TESTIMONY OF

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BEFORE THE

HOUSE JUDICIARY COMMITTEE'S

SUBCOMITTEE ON THE

CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

H.R. 3335 – DEMOCRACY RESTORATION ACT

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Testimony of Hans A. von Spakovsky

Thank you for the invitation to testify before the Subcommittee on the subject of felons and the rights of states to prevent convicted criminals from voting.

I am Hans A. von Spakovsky, a Senior Legal Fellow and Manager of the Civil Justice Reform Initiative in the Center for Legal and Judicial Studies at the Heritage Foundation (www.heritage.org). I was a Commissioner on the Federal Election Commission for two years and, of particular relevance to the subject of this hearing, I am a former career Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. I am also a former member of the Board of Advisors of the U.S. Election Assistance Commission as well as the Registration and Election Board of Fulton County, Georgia. I currently serve on the Electoral Board of Fairfax County, Virginia, and on the Virginia Advisory Board to the U.S. Commission on Civil Rights. All of the views and opinions I express in my testimony are my own and should not be construed as representing any official position of the Heritage Foundation or any other organization.

Various consequences attach to a criminal felony conviction. First, there may be (and usually are) prison or jail sentences. Second, there are other direct penalties such as fines, court costs, restitution, and possible probation and parole requirements. Finally, there are various disabilities such as the inability to own a gun, to work as a police officer, to serve in certain elected offices or to serve on a jury. In short, the initial time in prison is not, and has never been, the only way a felon pays his debt to society for breaking the law and endangering his fellow citizens and the public.

H.R. 3335 represents an unconstitutional intrusion into the rights of the states. Congress simply does not have the constitutional authority to force states to restore the voting rights of convicted felons. There are also good public policy reasons why this should not be done. While some states automatically restore the right to vote after a felon has completed all of the terms of his sentence, others require individual applications. States are entitled to make their own decisions on this issue. That includes implementing procedures that ensure that those who break the law to injure or murder their fellow citizens, to steal, or to damage our democracy by committing election crimes or engaging in public corruption like bribery, have paid their debt to society and, even more importantly, have shown that they can be trusted to exercise all of the rights of full citizenship.

H.R. 3335 states that the right of an individual to vote in any federal election cannot "be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election." The definition of "correctional institution or facility" contained in the bill does not include "any residential community treatment center (or similar public or private facility)."

Thus, H.R. 3335 would force all states to immediately restore the ability to vote to convicted felons the moment they are out of prison – even if they are simply out on parole, are in a half-way house or have not completed other requirements of their sentence such as paying restitution to the victims of their crimes or fines and civil penalties imposed on them. In other words, states would be forced to allow criminals to vote before they have even completed the primary terms imposed on them as a punishment by their fellow citizens through our justice system. So at least some individuals who have shown no compunction whatsoever about breaking the law will be given the ability to help make the law.

However, Section 2 of the Fourteenth Amendment specifically provides that states may abridge the right to vote of citizens "for participation in rebellion, or other crime." The Fourteenth Amendment simply recognized a process that goes back to ancient Greece and Rome. The claim that state laws that take away the right of felons to vote are all rooted in racial discrimination is simply historically inaccurate – even prior to the Civil War when many black Americans were slaves and could not vote, a majority of states took away the rights of voters who were convicted of crimes.

It is true that some Southern states tried to use these laws during Reconstruction and afterward to disenfranchise blacks, but those laws have all been changed and amended. The case cannot be made today that such laws are in any way applied in a discriminatory fashion. When they have been, they have been struck down, as the Supreme Court did to Alabama's law in *Hunter v. Underwood*, 471 U.S. 222 (1985). However, that case involved Alabama's 1901 Constitution that disenfranchised persons convicted not just of felonies, but of misdemeanors "involving moral turpitude," a catch all that was used by state officials specifically to target black Alabamians.

