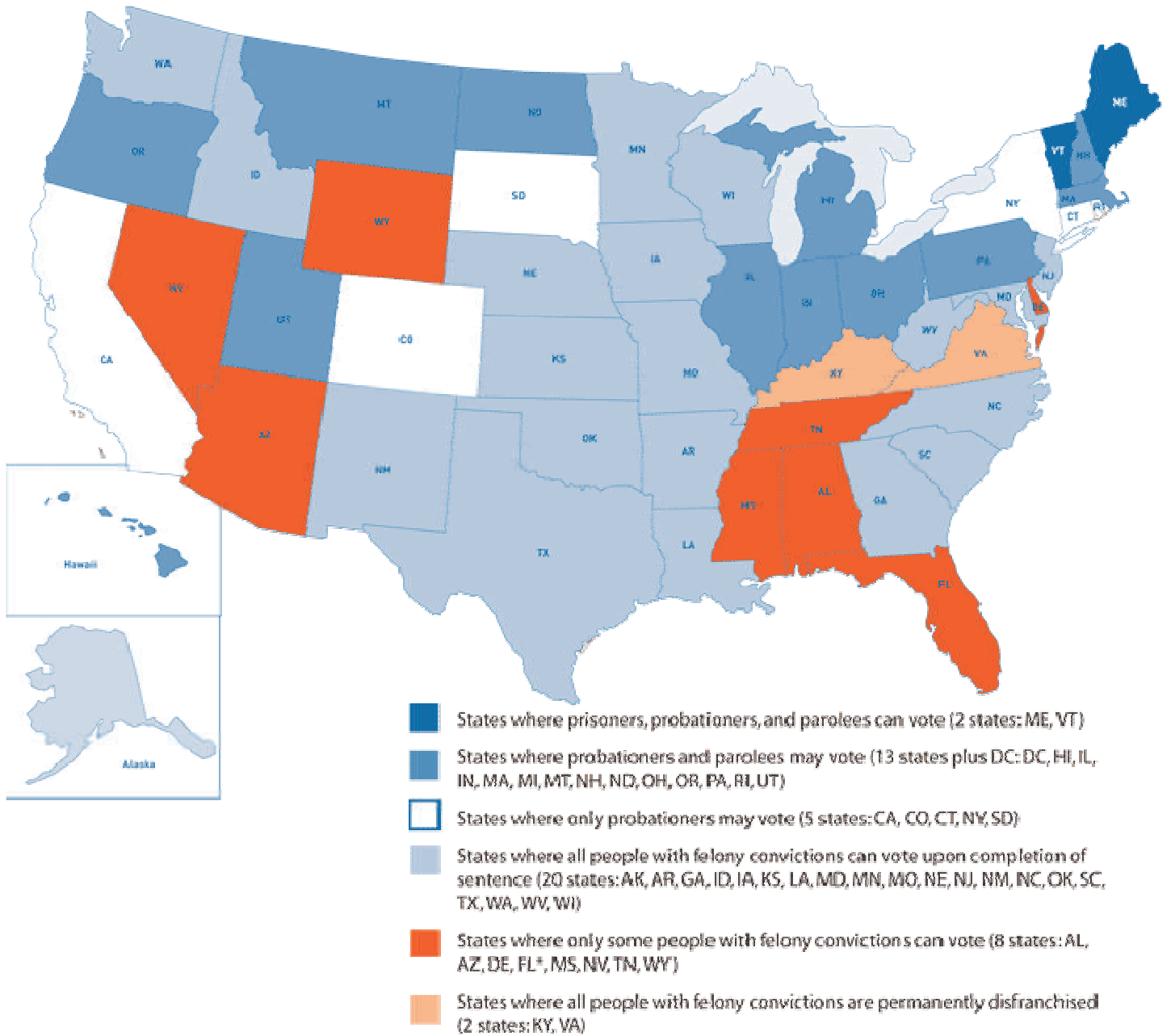
<sup>41</sup> Jeff Manza and Christopher Uggen, *supra* note 3.

<sup>42</sup> Jeff Manza and Christopher Uggen, *supra* note 3.

<sup>43</sup> See, e.g., Jennifer Gonnerman, *Million-Dollar Blocks: The Neighborhood Costs of America's Prison Boom*, *The Village Voice*, November 9, 2004, available at <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/>.

<sup>44</sup> Jeff Manza & Christopher Uggen, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 1 *COLUM. HUM. RTS. L. REV.* 36, 193-215 (2004).

disfranchised unless they successfully petition the governor for relief on an individual basis). The remaining 46 states and the District of Columbia have laws that fall somewhere in between.



\*Some still classify FL as a permanent disfranchisement state.

In addition to defining the point at which voting rights are regained, many disfranchisement policies contain additional hurdles to regaining the right to vote. For example, some states require applications from people seeking to regain their voting rights, and others impose post-sentence waiting periods. Some require that people with past convictions show proof of their eligibility when registering to vote; others require that all legal financial obligations – such as fines, restitution, court costs and other fees – be paid before voting rights can be restored. Five

states plus the District of Columbia also disfranchise some or all people with misdemeanor convictions.<sup>45</sup>

## **b. *De Facto* Disfranchisement**

While felony disfranchisement laws legally bar well over five million Americans from voting, many more are kept from the polls because they received inaccurate information regarding their right to vote. This widespread confusion is no surprise given the complexity of each state's law, which makes it difficult for election and corrections officials to administer and for people with prior convictions to navigate.

