Felon Voting Rights Conflict Hits Federal Court

by Michelle Chen

One of the most controversial state-level issues that arose with the debates over the fairness of recent elections is reaching the higher courts as convicted felons and ex-cons demand the right to engage in the political system.

New York City; June 24, 2005 – A veteran of the system, Joseph Hayden began his battle with the law in 1986, when a fistfight led to a death and a felony conviction. A couple of college degrees and nearly two decades later, the Harlem native again had his day in court, this time working with civil rights activists to reclaim what he says the state has unlawfully taken from him: the right to vote.

On Wednesday, the Second Circuit Court of Appeals heard the opening arguments of Hayden and his legal team in a class action suit challenging New York State’s ban on voting rights for felons who are incarcerated or on parole or probation. Following a district court’s dismissal of the same case last June, the appeals court will now decide whether to mandate that the case be reviewed on the basis of protections under the Voting Rights Act.

Hayden’s legal claim was originally filed in 2000 and later taken on by the civil rights groups NAACP Legal Defense and Education Fund, Community Service Society of New York, and the Center for Law and Social Justice at Medgar Evers College. The case has been expanded to a class action representing disenfranchised parolees and probationers, currently incarcerated prisoners, and the black and Latino communities impacted by high incarceration rates. For the appeal process, the suit was recently consolidated with another case involving Jalil Abdul Muntaqim, a convicted felon who remains incarcerated.

The legal argument for the repeal of New York’s felon disenfranchisement laws centers on disenfranchisement’s disproportionate impact on minority groups, drawing on the Fifteenth Amendment’s ban on race-based voting restrictions, the Fourteenth Amendment’s provision of equal protection under law, and the Voting Rights Act of 1965, which prohibits racial discrimination in voting procedures.

The civil rights advocacy community is closely watching the developments in the litigation, which parallels similar cases in Florida and Washington and could eventually push the Supreme Court to review the issue.

Speaking outside the courthouse on Wednesday, Hayden remarked that the hearing before federal judges was “confirmation of all my efforts and energies that I’ve put into this.”

Throughout most of the country, once a felony conviction blots a person’s criminal history, the power to cast a ballot vanishes for at least some period of time. Currently, 48 states and Washington, DC bar incarcerated felons from voting. Convicts on parole are denied the right to vote in 35 states, most of which also restrict probationers. In fourteen states, the voting ban continues even after the full sentence is completed, sometimes permanently. Only Vermont and Maine have no felony voting statutes.
According to DEMOS, a progressive policy advocacy group, felony convictions have barred an estimated 4.7 million Americans from the polls for at least some time, and of these, approximately two million are black. The organization reports that nationwide, disenfranchisement laws have permanently stripped one in eight black men of their right to vote. Recent research by the Mexican American Legal Defense and Education Fund indicates that disenfranchisement also disproportionately impacts Latino populations, though to a lesser extent.

Of those currently disenfranchised, approximately a quarter are actually in prison. Roughly a third are "ex-felons" who have served their sentences, and the rest are, like Hayden, living in communities on parole or probation.

Though disenfranchisement as a criminal punishment has historical roots in European legal doctrines, opponents say that today's felon disenfranchisement laws are inherited from a history of racist voting restrictions. New York adopted a felon disenfranchisement law in 1894, following a wave of state-level voting restrictions enacted in the wake of the Civil War.

Public interest law groups and civil rights activists charge that felon disenfranchisement guts the political rights of minority groups and epitomizes the inequalities embedded in the criminal justice system. For organizations like the NAACP, the legal question of felon voting rights is a vehicle for challenging what they see as institutional discrimination that corrodes democracy.

Advocates involved in the Hayden case argue that felon disenfranchisement distorts the distribution of political power, not just by stripping largely minority felons of political clout, but also by indirectly inflating the representation of white-majority districts where prisons are located, which can count non-voting inmates as part of their local populations.

Hayden, director of Unlock the Block, a New York-based campaign for felon voting rights, said the case for a link between incarceration and race was irrefutable. "The fact that [there is] racial discrimination in the criminal justice system is a slam dunk," he said. "There's no question about that."

Yet if the case proceeds to trial, the plaintiffs' arguments will also seek to connect disenfranchisement to deeper social problems tied to racial inequality, from failing public schools to racial profiling by police. "We look at the lack of affordable housing and employment, and all the rest of that. I think we can make our case," Hayden said.

Disenfranchisement Seen as Punishment by Some, Oppression by Others

Some of the current political foment can be traced back to the controversy surrounding the narrow sliver of the Florida electorate that tipped the 2000 electoral college vote in favor of George W. Bush. At the time, Florida had a disproportionately black, permanently disenfranchised felon population of approximately 820,000, including more than 600,000 ex-felons, who advocates say would likely have swung the election had they been permitted to vote. The balance of the vote may also have been influenced by flawed government records that erroneously listed thousands of people as convicted felons and, therefore, ineligible to vote.

