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## Government and Election Law

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### Re-Enfranchising People With Prior Convictions



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Earlier this spring, Virginia Governor Terry McAuliffe issued an executive order restoring voting rights to approximately 200,000 citizens who have completed their terms of incarceration and supervised release (including probation or parole).<sup>1</sup> He also announced that, going forward, those who satisfy these criteria will be eligible for rights restoration on a monthly basis.<sup>2</sup> Litigation has ensued. A few weeks after McAuliffe's order, the Speaker of the Virginia House of Delegates, the Majority Leader of the Virginia Senate, and others filed a

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<sup>1</sup> Order for the Restoration of Rights (Va. April 22, 2016) (McAuliffe), available at [https://commonwealth.virginia.gov/media/5848/order\\_restoring\\_rights\\_4-22-16.pdf](https://commonwealth.virginia.gov/media/5848/order_restoring_rights_4-22-16.pdf).

<sup>2</sup> See Secretary of the Commonwealth, Restoration of Rights, <https://commonwealth.virginia.gov/judicial-system/restoration-of-rights/>. See also Order for the Restoration of Rights (Va. May 31, 2016) (McAuliffe), available at <https://commonwealth.virginia.gov/media/6082/restoration-of-rights-may-31-2016.pdf> (first restoration order issued after initial order).

lawsuit in the state’s Supreme Court challenging it on state constitutional grounds.<sup>3</sup> The plaintiffs argued that McAuliffe did not have the authority to restore voting rights en masse; in other words, he could restore them person by person, but not a whole group in one fell swoop.<sup>4</sup>

A political fight over the use of executive authority to restore voting rights is not new. Nor is turning to the courts to decide whether state disenfranchisement laws are lawful. What is new is the use of state courts to adjudicate a largely political battle over the use of executive authority to restore voting rights.

## Laws and Court Rulings

Let’s back up a bit. There are nearly six million Americans ineligible to vote pursuant to state laws disenfranchising those with a felony conviction.<sup>5</sup> Almost 4.5 million of these are out of prison, and living in the community.<sup>6</sup> State criminal disenfranchisement laws vary. In Maine and Vermont, a person convicted of a felony never loses the right to vote, which means an American who is over 18 and not adjudicated incompetent can vote even while imprisoned.

In New York State, persons are disenfranchised while in prison or on parole, but persons on probation are eligible to vote.<sup>7</sup> The constitutions of Florida, Kentucky, Virginia and Iowa appear to permanently disenfranchise persons with criminal convictions unless their rights are individually restored by the government. The interpretation of Iowa’s rule is the subject of pending litigation.<sup>8</sup>

These laws are not new to the federal court system. In 1974, in *Richardson v. Ramirez*, the U.S. Supreme Court ruled that section 2 of the Fourteenth Amendment permitted states to

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<sup>3</sup> See Press Release, Virginia House Republican Caucus, Virginia voters to file suit against McAuliffe’s unconstitutional executive order (May 23, 2016), <http://virginiahouse.gov/2016/05/23/virginia-voters-to-file-suit-against-governor-mcauliffes-unconstitutional-executive-order/>.

<sup>4</sup> *Id.*

<sup>5</sup> See Christopher Uggen and Sarah Shannon, Sentencing Project, State-Level Estimates of Felon Disenfranchisement in the United States, 2010 16 tbl. 3 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> N.Y. ELEC. LAW §5-106. Interestingly, New York’s constitution once imposed a requirement that African-Americans—and only African-Americans—own real property before being allowed to vote, the only state in the country at that time to have such a requirement. Once that requirement was understood to be illegal pursuant to the passage of the 14th and 15th Amendments, there was a constitutional convention that altered the New York constitution to both remove this property qualification and require disenfranchisement for conviction of certain crimes. See Erika Wood & Liz Budnitz, Brennan Center for Justice, Jim Crow in New York (2010).