Research shows that, across the country, there is persistent confusion among election officials – who receive little or no training on this topic – about state felony disfranchisement laws. A recent report by the ACLU and the Brennan Center for Justice, based on telephone interviews with election officials in 23 states, showed that many state and local officials in charge of administering felony disfranchisement policies remain uninformed. The interviews revealed that many election officials do not understand the basic voter eligibility rules or registration procedures for people with criminal convictions in their states; as such, they often dispense incorrect or incomplete information to individuals seeking information about their right to vote.<sup>46</sup>

In addition to revealing the lack of understanding among election officials, the report also demonstrated the hostile – and sometimes racially biased – treatment people with criminal records sometimes receive from election staff when seeking information about their voting rights. Six county elections officials interviewed in Tennessee, for example, indicated that they would not offer assistance, either directly or through a referral, to a formerly incarcerated individual having difficulty obtaining the Certificate of Restoration required to restore voting rights. One Tennessee official said individuals with felony convictions “shouldn’t be allowed to vote.” In response to a question about assisting individuals with the required Certificate of Restoration, another official responded: “I uphold the good people, and criminals can take care of themselves. . . I’m not going to bend over backwards to help a felon.”<sup>47</sup> An official in Oklahoma, in response to a question about how people are removed from the voter roles, said that elections officials “pretty well know” who has been in trouble with the law and used the term “sambo,” a racist slur for African Americans, in response to another question.<sup>48</sup>

These factors, coupled with complex laws and complicated registration procedures, result in the mass distribution of wrong or misleading information, which in turn leads to the *de facto* disfranchisement of untold hundreds of thousands of *eligible* would-be voters throughout the country. *De facto* disfranchisement has devastating long-term effects. Once a single local election official misinforms a citizen that s/he is not eligible to vote because of a past conviction, it is highly unlikely that the citizen will ever follow up or make a second inquiry. Without further public education or outreach, the citizen will mistakenly believe that s/he is ineligible to vote for years, decades, or maybe permanently. And the same citizen may spread that same

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<sup>45</sup> For a detailed analysis of each state's disfranchisement law, see The Sentencing Project, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide* (June 2008).

<sup>46</sup> ACLU and Brennan Center for Justice, *De Facto Disenfranchisement* (2009), available at [http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf).

<sup>47</sup> ACLU of Tennessee, *Addressing Barriers to the Ballot Box: Registering to Vote in Tennessee with a Past Felony Conviction* (September 2008), available at <http://www.aclu-tn.org/pdfs/RTV/FinalRTVSurvey.pdf>.

<sup>48</sup> ACLU and Brennan Center for Justice, *supra* note 46.

wrong information to peers, family members and neighbors, creating a lasting ripple of *de facto* disfranchisement.

### c. History of U.S. Felony Disfranchisement Policies

The development of felony disfranchisement law is tied to the history of racial discrimination in America.

Although a few felony disfranchisement laws in the United States pre-date the end of slavery, the majority of states, primarily southern states, enacted their first disfranchisement laws following the end of the Civil War.<sup>49</sup> In 1868, Congress adopted Section 2 of the Fourteenth Amendment of the U.S. Constitution to impose the penalty of reduced representation in Congress against any state that denied the voting rights of U.S. citizens, including African American males, but carved out an exception for those citizens convicted of “rebellion, or other crime.” Because of the rampant discrimination and accompanying violence that many African Americans faced when trying to vote, Congress passed the Fifteenth Amendment in 1870 to prohibit the denial of voting rights to anyone “on account of race, color, or previous condition of servitude.” In response, southern states began to use criminal disfranchisement laws as a tool to restrict the political participation of newly-enfranchised African Americans and, thus, to suppress the African American vote.<sup>50</sup>

While disfranchisement laws already existed, a number of southern states tailored their laws during this era to target African Americans. For example, Mississippi revised its constitution to impose disfranchisement as a penalty specifically for crimes of which black people were most frequently convicted.<sup>51</sup> In 1902 at the Virginia Constitutional Convention, felony disfranchisement laws were introduced with the stated intent to “eliminate the darkey as a political factor in this State.”<sup>52</sup> Most of these laws remain in effect today.

By the beginning of the 20th century, Jim Crow policies – state and local laws mandating “separate but equal” status for black Americans – had proliferated. Nearly all black Americans in the former Confederate states were functionally banned from voting through felony disfranchisement laws, poll taxes, grandfather clauses and other policies that, while purportedly race-neutral, were meant to keep African Americans from voting. In certain states, felony disfranchisement laws banned ten times as many black citizens as white citizens from voting.<sup>53</sup>

As the civil rights movement gained momentum, its supporters successfully challenged Jim Crow policies in federal courts, and secured passage of the Voting Rights Act of 1965, which reinforced the Fifteenth Amendment’s prohibition against race-based disfranchisement.