Cued by the speculation surrounding the 2000 election, sociologists have analyzed disenfranchisement rates alongside historical voting patterns. Researchers from Northwestern University and the University of Minnesota wrote in a report that given the likelihood of a large, liberal-leaning population being disenfranchised by felony convictions, "felon disenfranchisement has provided a small but clear advantage to Republican candidates in every presidential and senatorial election from 1972 to 2000."

According to the report's co-author, Jeff Manza, aside from skewing the electorate, disenfranchisement laws accomplish little. "There's really no criminological reason to disenfranchise," he said, referring to a growing body of scholarship that raises concerns about the social implications of felon voting restrictions. "It doesn't keep people off the streets, it doesn't deter them in any meaningful way? and it certainly doesn't help to rehabilitate them."

But Roger Clegg, general counsel at the conservative think tank Center for Equal Opportunity, thinks that the loss of one's right to vote is a reasonable penalty for those who commit the most serious offenses. He argued that by the nature of their crimes, felons have proven that they cannot be trusted with the same political entitlements as others. "If you're not willing to
follow the law," he said, "then you shouldn’t demand the right to make the law for other people."

On the other hand, Clegg supports restoration of voting rights on an individual basis if there is evidence that an ex-felon has "turned over a new leaf."

 "Somebody who wrote a bad check 50 years ago and has led a crime-free life since then, I think, should have his or her right to vote restored," he said. "But somebody who’s in prison now for murdering a policeman should not," he added, referring to the plaintiff Muntaqim, who was convicted of killing a police officer in 1971.

Yet among those pushing for equal voting rights regardless of criminal history is Waverly Jones, the son of the officer who Muntaqim was convicted of killing.

"I’ve come to feel very proud to stand on this side of the issue," Jones commented after the court hearing yesterday.

He argued, "Voting is not a privilege, it is a fundamental right in any society that desires to serve the interests of its people. And to take it away because you’ve committed a crime is unjust."

Expressing strong support for the political empowerment of those still incarcerated, like Muntaqim, Jones said, "It will allow them to organize themselves in prison ? to vote what is in their best interest. And I think that that will improve the quality of participation in this type of electoral system."

**Among States, Reenfranchisement Process Ranges from Arbitrary to Automatic**

Even in the absence of a judicial ruling against felony disenfranchisement on constitutional grounds, some states have been moving to repeal or limit disenfranchisement laws.

Last week, Iowa Governor Tom Vilsack issued an executive order to automatically restore voting eligibility for felons who have completed their sentences. That move, to take effect next month, will do away with Iowa’s complex case-by-case petition process for voting rights restoration.

In March, the Nebraska legislature replaced its permanent voting ban with a two-year waiting period for reenfranchisement once a felony sentence ends. In Connecticut, the restoration of voting rights for felony probationers enacted in 2002 will reenfranchise approximately 36,000 people upon completion of their sentences, according to the Sentencing Project, an advocacy organization on criminal justice issues.

In many of the states where disenfranchisement continues after a sentence has been served, ex-felons can regain voting rights under certain conditions, but are generally subject to bureaucratic mechanisms that hand out suffrage on an individual basis.

In Florida, for instance, an ex-felon can petition the state Clemency Board for a special "pardon" to restore voting rights. But the disenfranchisement restrictions could be upheld due to an unfavorable background check or a prior conviction for any one of the hundreds of automatically "disqualifying" crimes established by the governor. The board has rejected more than 200,000 applications since 1999, reported the Sentencing Project.

Activists say that such review processes, which typically involve confusing rules, hearings, and arbitrary probes of an individual’s lifestyle or employment history, are inherently stacked against the petitioner. In its analysis of ex-felon reenfranchisement procedures, Sentencing Project researchers commented, "In a democracy, individual attributes or character flaws have no bearing on qualifications for voting. There is no more rational justification for employing such a standard to people with felony convictions than there would be for any other citizen."

**Civil Rights Litigation Pushes for Broader Representation**

Groups involved in the current court battle advocate a wholesale restoration of suffrage, including for those still imprisoned, as a step toward mitigating some of the symptoms of what they view as a fundamentally warped justice system.

Ryan Haygood, assistant counsel at the NAACP Legal Defense and Education Fund, said the legal challenge frames the racial disparities in the disenfranchised population as "just a
symptom of the bigger problem." A consequence of draconian law enforcement policies promoted by the so-called War on Drugs, he argued, is that blacks and Hispanics "are losing their voting rights daily and ? rather than being brought into the political fold, are being removed from it in striking numbers."

The Department of Justice reported that as of 2004, blacks and Hispanics, who make up only about 25 percent of the general population, constitute more than 60 percent of the state and federal prison population. In New York, blacks and Hispanics constitute only about 30 percent of total residents, but more than 85 percent of both the state’s prison population and the disenfranchised felon population.

While some argue that voting rights for felons would harm the law-abiding, Haygood believes a broad repeal of disenfranchisement laws would actually build up the political clout of underserved communities that "desperately need more votes and more voices" -- with the added benefit of helping former prisoners reintegrate into society through civic engagement.

In Haygood’s view, the political inclusion of the formerly disenfranchised could only strengthen the democratic system. He reflected, "You can’t actually undermine a democracy by participating in it? The participation in a democracy really affirms the legitimacy of it."