<sup>8</sup> Fla. Const. Art. VI, §4; Iowa Const. Art. II, §5; Ky. Const. Art. §145; Va. Const. Art. II, §1. As noted later, the interpretation of Iowa’s constitution as permanently disenfranchising all people with felony convictions is being contested.

disenfranchise people on account of criminal convictions. The court reasoned that the constitutional text allowing states to avoid diminished representation for disenfranchising people who commit “rebellion[s] or other crime[s] permitted states to disenfranchise Americans convicted of crimes.”<sup>9</sup> This analysis was limited in 1985, when the Supreme Court, in *Hunter v. Underwood*,<sup>10</sup> held that felony disenfranchisement laws enacted with the intent of disenfranchising minority voters were illegal. On the other hand, federal courts of appeals in the First, Second, Fourth, Sixth, Ninth, Tenth and Eleventh circuits have upheld state criminal disenfranchisement laws.<sup>11</sup>

In light of continuing defeats in the courts, advocates have turned to state legislatures to reform the laws. As a result, 18 states in the last two decades have eased voting restrictions imposed on people with felony convictions.<sup>12</sup> Most recently, in Maryland, the Legislature passed a law restoring voting rights to persons released from prison (or who were never incarcerated to begin with). Gov. Larry Hogan vetoed the bill, and the Legislature overrode him. The new law enfranchised more people than the prior practice of withholding the restoration of voting rights until completion of prison, probation, and parole. In New York, both the Assembly Elections and Rules Committees recently voted to restore voting rights to Americans while serving parole. Only those still imprisoned would be barred from casting a ballot.<sup>13</sup>

## Executive Orders

The Virginia Supreme Court will hear the McAuliffe’s executive order case on July 19.<sup>14</sup> If his order is upheld, Virginia will join 19 other states, like Texas, that restore voting rights to citizens upon completion of incarceration, probation, and parole.<sup>15</sup> Because McAuliffe’s executive order would continue to disenfranchise people while they are serving a term of probation or parole, Virginia’s disenfranchisement policy is still more restrictive than states like Montana and Utah,

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<sup>9</sup> *Richardson v. Ramirez*, 418 U.S. 24, (1974).

<sup>10</sup> *Hunter v. Underwood*, 471 U.S. 222 (1985).

<sup>11</sup> See, e.g., *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Allen v. Ellisor*, 664 F.2d 391 (4th Cir. 1981); *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010); *Woodruff v. Wyoming*, 49 Fed.Appx. 199 (10th Cir. 2002); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214 (11th Cir. 2005).

<sup>12</sup> See Myrna Pérez, Tomas Lopez, and Vishal Agraharkar, *The Sustained Momentum and Growing Bipartisan Consensus for Voting Rights Restoration*, Brennan Center for Justice, <https://www.brennancenter.org/analysis/sustained-momentum-and-growing-bipartisan-consensus-voting-rights-restoration>.

<sup>13</sup> A. 7634 (N.Y. 2016).

<sup>14</sup> Scheduling and Briefing Order, *Howell v. McConnell* (Va. June 1, 2016), available at [https://gallery.mailchimp.com/a8970db37d2569f1a2b65e59d/files/ORD\\_06\\_01\\_2016\\_Howell\\_W.pdf](https://gallery.mailchimp.com/a8970db37d2569f1a2b65e59d/files/ORD_06_01_2016_Howell_W.pdf).

<sup>15</sup> Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

which allow people with criminal convictions to vote once they are out of prison (or are never sentenced to prison to begin with)— even if they are still on probation or parole.<sup>16</sup>

Indeed, the recent order in Virginia is significant but not unprecedented. In 2005, then-Iowa Governor Tom Vilsack issued an executive order which restored voting rights to Iowans who had already completed their sentences for felony convictions, and like Virginia, provided for ongoing monthly restorations of voting rights to otherwise eligible Americans as they completed their sentences.<sup>17</sup> In the almost six years Vilsack's order was in effect, voting rights were restored to an estimated 115,000 citizens.<sup>18</sup> Immediately upon taking office in 2011, however, Vilsack's successor, Governor Terry Branstad, issued his own order that permanently disenfranchised people with felony convictions unless they obtained approval from his office.<sup>19</sup> Branstad's executive order remains in place today.