Neither the Fifteenth Amendment nor the Voting Rights Act of 1965, however, prohibited felony disfranchisement, despite its disproportionate impact on people of color. Indeed, the Supreme Court ruled in 1974 that section 2 of the Fourteenth Amendment provides an affirmative sanction

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49 Jeff Manza and Christopher Uggen, *supra* note 3.

50 See *Hunter v. Underwood*, 471 U.S. 222 (1985).

51 Jeff Manza and Christopher Uggen, *supra* note 3.

52 The Advancement Project, *Access Denied: The Impact of Virginia’s Felony Disenfranchisement Laws* (December 2005), available at <http://www.advancementproject.org/pdfs/VADisencosts.pdf>.

53 Jeff Manza and Christopher Uggen, *supra* note 3.

for states to disfranchise person convicted of criminal offenses.<sup>54</sup> As a result, states continued to turn to felony disfranchisement laws to restrict the political participation of people of color in America. Sadly, felony disfranchisement has become increasingly popular: in 1850, only 35% of states had felony disfranchisement laws; today, 95% of states have felony disfranchisement laws.<sup>55</sup>

#### **d. Portrait of the Disfranchised Population**

The vast majority of disfranchised individuals are not incarcerated, but are living in their communities. Nearly 4 million disfranchised Americans have been released from prison, 2.1 million of whom have fully completed all terms of their sentences.<sup>56</sup> Although these 4 million individuals work, pay taxes, and are involved with the issues that affect their communities, they are denied a political voice.

People of color are disproportionately represented among the disfranchised population. 1.4 million—or one in seven—African American men are disfranchised due to felony convictions, seven times the national disfranchisement rate of one in 40 adults.<sup>57</sup> If incarceration rates hold steady, three in ten of the next generation of black men can expect to be disfranchised at some point in their lives.<sup>58</sup>

Many of the states with the harshest disfranchisement laws also have the highest rates of African American disfranchisement. Kentucky, for example, disfranchises 23.7% of the black voting age population, compared to only 5.97% of the statewide voting age population.<sup>59</sup> Virginia has an African American disfranchisement rate of 19.76%, compared to a 6.76% disfranchisement rate statewide.<sup>60</sup> In Arizona, African Americans are barred from voting at a rate of 21.08%, while voters statewide are barred at a rate of only 4.34%.<sup>61</sup> And in Florida, where close to a million people are disfranchised due to felony convictions, the African American disfranchisement rate is 18.92%, compared to 9.01% statewide.<sup>62</sup> For a 50-state comparison of statewide and African American disfranchisement rates, see Appendix A.

Though national data is not available on the disfranchisement rates of Latinos and indigenous communities, state-level data indicates that these communities are also disproportionately impacted by felony disfranchisement.

According to a 2003 study of ten states, Latinos are disproportionately represented among the disfranchised population; this disproportionality is particularly stark when citizens of voting age

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<sup>54</sup> *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>55</sup> Jeff Manza and Christopher Uggen, *supra* note 3.

<sup>56</sup> *Id.*

<sup>57</sup> The Sentencing Project, *Felony Disenfranchisement Laws in The United States* (September 2008), available at [http://www.sentencingproject.org/doc/publications/fd\\_bs\\_fdlawsinus.pdf](http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf).

<sup>58</sup> *Id.*

<sup>59</sup> Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy Tables A3.3 and A3.4* (Oxford University Press 2006).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*



only are compared (*i.e.*, non-citizens are removed from the equation). In the ten states studied in the report, more than half a million Latinos could not vote due to felony disenfranchisement laws.<sup>63</sup>

State-level data for American Indians similarly shows a disproportionate burden on communities of color. In Alaska, Alaska Natives comprise 32% of the disenfranchised population but only 16% of the total Alaska population.<sup>64</sup> In Hawai‘i, Native Hawaiians comprise 39% of the total disenfranchised population but only 20% of the total population of Hawai‘i. Native Hawaiians of voting age are disenfranchised at a rate of 1.6% compared to 0.6% of the general voting-age population, making the native Hawaiian disenfranchisement rate nearly 3 times higher than that of the total population.<sup>65</sup>

Minorities in the United States continue to bear the brunt of harsh felony disenfranchisement laws, experiencing these legal barriers to the ballot box at rates far higher than white Americans.

## **VI. American Felony Disfranchisement Policies in an International Context**

Disfranchisement policies in the United States are significantly harsher than, and out of step with, disenfranchisement policies around the world.

Other democracies disenfranchise far fewer people with criminal convictions, and virtually none disenfranchise citizens after they complete their sentences. Many democratic nations permit people with felony convictions to vote in prison, and some even actively facilitate their political participation.

### **a. Felony Disfranchisement in Europe**

Nearly half of all European countries – 17 nations in total – allow people in prison to vote, and 11 other countries permit some (but not all) prisoners to vote. The remaining 12 European nations deny prisoners the vote, but restore that right upon release from incarceration.<sup>66</sup>

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63 MALDEF, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States* (December 2003), available at <http://www.maldef.org/assets/pdf/FEB18-LatinoVotingRightsReport.pdf>.