Even the "Findings" in this bill do not claim that felon voting laws are administered in a racially discriminatory fashion; only that they have a "disparate impact" because of the higher incarceration rate of certain minorities. In the *Hunter* case, however, the Supreme Court specifically noted that "[p]roof of racially discriminatory intent is required to show a violation of the Equal Protection Clause." No such showing of intentional discrimination can be made with regard to such state laws today and they cannot be held unconstitutional even if they have a "racially disproportionate impact." Criminals lose their right to vote because of their own conscious actions in violating the law, not because of their race.

It should be kept in mind that the Fourteenth Amendment, like the Fifteenth Amendment, was one of the key post-Civil War amendments sponsored and passed by Republicans, the party of Abraham Lincoln and abolition, to help secure the rights of black Americans, including their right to vote. Those same members of Congress deliberately and intentionally protected the right of states to withhold the right to vote from those citizens convicted of serious crimes against their fellow citizens.

Under our Constitution, if Congress is not acting pursuant to a specific grant of power in Article I, it is acting unconstitutionally. The federal government does not have

the inherent power to do whatever it wants – we have a government of limited and enumerated powers. *See U.S. v. Lopez*, 514 U.S. 549 (1995). There simply is no authority in Article I for Congress to force states to allow felons to vote, particularly in light of the language of the Fourteenth Amendment.

In fact, Section 2 of Article I says that voters for members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment provides the same state qualification for voters for members of the Senate. In other words, the qualifications or eligibility requirements that states apply to their residents voting for state legislators must be applied to those same residents voting for members of Congress, which *explicitly* places in the hands of the states the ability to determine those qualifications.

This is confirmed by James Madison and Alexander Hamilton in *The Federalist Papers,* Nos. 52 and 60. James Madison states, for example, in *Federalist* No. 52, that to have left such qualifications open to "the regulation of the Congress" would be improper. States also disqualify children, noncitizens, and the mentally incompetent. States cannot limit voting qualifications based on race or sex because of the explicit prohibitions of the Fifteenth and Nineteenth Amendment – but in contrast, the Fourteenth Amendment specifically allows them to limit those qualifications based on criminal convictions.

Congress is given the authority in Section 4 of Article I to alter the "Times, Places and Manner of holding Elections for Senators and Representatives" but that power does not extend to the "qualifications" of voters. The qualification of a felon to vote cannot even remotely be compared to a regulation governing the time, place or manner of an election.

Congress has even less authority when it comes to presidential elections. Article II, Section 1, provides that states "shall appoint, in such Manner as the Legislature thereof may direct," the electors of the Electoral College. Congress can only determine "the Time of chusing the Electors, and the Day on which they shall give their Votes." Thus, Congress clearly has no authority under these provisions to tell the states that they must allow felons to vote in presidential (or congressional) elections.

The Equal Protection Doctrine of Section 1 of the Fourteenth Amendment also provides Congress with no authority on this issue. The "Findings" in H.R. 3335 state that "equal protection for Americans to vote in Federal elections" require a uniform federal rule for felons. However, the Supreme Court threw out an equal protection challenge to California's felon disenfranchisement law in 1974, concluding that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in §1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by §2 of the Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974).

Finally, *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Supreme Court upheld a federal statute changing the voting age from 21 to 18 just prior to the ratification of the Twenty-Sixth Amendment and the elimination of residency requirements for federal elections also provides no basis for believing that Congress has any constitutional authority for H.R. 3335. The opinion in *Mitchell* was a fractured decision, in which eight Justices *rejected* the argument that Congress had the authority under Article I to make such changes – only Justice Black thought Congress had that inherent authority. Four of the justices based their opinion on the age change on the enforcement clause of the Fourteenth Amendment.

The residency requirement was thrown out based on the Privileges or Immunities Clause of the Fourteenth Amendment because it infringed on an individual's national right as a citizen to travel. While such a residency requirement would discriminate against individuals living in the same state by allowing older residents to vote while preventing newer residents from voting, a disparity in felon voting laws does not discriminate among voters in the same state.