Iowa's policy under Gov. Branstad is being challenged by Kelli Jo Griffin, a resident with a felony conviction who served her time and believed she could vote because her lawyer told her she was eligible to do so. After she attempted to vote, she was prosecuted.<sup>20</sup> She was acquitted by a jury, and later went on to sue Iowa, arguing that Branstad's order and other related laws that permanently disenfranchise all people with felony convictions are invalid under the Iowa Constitution—and sought to have her voting rights restored.<sup>21</sup> The trial court ruled against her and in favor of the state. Griffin appealed to the Iowa Supreme Court, where oral arguments were heard on March 30, 2016. A decision has not yet been issued, but is expected later in the summer.<sup>22</sup>

In recent years, governors in Florida and Kentucky also used their executive powers to avoid a policy of permanent disenfranchisement in their states, and in both instances, a successive governor backtracked on the policy.<sup>23</sup> Iowa's then-Governor Vilsack, like Virginia's current

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<sup>16</sup> See MONT. CONST. ART. IV, §2 (providing that a citizen is ineligible to vote while “serving a sentence for a felony in a penal institution”); UTAH CODE §§20A-2-101.3(2); 20A-2-101.5(2) (providing that voting rights are restored automatically upon a sentence to probation by the sentencing court, a grant of parole, or successful completion of a term of incarceration.).

<sup>17</sup> Exec. Order 42 (Iowa 2005) (Vilsack), available at [https://www.brennancenter.org/sites/default/files/analysis/IA\\_9\\_Exec\\_Order\\_42.pdf](https://www.brennancenter.org/sites/default/files/analysis/IA_9_Exec_Order_42.pdf).

<sup>18</sup> Uggen and Shannon, *supra* note 5, at 14 tbl. 2.

<sup>19</sup> Exec. Order 70 (Iowa 2011) (Branstad) (executive order reversing Vilsack rights restoration policy), available at [http://www.brennancenter.org/sites/default/files/analysis/IA\\_6\\_Executive\\_Order.pdf](http://www.brennancenter.org/sites/default/files/analysis/IA_6_Executive_Order.pdf).

<sup>20</sup> See Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, *Griffin v. Branstad* (Iowa Dist. Ct. Nov. 7, 2014), available at [https://www.brennancenter.org/sites/default/files/legal-work/Griffin\\_v\\_Pate\\_Ptn\\_Declaratory.pdf](https://www.brennancenter.org/sites/default/files/legal-work/Griffin_v_Pate_Ptn_Declaratory.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> See [http://www.iowacourts.gov/About\\_the\\_Courts/Supreme\\_Court/Case\\_Timeline/](http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Case_Timeline/).

<sup>23</sup> In 2007, Florida Clemency Board under Governor Charlie Crist issued an order streamlining the rights restoration process. In 2011, the Clemency Board under Crist's successor, Governor Rick Scott, revoked Crist's executive order. See Florida Rules of Executive Clemency (2007) (Florida clemency rules adopted under Gov.

Governor McAuliffe, also saw a legal challenge to his executive action, but in Iowa’s case, it was a lone county attorney challenging the law—not the legislative leadership of the state like in Virginia.<sup>24</sup> So taken together, among the four states with the most regressive laws on rights restoration, there has been a back-and-forth on state policy depending on who was governor. Unlike the other states, though, only McAuliffe’s executive order has experienced a direct attack by legislative leaders in the courts.

In a presidential election year, the Iowa and Virginia cases will be watched with interest.

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Charlie Crist), available at [http://www.brennancenter.org/sites/default/files/analysis/FL\\_1\\_2007\\_reforms.pdf](http://www.brennancenter.org/sites/default/files/analysis/FL_1_2007_reforms.pdf); Florida Rules of Executive Clemency (2011) (Florida clemency rules adopted under Gov. Rick Scott), available at [http://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final\\_.3-9.pdf](http://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf). In Kentucky, then-Governor Steve Beshear issued an executive order in 2015 that streamlined and simplified the rights restoration application process. In 2015, Beshear’s successor, Governor Matt Bevin, passed an executive order that suspended the prior order. *See* Exec. Order 2015-871 (Ky. 2015) (Beshear), available at <http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2015-MISC-2015-0871-242277.pdf>; Exec. Order 2015-052 (Ky. 2015) (Bevin), available at [https://www.brennancenter.org/sites/default/files/blog/Bevin\\_Order\\_2015-052.pdf](https://www.brennancenter.org/sites/default/files/blog/Bevin_Order_2015-052.pdf).

<sup>24</sup> *See* Brennan Center for Justice, *Allison v. Vilsack* (case information page), <https://www.brennancenter.org/legal-work/allison-v-vilsack> (compilation of litigation documents in county attorney’s challenge of Gov. Vilsack’s executive order).