64 U.S. Census Bureau, *Profile of General Demographic Characteristics: Alaska* (April 1, 2000), available at [http://factfinder.census.gov/servlet/OTTable?\\_bm=v&-geo\\_id=04000US02&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_DP1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-lang=en&-sse=on](http://factfinder.census.gov/servlet/OTTable?_bm=v&-geo_id=04000US02&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-lang=en&-sse=on).

65 U.S. Census Bureau, *2005-2007 American Community Survey*, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=v&-geo\\_id=04000US15&-qr\\_name=ACS\\_2007\\_3YR\\_G00\\_DP3YR5&-ds\\_name=&-lang=en&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=v&-geo_id=04000US15&-qr_name=ACS_2007_3YR_G00_DP3YR5&-ds_name=&-lang=en&-redoLog=false).

; see also, U.S. Census Bureau, *2006 Demographic Data Book*, available at <http://www.oha.org/pdf/databook/2006/DataBook2006Demographics.pdf>.

66 ACLU, *Out of Step With the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies* (May 2006), available at [http://www.aclu.org/files/images/asset\\_upload\\_file825\\_25663.pdf](http://www.aclu.org/files/images/asset_upload_file825_25663.pdf).

European countries that allow all prisoners to vote (17)	European countries that allow some prisoners to vote (11)	European countries that disfranchise all prisoners but permit voting upon release from incarceration (12)
Austria	Belgium	Belarus
Albania	Bosnia and Herzegovina	Bulgaria
Croatia	France	Estonia
Czech Republic	Greece	Hungary
Denmark	Italy	Kosovo
Finland	Luxembourg	Latvia
Germany	Malta	Moldova
Iceland	Norway	Russia
Ireland	Poland	Slovakia
Lithuania	Portugal	Spain
Macedonia	Romania	Ukraine
Montenegro		United Kingdom
Netherlands		
Serbia		
Slovenia		
Sweden		
Switzerland		

### **b. Felony Disfranchisement in The Americas**

Disfranchisement policies for individuals with criminal convictions in the Americas vary from country to country. Sixteen countries in the Americas allow at least some prisoners to vote. Fourteen countries specifically forbid permanent disfranchisement of people with criminal convictions.<sup>67</sup>

Furthermore, in 16 countries in the Americas, voting is mandatory or considered a duty. Eight nations enforce this duty by fining or otherwise punishing those who fail to vote. Two countries provide explicit benefits to voters: Colombia, for example, grants those who vote preference in higher education admissions and discounts college enrollment costs, gives preference to voters in state employment, housing subsidies offered by the government and shorter military service.

## **VII. Recent Legal Developments and Prospects for Reform of Felon Disfranchisement Laws and Policies**

### **a. State Legislative Reform**

Despite the prevalence of felony disfranchisement laws, the national trend over the last decade has been toward lowering barriers for the disfranchised. Since 1997, 20 states have made

<sup>67</sup> Lawyers Committee for Civil Rights, ACLU, The Sentencing Project, *Request for a Thematic Hearing on the Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices in the Americas* (September 2009), available at [http://www.aclu.org/files/pdfs/humanrights/iachr\\_request\\_thematic\\_hrg\\_disenfranchisement.pdf](http://www.aclu.org/files/pdfs/humanrights/iachr_request_thematic_hrg_disenfranchisement.pdf).

progressive changes to their felony disenfranchisement laws, enfranchising over 700,000 formerly incarcerated individuals. Many of these recent reforms have put an end to state policies of permanent disenfranchisement. In 1997, there were ten states that disenfranchised all people with felony convictions for life; today there are only two.<sup>68</sup>

### **i. Washington**

In 2009, Washington State became the most recent state to amend its felony disenfranchisement policy. Prior to the passage of the new law, individuals with felony convictions could not vote until they fully completed their sentences *and* repaid all associated legal financial obligations. Thousands of Washingtonians were barred from voting because of this modern-day poll tax. The

new law divorces the right to vote from the ability to pay outstanding legal fees, and has enfranchised close to 30,000 individuals.<sup>69</sup>

### **ii. Florida**

Prior to 2007, Florida was one of three states (along with Kentucky and Virginia) that permanently disenfranchised all people with felony convictions, and was the state with the largest number of disenfranchised citizens (nearly one million). African Americans were particularly impacted by Florida's draconian policies, which disenfranchised fully 18.8% of the black voting-age population in the state.<sup>70</sup> On April 5, 2007, Florida's Republican Governor Charlie Crist and the state clemency board revised the Rules of Executive Clemency that govern civil rights restoration, allowing certain people with felony convictions to be restored to the rolls without applications to or hearings by the clemency board.<sup>71</sup>

However, significant problems persist in Florida. Though these 2007 reforms have been touted as fixes to the disenfranchisement crisis in the state, a highly complicated and multi-tiered system of rights restoration still bars hundreds of thousands of citizens from voting.<sup>72</sup>

### **iii. Maryland**

In 2007, Maryland repealed the three-year waiting period for rights restoration imposed on people who had completed their sentences; the state also repealed the lifetime voting ban for people convicted of certain offenses and established automatic restoration of voting rights upon completion of sentence. Approximately 50,000 of Maryland's estimated 111,000 disenfranchised persons immediately benefited from the measure.<sup>73</sup>

### **iv. Rhode Island**

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68 The Sentencing Project, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008* (September 2008), available at [http://www.sentencingproject.org/doc/publications/fd\\_statedisenfranchisement.pdf](http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf).

