



Report of the Attorney General's
Rights Restoration Advisory Committee
Alternatives to a Constitutional Amendment

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The Constitution of Virginia declares that “[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.”¹ The policy choice by Virginians through their Constitution to deny the right to vote to persons convicted of certain criminal offenses has been in place in one form or another since the Constitution of 1830.² Questions of law have arisen in recent public policy discussions regarding the manner and extent to which the restoration of civil rights for persons convicted of felonies may be accomplished in Virginia. Attorney General Kenneth T. Cuccinelli, II appointed an advisory committee to consider these legal questions.

The Attorney General’s Rights Restoration Advisory Committee examined Article II, § 1 as well as the constitutional provision setting forth the Governor’s clemency powers.³ The committee also considered alternatives that may be available within the existing framework of the Constitution of Virginia to restore the civil rights of individuals who, after having been convicted of certain nonviolent felonies, have completed their sentences and paid all fines and court-ordered restitution, if any.⁴

The committee reached the following conclusions:

1. The General Assembly cannot establish by statute a process for the automatic restoration of rights.
2. The Governor cannot institute by executive order an automatic, self-executing restoration of rights for all convicted felons in the Commonwealth of Virginia.
3. The Governor, however, may exercise his discretionary clemency power in a more expansive manner to restore civil rights on an individualized basis.
4. The General Assembly through the appropriation act may facilitate a permanent function under the Office of the Governor to assist the Governor in the exercise of his discretionary clemency power so that all those who apply can be given timely consideration to have their civil rights restored.
5. The Governor in the exercise of his discretionary clemency power may decide the policy details of the process his Office will use for the restoration of civil rights within the existing constitutional framework.

The Governor possesses the authority to consider new approaches to the restoration of rights that could include proactive outreach and educational efforts addressed to those Virginians who have returned to the community after felony convictions but have not yet applied to have their civil rights restored. The details for such new approaches would be within the discretion of the Governor under his clemency power, so long as Governor’s action to remove political disabilities continues to be made on an individualized basis.

¹ VA. CONST. art. II, § 1.

² VA. CONST. of 1830, art. III, § 14 (disqualifying from voting “any person convicted of any infamous offence”). See I A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 344-47 (1974).

³ VA. CONST. art. V, § 12 (“The Governor shall have power ... to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution”).

⁴ This report does not address whether the restoration of rights process utilized by the Governor should be revised as that is a policy question reserved to the Governor in the exercise of his discretionary clemency power.

1. The General Assembly cannot establish by statute a process for the automatic restoration of rights.

In 1999, an official advisory opinion of the Attorney General concluded that the General Assembly is not an “other appropriate authority” within the meaning of Article II, § 1 empowered to restore the voting rights of felons in Virginia.⁵ The General Assembly in 1969 added to the proposed Constitution later presented to the voters for adoption the phrase “or other appropriate authority” to “make it clear that civil rights may be restored for felons by ‘other appropriate authority’ to include President, other governors, pardoning boards, etc.”⁶ In 1974, an opinion of the Attorney General construed the phrase to “include the President, other Governors, and pardoning boards which have such power.”⁷ Because the clemency power in Virginia is vested in the Governor, not the General Assembly, the legislature does not possess an independent power to restore civil rights to persons convicted of felonies other than through the process to amend the Virginia Constitution.⁸

2. The Governor cannot institute by executive order an automatic, self-executing restoration of rights for all convicted felons in the Commonwealth of Virginia.

When a Governor issues an executive order, he does so based upon the authority inherent in the constitutional duty of a Governor to “take care that the laws be faithfully executed.”⁹ The issuance of an executive order generally is considered appropriate whenever:

- (i) The Code of Virginia expressly confers that authority upon the Governor;¹⁰
- (ii) There is a genuine emergency that requires the Governor to issue an order to abate a danger to the public regardless of the absence of explicit authority;¹¹ or
- (iii) The executive order merely is administrative in nature, as opposed to legislative.¹²

⁵ 1999 Op. Va. Att’y Gen. 48, 49-50. *See also* 1999 Op. Va. Att’y Gen. 50, 52 (circuit courts are not an “other appropriate authority” under Article II, § 1 “and may not be imbued with such authority either legislatively or through an executive order issued by the Governor.”).

⁶ *See* PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 104 (Ex. Sess. 1969). *See also* PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 159 (“civil rights may be restored for felons by other appropriate authority which, of course, could include the President or Governor, pardoning boards, and so forth”) (Ex. Sess. 1969).

⁷ 1974-75 Op. Va. Att’y Gen. 197, 198.

⁸ *See* VA. CONST. art. XII, § 1. Pursuit of a constitutional amendment is the path that would afford policy makers the greatest flexibility to fashion a change in how civil rights are restored in Virginia.

⁹ VA. CONST. art. V, § 7.

¹⁰ *See Boyd v. Commonwealth*, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975) (Governor acted within the limits of authority granted to him by Emergency Services and Disaster Law of 1973 when he issued executive order changing speed limit on grounds that a fuel shortage was a “disaster” within the meaning of the act). *See also* 1990 Op. Va. Att’y Gen. 1, 3; 1983-84 Op. Va. Att’y Gen. 180, 182; 1977-78 Op. Va. Att’y Gen. 5, 7-8.

¹¹ 1990 Op. Va. Att’y Gen. at 3.