Because the Fourteenth Amendment gives states the right to bar felons from voting, there is no equal protection violation because some states have different rules for when felons recover their right to vote (two states even allow felons to vote while they are in prison). As in the *Richardson* case, it cannot be argued that the Privileges or Immunities Clause in Section 1 can take away from the states a right specifically granted them in Section 2.

Finally, as the Eleventh Circuit said in *Johnson v. Florida*, 405 F.3d 1214 (2005), when it concluded that Section 2 of the Voting Rights Act did not apply to Florida's voting rules for felons, any contrary view would raise "serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution [in the Fourteenth Amendment]." *Johnson* at 1229 ("Congress has expressed its intent to *exclude* felon disenfranchisement provisions from Voting Rights Act scrutiny." *Id.* at 1234).

Even if Congress had the constitutional authority to pass this legislation, which it does not, there are sound public policy reasons why it should not. The loss of civil rights is part of the sanction that our society has determined should be applied to criminals. Many black communities unfortunately suffer from high rates of crime, yet this bill would have a pernicious effect on the ability of law-abiding citizens to reduce crime in their own communities. These laws are overwhelmingly supported by the public, a clear sign that they do not want their ability to influence the decisions made by elected officials on controlling crime diluted by convicted felons or individuals on parole.

While some states automatically restore the rights of felons when they have completed their sentences, other states have more individualized procedures. Virginia, for example, has set up an application process for felons to apply for the restoration of their civil rights, including the right to vote. Virginia's process allows for an individualized review in which the state can determine whether a felon has fully paid his

debt to society and changed his ways. He cannot apply for restoration until he has been released from supervised probation for three years for nonviolent crimes or five years for violent, drug, or election-related crimes. That is perfectly reasonable and common-sense – particularly since a large majority of felons are rearrested and re-incarcerated within a short time after they are released from prison.

In Virginia, the felon must also show that he has paid all court costs, fines, and restitution to their victims. This proposed bill would completely ignore and override this process, particularly at the expense of victims who are still owed restitution, and grant relief on a wholesale basis, without considering whether someone is really entitled to restoration of his rights.

Finally, what is particularly odd about this proposed legislation is the fact that it is limited only to restoring the ability of convicted criminals to vote. The findings in Section 2 of H.R. 3335 state that this legislation will reintegrate "offenders into free society, helping to enhance public safety." The findings also say felon disenfranchisement laws serve "no compelling State interest" for felons "who are living and working in the community." If that is correct, than why does this legislation not propose to restore all of the other civil rights that a convicted criminal loses in many states?

If convicted criminals can now be trusted to exercise the right to vote, as the legislation concludes, and if restoring that ability will help integrate such criminals back into society, than why are their rights to public employment not restored? Many states prohibit felons from working as police officers or school teachers – if they can be trusted with the right to vote, why do the sponsors of this legislation not trust them to work as teachers in our public schools?

State and federal laws also prohibit felons from owning a gun (*see e.g.*, 18 U.S.C. § 922(g)). If public safety will be enhanced by providing felons with the ability to vote as the legislation claims, why does this bill not also amend federal law to allow them to once again own a gun? Are we to believe that they can be trusted to vote but not to own a handgun? Are we to believe that the sponsors of this legislation think that a convicted child molester can be trusted to vote but cannot be trusted to be a teacher in a public school? Are we to believe a convicted drug dealer can be trusted to vote but cannot be trusted to be a police officer? Or is the true motivation here based more on the fact that their vote is important to winning close elections?

The problem with the supporters' narrow focus is obvious. The sponsors apparently trust felons enough to require the automatic restoration of their right to vote, but don't trust them enough to automatically restore their right to own a gun or all of their other civil rights that were taken away when they were convicted of murder or robbery or rape or bribery.

The American people and their freely-elected state representatives must make their own decisions in their own states on when felons should have their civil rights

restored, including the right to vote. The Constitution specifically gives that authority to the states and any legislation passed by Congress taking away that power is unconstitutional and bad public policy.