69 Press Release, ACLU, *ACLU Hails Signing of Voting Rights Restoration Reform*, May 4, 2009, available at <http://www.aclu-wa.org/detail.cfm?id=1094>.

70 Jeff Manza and Christopher Uggen, *supra* note 3.

71 Press Release, Office of Florida Governor Charlie Crist, *Governor Crist Announces Clemency Boards Vote to Restore Civil Rights*, April 5, 2007, available at <http://www.flgov.com/release/8776>.

72 Muslima Lewis, *Still Voteless and Voiceless in Florida: Florida's Continuing Disfranchisement Crisis* (ACLU of Florida March, 2009), available at [http://www.aclufi.org/2009votingreport/ACLU\\_Report.pdf](http://www.aclufi.org/2009votingreport/ACLU_Report.pdf).

73 The Sentencing Project, *supra* note 68.

In 2006, Rhode Island voters approved a state constitutional amendment that enfranchised individuals on parole and probation. In 2007, the state legislature enacted a statute to implement the new constitutional provision. The statute requires that people with felony convictions be notified of the loss and restoration of their voting rights, that criminal justice agencies provide assistance with voter registration and voting by absentee ballot, and that corrections and elections agencies share the data necessary to verify voter eligibility.<sup>74</sup>

## **v. Iowa**

On July 4, 2005, Iowa Governor Thomas Vilsack signed Executive Order 42, restoring the right to vote to individuals with felony convictions who had fully completed their sentences.<sup>75</sup> Prior to the order, people with felony convictions were permanently disfranchised by the Iowa Constitution unless they submitted to a lengthy application process involving the state parole board and governor's office. The main impact of Vilsack's Order was retroactive, restoring the rights of citizenship for approximately 80,000 Iowans who had completely discharged their criminal sentences as of July 4, 2005. Vilsack's Order also required that from the date of his Order going forward, individuals would automatically have their voting rights restored.<sup>76</sup>

This reform made a particularly significant impact on the voting rights of minorities, since – prior to the change – Iowa had the highest rate of African American disfranchisement in the country with nearly 34% of African Americans of voting age permanently disfranchised.<sup>77</sup>

## **b. Federal Legislation**

Because of the patchwork nature of state laws and widespread confusion of local election officials, federal congressional action is also needed to establish a federal standard that restores voting rights in federal elections to the millions of Americans who are living in the community, but continue to be denied their ability to fully participate in civic life. In July 2009, Senator Russell Feingold (D-WI) and Representative John Conyers (D-MI) introduced the Democracy Restoration Act of 2009 (S.1516/H.R.3335). The ACLU, in conjunction with several other civil rights organizations, has been leading the effort to support and promote this legislation.

If passed, the Democracy Restoration Act would restore voting rights in federal elections to nearly 4 million Americans who have been released from prison and are living in the community; ensure that probationers never lose their right to vote in federal elections; and notify people about their right to vote in federal elections when they are leaving prison, sentenced to probation, or convicted of a misdemeanor.<sup>78</sup>

The federal bill is critical because it would create a uniform standard across the country in federal elections and facilitate election administration by streamlining registration issues and

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<sup>74</sup> The Sentencing Project, *supra* note 68.

<sup>75</sup> Iowa General Assembly Legal Updates 2005, available at [http://www.legis.state.ia.us/lisadocs/Legal\\_Update/2005/LUSEC001.PDF](http://www.legis.state.ia.us/lisadocs/Legal_Update/2005/LUSEC001.PDF).

<sup>76</sup> The Sentencing Project, *supra* note 68.

<sup>77</sup> Jeff Manza and Christopher Uggen, *supra* note 3.

<sup>78</sup> Press Release, ACLU, *Democracy Restoration Act Needed To Restore Voting Rights Of Millions Of Americans*, July 24, 2009, available at <http://www.aclu.org/racial-justice-voting-rights/democracy-restoration-act-needed-restore-voting-rights-millions-america>.

eliminating the opportunity for confusion and the erroneous purges of eligible voters. Public support by the Obama Administration is needed in order to advance this critical federal work.

### c. Ongoing Litigation

There have been scores of lawsuits filed in the United States challenging the constitutionality of state felon disenfranchisement laws. Many of these cases have been unsuccessful, and most courts have relied exclusively upon the Supreme Court's decision in *Richardson v. Ramirez*, in which the Court upheld California's felon disenfranchisement law, finding that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment."<sup>79</sup> However, the Court remanded the case for further consideration as to whether there was such a total lack of uniformity in the manner in which local election officials were enforcing the state's felon disenfranchisement law "as to work a separate denial of equal protection."<sup>80</sup> The Court's refusal to shield state felon disenfranchisement laws from equal protection challenges was further demonstrated in *Hunter v. Underwood*, in which the Court invalidated Alabama's felon disenfranchisement scheme based on evidence showing the state had adopted the law with the intent to discriminate against African Americans.<sup>81</sup> The Court held: "we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [state law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests to the contrary."<sup>82</sup>

The legal mechanisms available in the United States for addressing the disparate racial impact of disenfranchisement laws are woefully inadequate. The proof requirements under the 14th Amendment of the United States Constitution render the invalidation of felony disenfranchisement laws, on the basis of their disproportionate impact on racial minorities, an extremely difficult task. As such, attorneys have focused on specific aspects of felony disenfranchisement, rather than the issue as a whole, when pursuing reform in the courts.

