

## Barred From the Ballot Box

*Rehnquist's legacy still haunts those who finish their prison sentence yet still can't vote.*

By Frank Askin

It is refreshing to see that the unsavory history of our late Chief Justice William Rehnquist is at last getting a fresh examination as a consequence of the release of FBI files in January under the Freedom of Information Act.

It is particularly noteworthy that the files reveal how Rehnquist's friends at the FBI (read J. Edgar Hoover) tried to protect Rehnquist at his 1986 Senate confirmation hearings for chief justice from allegations that as a young Republican lawyer in Phoenix he worked to keep Hispanic voters from casting ballots. The allegation about Rehnquist's conduct is not new, but the fact that the FBI tried to intimidate witnesses into not testifying about it is.

The new revelations show just how courageous former Assistant U.S. Attorney James Brosnahan was when he stepped forward to tell the Senate Judiciary Committee how he confronted Rehnquist at a Phoenix polling place in 1962. Brosnahan testified that he warned Rehnquist that voter intimidation was a violation of federal law.

Noting that Rehnquist had denied the allegations in his own testimony, Brosnahan told the senators, "This does not comport with my recollection of the events I witnessed in 1962, when Mr. Rehnquist served as a challenger."

### NOT ANCIENT HISTORY

But it is important to keep in mind that this is not ancient history. After the Senate went ahead and confirmed him as a justice in 1971, Rehnquist crafted a doctrine that to this day bars some 5 million Americans, disproportionately African-American and Hispanic, from voting.

It was Rehnquist's opinion in 1974, in *Richardson v. Ramirez*, that has allowed 48 of our 50 states and the District of Columbia to bar anyone convicted of a crime from voting. Thirty-five of those states continue the practice even after the offender has completed his sentence.

It was Rehnquist's cynical sleight of hand in *Ramirez* that reinterpreted Section 2 of the 14th Amendment, adopted right after the Civil War. Rehnquist transformed it from a prohibition on states'

barring ex-slaves from voting into an authorization to do so—so long as the states first arrested them and convicted them of a crime.

The language of Section 2 of the 14th Amendment is straightforward. It provides that any state prohibiting ex-slaves from voting would have its congressional representation proportionately reduced. It also had an exception "for participation in rebellion or other crime." Despite the fact that practically no blacks were permitted to vote in the former Confederate states for the next 100 years, no state ever lost a single seat in Congress.

But in *Ramirez*, Rehnquist found a use for Section 2. He ruled that it was an affirmative authorization for the states to disfranchise blacks—and anyone else—so long as the states first convicted them of a crime. Thus, he said, the proviso in Section 2, intended to reduce a state's representation in Congress, also provided the states an exception from Section 1 of the 14th Amendment, which forbids any state from denying any group the equal protection of the laws.

As Justice Thurgood Marshall said in dissent in *Ramirez*, this was in direct disregard of the "historical purpose" of the Section 2 proviso, which was to "put Southern States to a choice—enfranchise Negro voters or lose congressional representation."

### VOTING RIGHTS

Even after Congress in 1982 adopted amendments to the federal Voting Rights Act to prohibit states from enforcing standards or practices that have the effect of making it more difficult for racial minority groups to elect representatives of their choice, federal courts have taken the position that to strike down felon-disfranchisement laws would deprive the states of a right granted them by Section 2 of the 14th Amendment.

Courts conclude this even when challengers can demonstrate that the vastly disparate impact of disfranchisement laws is an artifact of racial profiling and other discriminatory applications of the criminal laws.

The U.S. Courts of Appeals for the 2nd Circuit and the 11th Circuit have ruled *en banc* that felon disfranchisement does not violate the Voting Rights Act. The 9th Circuit suggested otherwise and remanded the issue to a U.S. district court in Seattle, but the district court has now dismissed the case and ruled against the plaintiffs seeking voting

rights for felons. A similar challenge brought under the New Jersey Constitution was dismissed, and the state supreme court denied review. That New Jersey decision has now been submitted to the Inter-American Commission on Human Rights, a human-rights body of the Organization of American States, on the basis that the ruling violates the OAS' *Declaration of the Rights and Duties of Man*.

Thus, as a consequence of the *Ramirez* decision, more than 5 million Americans are currently disfranchised as a result of a criminal conviction. Some 60 percent of them have completed their prison sentences and are living among us in the community.

At least 2 million of the disfranchised are black. Latest available figures show that 13 percent of black males in the country are thus denied the right to vote, some seven times the national average. Though exact figures on Hispanic disfranchisement are hard to come by, it is clear that the rate is far greater than that for non-Hispanic whites.

Because the *Ramirez* decision leaves the issue of felon disfranchisement up to each state, the figures vary greatly from state to state. In the state of Florida, an estimated 960,000 ex-offenders, the great majority of whom were persons of color, were unable to vote in the 2004 presidential election.

In contrast, though it is impossible to prove any racial motivation behind these state laws, the two states that allow even incarcerated prisoners to vote are Maine and Vermont, whose racial demographics are quite different from states with the harshest disfranchisement laws.

## DRUG CRIMES

The impact that racial profiling has on the disparate impact of these laws is vividly illustrated by the so-called War on

Drugs, which has greatly escalated over the past 20 years.

In New Jersey, for example, the percentage of the prison population incarcerated for drug offenses rose from 12 percent to 34 percent between 1982 and 2001, while the percentage of inmates who were non-Hispanic whites dropped from 32 percent to 18 percent.

These figures are not surprising in light of everything we have learned in recent years about police profiling. Unlike arrests for crimes with identifiable victims (such as murder, rape, and assault), drug arrests typically result from proactive police investigation. So who is investigated, arrested, prosecuted, and convicted (and thus disfranchised) depends largely on where police look and whom they look at.

The natural tendency of police to target vulnerable individuals and communities was augmented by the Comprehensive Drug Reform Act of 1986, which led to the targeting of inner-city neighborhoods where the population is overwhelmingly minority.

Thus, even from the grave, William Rehnquist, just as he did in his early political career in Phoenix, continues to bar the election booth to millions of minority voters.

And the vast majority of those voters would probably vote against his favored political party. One might almost say that Rehnquist earned those famous gold stripes from the Republican National Committee.

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