

**Supplemental Written Testimony of the
Brennan Center for Justice at NYU School of Law
Hearing on H.R. 1, The For the People Act
The Committee on House Administration, U.S. House of Representatives**

March 5, 2019

Chairperson Lofgren, Ranking Member Davis, and members of the Committee:

Thank you for the opportunity to submit this supplemental statement in support of House Resolution 1, the *For the People Act*, and in particular, in support of the subtitle E, the Democracy Restoration Act of 2019 (“the DRA”).

As Wendy Weiser, the Director of the Brennan Center’s Democracy Program, noted in her previous testimony on February 14, 2019, Congress has the authority to pass the DRA under the Elections Clause of Article I, Section 4, the Fourteenth Amendment, and the Fifteenth Amendment. This supplement is directed specifically at laying out the record of discrimination that justifies congressional action to enforce the Fourteenth and Fifteenth Amendments. As set forth below, there is ample evidence that: 1) many of the states’ criminal disenfranchisement laws were intended to disenfranchise African Americans at the time of their enactment; and 2) these criminal disenfranchisement laws have a racially discriminatory impact today. Much of this evidence has been previously considered by Congress in testimony, hearings, and related submissions. For these reasons, it is well within the power of Congress to pass the DRA to remedy this harm.

Historians have documented two corresponding trends in the aftermath of the Civil War that reveal concerted efforts to use these laws to disenfranchise African Americans and evade the mandate of the Fifteenth Amendment. First, there was a trend among the States to enact so-called “Black Codes” aimed at restricting the freedom of newly emancipated African Americans by, among other things, criminalizing conduct that would likely ensnare them. Second there was a trend of passing and extending criminal disenfranchisement laws. Together, these efforts ensured, and were intended to ensure, that criminal disenfranchisement laws would work to circumvent the Fifteenth Amendment and deprive significant numbers of African Americans of

the right to vote. The following sources¹ lay out and provide context for these Reconstruction Era trends:

MICHELLE ALEXANDER, *THE NEW JIM CROW* 28 (2012)

DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008)

ERIC FONER, *RECONSTRUCTION 199-205* (2002)

ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, *RACISM AND FELONY DISENFRANCHISEMENT* (2017),
https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf

ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 162 and Table A.15 (2000)

JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 55–58 (2006)

Shadman Zaman, Note, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233 (2015)

It was no accident that these trends developed side-by-side. There is significant evidence from a number of states, from Alabama and Virginia to New York and Florida, that criminal disenfranchisement provisions were intended to disenfranchise African Americans and that they were often designed with “Black Codes” in mind. That is, states often tailored the list of disenfranchising crimes to correspond to the crimes that they believed African Americans were more likely to be convicted of under the discriminatory criminal justice systems developed during this time. A number of researchers have chronicled this evidence, in some cases in state-specific reports:

Benno Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 Colum. L. Rev. 835 (1982)

Angela Behrens, Christopher Uggen, and Jeff Manza, “*Ballot Manipulation and the ‘Menace of Negro Domination’: Racial Threat and Felon Disfranchisement in the United States, 1850-2002*,” 109 AM. J. SOC. 559 (2003)

Helen Gibson, *Felons and the Right to Vote in Virginia: A Historical Overview*, 91 VA. NEWSL., Jan. 2015, at 1

¹ For the convenience of the reader, we divide these sources roughly according to the type of evidence they contain, but it is worth noting that many of these sources provide research and support that is relevant to a number of the themes we describe.

https://vig.coopercenter.org/sites/vig/files/VirginiaNewsLetter_2015_V91-N1.pdf

PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* 21 (2013)

Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUMAN RIGHTS, Winter 2004, at 16 (2004)

Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993)

ERIKA L. WOOD, BRENNAN CTR. FOR JUSTICE, FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS (2016), http://www.brennancenter.org/sites/default/files/publications/Florida_Voting_Rights_Outlier.pdf

ERIKA L. WOOD ET AL., JIM CROW IN NEW YORK (2010), http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY_2010.pdf

Felony disenfranchisement continues to this day to have the intended effect of disproportionately disenfranchising people of color, largely because our nation's criminal justice system is still racially discriminatory. The research below demonstrates both the structural inequality of the criminal justice system and the disparity it causes in the impact of felony disenfranchisement. The disparity is seen across the country and has persisted since the eras of Reconstruction and Jim Crow. In some states, such as Kentucky, Tennessee, Kansas, and Wyoming, and among some demographic sub-groups, such as Black men, the numbers are even more stark.

ACLU, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 3 (2006), http://www.aclu.org/images/asset_upload_file825_25663.pdf

Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993)

JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISFRANCHISEMENT LAWS IN THE UNITED STATES* (1998), http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf

HUMAN RIGHTS WATCH, *TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES* 19 (2008), <http://www.hrw.org/reports/2008/us0508/us0508webwcover.pdf>

R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004)

MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf

THE SENTENCING PROJECT, IOWA AND FELONY DISENFRANCHISEMENT (2005), https://web.archive.org/web/20131019085622/http://www.sentencingproject.org/doc/publications/fd_iowa.pdf

Christopher Uggen et al., The Sentencing Project, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>

Finally, not only does this burden fall more heavily on people of color in the first instance, it diminishes the political voices of entire communities. The research below suggests that criminal disenfranchisement laws decrease turnout in affected communities even among people not formally disenfranchised. The article by Eric Plutzer explains that people's voting behavior is learned from an influenced by that of their parents, which may be one of the reasons for this ripple effect.

Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722 (2009)

Aman McLeod et al., *The Locked Ballot Box: The Impact of State Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 77-78 (2003)

Eric Plutzer, *Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood*, 96 AM. POL. SCI. REV. 41, 43 (Mar. 2002)

In addition to the published historical and quantitative research described above, a number of courts have examined evidence and made findings consistent with this record of race discrimination. A non-exhaustive list of these decisions is below. Most of these cases concern challenges to felon disenfranchisement laws (although one, *Ratliff v. Beale*, is a disgraceful nineteenth century endorsement of Mississippi's intentional race discrimination).

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

Johnson v. Governor of State of Fla., 353 F.3d 1287, 1296 (11th Cir. 2003), *vacated*, 405 F.3d 1214 (11th Cir. 2003) (en banc)

Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E.D. Wash. 2009), *rev'd on other grounds*, 623 F.3d 990 (9th Cir. 2010) (en banc)

Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896)

In short, there is a significant record before Congress demonstrating that criminal disenfranchisement laws are motivated by and cause race discrimination. It is time that our nation reject the shameful history of discrimination that led to the criminal disenfranchisement laws in states across the country and remove the remaining barriers to full and equal access to the ballot. We urge Congress to take a step in that direction by ensuring that all American citizens living the community can vote in federal elections by passing the DRA, and H.R.1 in its entirety.