In the case of *Janis v. Nelson*,<sup>83</sup> two Native American women are challenging their denial of the right to vote in the 2008 primary and general elections; though they were sentenced only to probation and South Dakota allows individuals on probation to vote,<sup>84</sup> they were denied the right to vote based on their felony convictions. The suit alleges violations of federal and state law, including Section 2 of the Voting Rights Act, which prohibits states from enacting or enforcing any voting practice or procedure that results in the denial of a citizen's right to vote on account of their race, color, or membership in a language minority group.<sup>85</sup> Because of the overrepresentation of Native Americans in South Dakota's criminal justice system, the plaintiffs maintain that the systematic removal of qualified Native Americans from the voter rolls has resulted in the denial and/or dilution of Native American voting strength. The parties are still litigating the case in the district court.

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

80 *Richardson v. Ramirez*, 418 U.S., 56. (1974).

81 *Hunter v. Underwood*, 471 U.S. 222 (1985).

82 *Id.*, at 233.

83 Civil Action No. 09-5019 (D. S.D., filed Feb. 18, 2009)

84 S.D.C.L. § 23A-27-35.

85 42 U.S.C. § 1973.

In the case of *Coronado v. Brewer*,<sup>86</sup> the plaintiffs include Latino and African American Arizona citizens who raise two primary legal challenges to the state's felony disfranchisement and re-enfranchisement laws: (1) Arizona's requirement that people with felony convictions pay all of the restitution, fines, and other legal financial obligations associated with their sentences prior to getting their voting rights restored discriminates against individuals based on their poor economic status; and (2) Congress never intended for states to disfranchise people convicted of drug crimes and other offenses that were not felonies at common law when it granted state's the authority to enact their own felon disfranchisement laws.<sup>87</sup> For both claims, the plaintiffs point to the overrepresentation of minorities in the criminal justice system and the links between race and poverty that result in high disfranchisement rates in minority communities and fewer minorities ever getting their voting rights restored. The case is still pending before the Ninth Circuit.

In the case of *Farrakhan v. Gregoire*,<sup>88</sup> the Voting Rights Project of the ACLU and the ACLU of Washington filed an amicus brief in support of the plaintiffs who were appealing the dismissal of their suit challenging Washington state's felon disfranchisement law under Section 2 of the Voting Rights Act.<sup>89</sup> On appeal, the plaintiffs, who include African American, Latino, and Native American inmates, argued that discrimination in the state's criminal justice system leads to high rates of disfranchisement for minorities. Collectively, African Americans, Latinos, and Native Americans represent only 12% of Washington's overall population, but make up about 36% of the state's incarcerated population. In the amicus brief, the ACLU argues that the district court's analysis of the plaintiffs' Section 2 claim was severely flawed in that the court imposed a higher burden of proof than Section 2 requires. Furthermore, because disfranchisement is automatic once a conviction occurs, the racial bias in the criminal justice system has an automatic and disproportionate impact on minority voters in violation of Section 2. The case is still pending before the Ninth Circuit.

#### **d. Petition to the Inter-American Commission on Human Rights**

In September 2006, the ACLU, on behalf of the New Jersey State Conference NAACP, the Latino Leadership Alliance of New Jersey and others, submitted a petition to the Inter-American Commission on Human Rights alleging violations of the human rights to vote and to vote free of discrimination by the U.S. and the State of New Jersey. The petition alleges that the issue of felony disfranchisement is not merely about the right to vote, but also about the right of African American and Latino communities to "participate fully and effectively in the political process."<sup>90</sup> This filing was followed by a request to the Commission to hold a thematic hearing on the discriminatory effects of felony disfranchisement laws, policies and practices in the Americas. Though the request for a thematic hearing was recently denied, the petition is still pending.<sup>91</sup>

#### **e. Rulings by Human Rights Tribunals and Foreign Courts**

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<sup>86</sup> Case No. 08-17567 (9th Cir.; appeal filed on Nov. 13, 2008)

<sup>87</sup> U.S. Const. amend XIV, § 2.

<sup>88</sup> Case No. 06-35669 (9th Cir.)

<sup>89</sup> (42 U.S.C. § 1973)

<sup>90</sup> Press Release, ACLU, Petition to the Inter-American Commission on Human Rights, September 13, 2006, available at <http://www.aclu.org/human-rights/petition-inter-american-commission-human-rights>

<sup>91</sup> Press Release, ACLU, *Request for a Thematic Hearing on the Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices in the Americas*, September 8, 2009, available at [http://www.aclu.org/racial-justice\\_voting-rights/request-thematic-hearing-discriminatory-effects-felony-disenfranchiseme](http://www.aclu.org/racial-justice_voting-rights/request-thematic-hearing-discriminatory-effects-felony-disenfranchiseme).

