9th Circuit appeals bench would allow felons to vote

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Washington's longtime constitutional ban on voting by felons has been tossed out by the 9th U.S. Circuit Court of Appeals. The state is expected to appeal.

The surprise ruling contradicts holdings in three other circuits, with cases out of New York, Massachusetts and Florida, and it may well be up to the U.S. Supreme Court to settle the conflict. If Tuesday's ruling were the last word on the case, it would allow inmates currently behind bars to vote in Washington. The ruling could also be the basis of litigation in the eight other states in the 9th Circuit – Oregon, California, Idaho, Nevada, Montana, Alaska, Arizona, Hawaii, plus Guam.

Secretary of State Sam Reed, Washington's chief elections officer, said, "We were quite surprised at today's 2-1 ruling by the 9th Circuit, and we would expect to appeal the decision. We certainly support racial equality and efforts to make our criminal justice system free of bias. But we also support our state constitutional ban on voting by felons who are under Department of Corrections supervision.

"We believe that the loss of voting rights is an appropriate and reasonable sanction for society to demand of felons while they are incarcerated or on community supervision. Most states have this sensible policy. Once inmates satisfy their prison sentence and community supervision, our Legislature has recently provided that they may apply to have their voting rights restored as part of reintegrating back into the community.

"We are hopeful that this longstanding policy will be upheld as this case is appealed further. We look forward to the courts giving some finality to this question, which has been in litigation since 1996."

The case was originally brought nearly 14 years ago in U.S. District Court in Eastern Washington by Muhammad Shabazz Farrakhan and three other black inmates, and by a Native American and a Latino inmate. The inmates said minorities are disproportionately prosecuted and sentenced to prison, and that their automatic disenfranchisement violates the federal Voting Rights Act.

The Appeals bench concurred with the inmates that the state's criminal justice system is "infected" with racial discrimination and that the challengers don't have to prove that that it is intentional or racially motivated discrimination. The court said that "based on uncontroverted facts," it would rely on academic research that showed Washington's African Americans were over nine times more likely to be in prison than Caucasians, even though the ratio of black-to-white arrest for violent crimes was less than 4:1. Another study showed that Native Americans were twice as likely to be searched by state troopers than whites, blacks more than 70 percent more likely to be searched and Latinos more than 50 percent more likely. Other studies were cited.

The challengers didn't assert that the felon disenfranchisement law was enacted with intent to discriminate, but said that when the law is applied in the context of the criminal justice system, it is more likely for minorities to lose their voting rights. That's illegal, they contended.

The court held that the Voting Rights Act, adopted by Congress in 1965 for the purpose of eliminating racial discrimination in voting, does not permit disenfranchising voters who are behind bars when the criminal justice system is skewed toward greater incarceration of minorities. The judges also said it is irrelevant that the state Legislature last year approved a new law that takes away a felon's voting rights only while in the direct custody of the Department of Corrections. Previously, voting rights were restored only after restitution and other costs were repaid, a matter of years for some ex-cons.

Three other circuits, the First, Second and Eleventh, have reached the opposite conclusion about felon voting. The decision in the First, out of Massachusetts, was in 2009; the 2nd Circuit decision, in a New York case, was in 2006; and the 11th Circuit, out of Florida, was in 2005.

In a strongly worded dissent, Judge M. Margaret McKeown said her colleagues have "charted territory that none of our sister circuits have dared to explore." At the least, the court should have remanded the case for further fact-finding on some of the key points, she wrote.
State Elections Director Nick Handy said the conflicting opinions makes it likely that the U.S. Supreme Court will be asked to take the Farrakhan case on appeal.

The 9th Circuit opinion was written by Judge A. Wallace Tashima and signed by himself and Stephen Reinhardt.
Deputy Solicitor General Jeff Even of the Attorney General's office said attorneys will review the lengthy opinion and consider the next steps. The state could ask the full 9th Circuit, rather than a three-judge panel, to consider the case. That would involve a hearing before 11 judges. Another option would be to ask the Supreme Court to hear the case, he confirmed.

The case has had a very long shelf life. It was originally filed in Spokane in 1996. The District Court upheld the state's disenfranchisement law. That was appealed to the 9th Circuit, which reversed and sent it back to the district court for further consideration. The court's subsequent ruling, along in favor of the state, was appealed a second time to the 9th Circuit. Last year, the state Legislature, at Reed's request, amended the law to allow restoration of voting rights after an ex-convict completes his or her prison sentence and community supervision. Previously, an ex-convict also would have to satisfy all outstanding financial obligations, including court costs and restitution, before applying for restoration of voting rights.

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