Overseas courts increasingly view felony disenfranchisement as a human rights issue. Recent decisions by national and regional courts in Canada,<sup>92</sup> Israel,<sup>93</sup> South Africa<sup>94</sup> and Europe<sup>95</sup> all affirm the rights of citizens to vote while incarcerated. In fact, all foreign constitutional courts that have evaluated disenfranchisement laws have found automatic, blanket disqualifications of prisoners to violate basic democratic principles. These courts and others have found felony disenfranchisement inconsistent with domestic law, as well as the international laws mentioned above that set forth the right to vote as an essential human right.

### **VIII. United States Violation of Treaty Obligations**

Continued barriers to voting for minorities in the U.S. violate several human rights treaties by which the United States has agreed to abide.

In 2006, the UN Human Rights Committee considered US compliance with the ICCPR and issued Concluding Observations, which included the following:

35. The Committee is concerned that about five million citizens cannot vote due to a felony conviction, and that this practice has significant racial implications. The Committee also notes with concern that the recommendation made in 2001 by the National Commission on Federal Election Reform that all states restore voting rights to citizens who have fully served their sentences has not been endorsed by all states. The Committee is of the view that general deprivation of the right vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 of 26 of the Covenant, nor serves the rehabilitation goals of article 10 (3).

**The State party should adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole. The Committee also recommends that the State party review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of article 25. The State party should also assess the extent to which such regulations disproportionately impact on the rights of minority groups and provide the Committee with detailed information in this regard.**

36. The Committee, having taken note of the responses provided by the delegation, remains concerned that residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the Covenant. (articles 2, 25 and 26)

**The State party should ensure the right of residents of the District of Columbia to take part in the conduct of public affairs, directly or through**

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92 *Sauvé v. Canada*, [1993] 2 S.C.R. 438 (Can.)

93 *Hilla Alrai v. Minister of Interior*, H.C. 2757/96, P.D. 50(2) 18 (Israel 1996).

94 *August and another v. Electoral Commission and Others* (CCT 8/99 1999)

95 *Hirst v. United Kingdom* (Hirst No. 1) 30.6.2004, Rep 2004.

**freely chosen representatives, in particular with regard to the House of Representatives.**<sup>96</sup>

In 2008, the U.N. Committee on the Elimination of Racial Discrimination (CERD) considered US compliance with ICERD and issued Concluding Observations including the following:

6. The Committee also welcomes the re-authorisation, in 2006, of the *Voting Rights Act* of 1965 (VRA).

27. The Committee remains concerned about the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system. The Committee notes with particular concern that in some states, individuals remain disenfranchised even after the completion of their sentences. (Article 5 (c))

**Taking into account the disproportionate impact that the Implementation of disenfranchisement laws has on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, the Committee recommends that the State Party adopt all appropriate measures to ensure that the denial of voting rights is used only with regard to persons convicted of the most serious crimes, and that the right to vote is in any case automatically restored after the completion of the criminal sentence.**<sup>97</sup>

The United States government must heed the recommendations of CERD and HRC and fully comply with the requirements of ICERD and the ICCPR.

## **IX. Recommendations to the United States**

In light of the information provided in this current report, the ACLU makes the following recommendations to the United States:

- Allow all citizens, regardless of their criminal histories, to vote. In the alternative, require all states to restore voting rights to individuals with felony convictions who have been released from prison (including those who are on parole), and provide for no loss of voting rights to people sentenced only to probation. In order to further this recommendation, Congress should pass and the Administration should publicly support the Democracy Restoration Act of 2009.
- Eliminate all barriers to voting rights restoration, including waiting periods, rights restoration applications, requirements that people show proof of eligibility (such as discharge papers or

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<sup>96</sup> See Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), para. 35,36.

<sup>97</sup> U.N. Committee on the Elimination of Racial Discrimination [CERD], Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, 6, 27 U.N. Doc. CERD/C/USA/CO/6 (May 2008).



certificates of restoration), and the requirement that legal financial obligations be satisfied before voting rights are restored.

- Ensure that people with criminal records receive accurate information about their voting rights. Notify criminal defendants before conviction and upon release from incarceration (or at other relevant points) of the revocation and reinstatement of their voting rights. Regularly train election and criminal justice officials on felony disenfranchisement laws and registration procedures for people with criminal records. Make information about voting with a criminal record widely available to the public.
- Facilitate voting by eligible people with criminal records. Ensure that individuals who do not lose their right to vote – such as people with misdemeanor convictions or those awaiting trial – can register and vote by absentee ballot from jail. Make departments of corrections and probation and parole authorities responsible for assisting with voluntary voter registration.
- Streamline voter registration and eliminate paperwork for eligible peoples with criminal records. Voting rights should be restored automatically without additional paperwork and bureaucratic red tape. States should ensure that individuals are marked inactive upon a person’s imprisonment and then automatically reactivated when eligible. Once eligible, individuals with criminal histories should follow the same registration procedures as everyone else.
- Congress should increase oversight of the Voting Rights Section of the Civil Rights Division and ensure that the Section returns to its historic mission of protecting minority voters.
- The Justice Department Civil Rights Division should fully enforce current federal voting rights laws, including the anti-discrimination provisions of the Voting Rights Act, the Help America Vote Act, and the National Voter Registration Act.
- Minority communities should be encouraged to participate in the Section 5 preclearance process.
- Local and state election boards should encourage and assist American Indian voters, including those who live on reservations, in registering to vote. Polling places should be located conveniently for all citizens, including those who live on reservations. American Indian voters should be free from harassment, intimidation and misinformation by those who oppose their participation in elections.
- Election district lines should be drawn in ways that do not dilute American Indian voting strength and provide Indian voters an equal opportunity to elect candidates of their choice. American Indian voters should have the opportunity to participate in the redistricting process to ensure their interests are protected.
- Implement recommendations of the U.N. Human Rights Committee and the U.N. Committee on the Elimination of Racial Discrimination and ensure that enforcement of federal voting laws is consistent with human rights treaty obligations.

## Appendix A: State-by-State Felony Disfranchisement Rates\*

Source: Manza, Jeff and Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy (Oxford University Press, 2006), Tables A3.3 and A3.4

Rank	State	Voting Age Population	Disfranchisement Rate	African-American Voting Age Population	African-American Disenfranchisement Rate
	Nationwide	217,766,271	2.42%	24,162,453	8.25%
1	Iowa	2,250,634	5.39%	43,275	33.98%
2	Kentucky	3,123,645	5.97%	207,961	23.70%
3	Nebraska	1,298,451	4.77%	50,230	22.70%
4	Arizona	4,061,499	4.34%	114,708	21.08%
5	Wyoming	380,169	5.31%	3,420	20.03%
6	Virginia	5,587,563	6.76%	1,054,523	19.76%
7	Delaware	618,649	7.54%	106,283	19.63%
8	Rhode Island	832,115	2.50%	27,489	18.86%
9	Florida	13,094,945	9.01%	1,559,354	18.82%
10	Washington	4,634,864	3.61%	135,689	17.22%
11	Alabama	3,392,779	7.37%	813,208	15.30%
12	Mississippi	2,120,013	6.89%	696,831	13.24%
13	Nevada	1,659,757	2.63%	101,951	12.39%
14	Wisconsin	4,139,405	1.51%	218,943	11.10%
15	Georgia	6,387,956	4.44%	1,681,040	9.57%
16	Texas	15,878,347	3.29%	1,785,595	9.30%
17	Arkansas	2,043,701	2.82%	284,210	8.97%
18	New Jersey	6,506,779	1.95%	808,463	8.69%
19	Missouri	4,297,142	2.18%	435,218	7.97%
20	Minnesota	3,810,605	1.02%	111,714	7.94%
21	Alaska	459,529	2.42%	19,212	7.64%
22	California	26,064,483	1.09%	1,504,362	7.60%
23	Kansas	2,028,426	1.37%	118,799	7.37%
24	Oklahoma	2,633,289	1.88%	202,628	7.34%
25	Louisiana	3,318,779	2.96%	1,000,499	6.78%
26	Connecticut	2,647,997	0.86%	212,894	6.72%
27	New Mexico	1,372,580	1.32%	25,680	6.71%
28	Tennessee	4,447,269	2.12%	672,913	6.42%
29	Idaho	994,305	1.75%	5,110	6.03%
30	Maryland	4,130,817	2.70%	1,111,217	5.80%
31	Colorado	3,397,937	0.84%	137,783	5.41%
32	Oregon	2,710,424	0.52%	45,588	4.36%
33	New York	14,657,367	0.83%	1,868,249	4.21%
34	So. Carolina	3,123,648	1.55%	830,653	3.71%
35	South Dakota	568,883	0.58%	3,830	3.71%
36	West Virginia	1,419,453	0.76%	42,499	3.44%
37	Utah	1,608,540	0.37%	13,385	3.43%

\* Note: changes to state disfranchisement laws since 2004 have likely altered these rankings.

38	North Carolina	6,319,805	1.16%	1,277,505	3.31%
39	Indiana	4,591,742	0.57%	354,616	3.21%
40	Pennsylvania	9,534,761	0.44%	829,353	3.15%
41	Michigan	7,541,065	0.66%	985,837	2.85%
42	Illinois	9,422,938	0.49%	1,230,967	2.69%
43	New Hampshire	981,456	0.26%	5,497	2.68%
44	Ohio	8,620,509	0.53%	928,659	2.64%
45	Montana	701,847	0.59%	2,783	2.21%
46	Hawaii	960,466	0.68%	21,442	1.71%
47	Massachusetts	4,946,304	0.20%	236,703	1.61%
48	North Dakota	487,010	0.30%	3,732	0.99%
49	District of Columbia	454,981	0.16%	224,361	0.31%
50	Maine	1,018,982	0.00%	3,466	0.00%
51	Vermont	481,661	0.00%	2,126	0.00%