Altering the public policy of the Commonwealth as regards the disenfranchisement of persons convicted of felonies clearly would be a legislative act, not an administrative act.¹³ While the Constitution of Virginia does confer on the Governor the power “to remove political disabilities consequent upon conviction for offenses,” a court likely would find it difficult to sustain a Governor’s exercise of this clemency power in so sweeping a manner that the Constitution’s general policy of disenfranchisement of felons is voided.¹⁴

The Governor’s power to remove political disabilities is a matter left to his discretion and, unlike his other clemency powers, is not subject to a requirement to report to the General Assembly on the particulars for every exercise of the power and the reasons for exercising the same.¹⁵ However, “[i]t is ... an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.”¹⁶ To harmonize and give effect to both Article II, § 1 and Article V, § 12, the Governor’s power to remove political disabilities more properly is read to be exercisable on an individualized basis. After all, Article II, § 1 provides that “[n]o *person* who has been convicted of a felony shall be qualified to vote unless *his* civil rights have been restored by the Governor or other appropriate authority.”¹⁷

3. The Governor, however, may exercise his discretionary clemency power in a more expansive manner to restore civil rights on an individualized basis.

As noted above, the Governor’s discretionary power to remove political disabilities is not constrained by any requirement to report on the particulars for every exercise of the power and the reasons for exercising the same.¹⁸ The Constitution accords to the Governor considerable latitude in how he may exercise this power to remove political disabilities so long as he makes some form of individualized consideration and individualized grant of clemency.

¹² *Id.*

¹³ See *Whitehead v. H and C Dev. Corp.*, 204 Va. 144, 150, 129 S.E.2d 691, 695 (1963) (“[S]ubjects of a permanent or general character are to be considered legislative; while those which are temporary in operation and effect are administrative. Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power”).

¹⁴ See *Jackson v. Hodges*, 176 Va. 89, 93-94, 10 S.E.2d 566, 567 (1940) (Governor had no authority to increase the salary of the Secretary of the Commonwealth by executive order as it violated a constitutional provision that salaries of officers of the executive department were to be fixed by law and not increased or diminished during term of office). See also 2006 Op. Va. Att’y Gen. 36, 38-41 (an executive order that changes public policy on protected employment classes is beyond the scope of executive authority); 1941-42 Op. Va. Att’y Gen. 75 (Governor does not have the power to issue and enforce a proclamation requiring the observance of daylight savings time as that involves the exercise of a legislative, not executive, function).

¹⁵ VA. CONST. art. V, § 12. See *In re Phillips*, 265 Va. 81, 87-88, 574 S.E.2d 270, 273 (2003) (“the power to remove the felon’s political disabilities remains vested solely in the Governor, who may grant or deny any request without explanation, and there is no right of appeal from the Governor’s decision”).

¹⁶ See *Pierce v. Dennis*, 205 Va. 478, 482, 138 S.E.2d 6, 9 (1964) (quoting *City of Portsmouth v. Weiss*, 145 Va. 94, 107, 133 S.E. 781, 785 (1926)).

¹⁷ VA. CONST. art. II, § 1 (emphasis added).

¹⁸ See authorities cited *supra* note 15.

4. The General Assembly through the appropriation act may facilitate a permanent function under the Office of the Governor to assist the Governor in the exercise of his discretionary clemency power so that all those who apply can be given timely consideration to have their civil rights restored.

Governor Robert F. McDonnell instituted a practice in his administration that complete applications for the restoration of civil rights received by his office are to be acted upon within 60 days. By making restoration of rights a priority, Governor McDonnell eliminated the backlog of pending applications that he inherited from his predecessor. As of April 12, 2013, Governor McDonnell had removed the political disabilities of 4,659 individuals, the highest number of any Governor in the past 70 years. The Secretary of the Commonwealth currently has two employees assigned to clemency matters, and she indicates that this staffing level is appropriate to process in a timely manner the applications received under the currently structured program.

The number of Virginians convicted of felonies who apply to have their rights restored is a relatively small percentage of the total number of persons with political disabilities by reason of felony convictions. Further refinements to the Governor's restoration of rights program to reach a broader number of persons may necessitate additional resources, and the General Assembly may exercise its legislative power to provide such resources through the appropriation act. Additionally, state personnel resources might be augmented by volunteers coordinated through, for example, the Virginia State Bar and faith-based organizations.

5. The Governor in the exercise of his discretionary clemency power may decide the policy details of the process his Office will use for the restoration of civil rights within the existing constitutional framework.

Individuals are more likely to take the initiative to avail themselves of a process if (i) notice of the process is given to them,¹⁹ (ii) the process is designed so that it is easy to use, and (iii) there is a level of confidence that the process will be uniform in its application as regards like situated persons. Whether to revise further the restoration of rights process utilized by the Office of the Governor, and what form that revised process might take, are policy questions reserved to the Governor in the exercise of his discretionary clemency power. New approaches to the restoration of rights within the scope of the Governor's authority could include proactive outreach and educational efforts addressed to those Virginians who have returned to the community after felony convictions but have not yet applied to have their civil rights restored. The details for such new approaches would be within the discretion of the Governor under his clemency power, so long as Governor's action to remove political disabilities continues to be made on an individualized basis.

Alternative Approaches Discussed

Since 1982, attempts to amend the Virginia Constitution on the subject of the restoration of rights have proven unsuccessful. The committee considered a number of alternative approaches to the subject

¹⁹ See VA. CODE ANN. § 53.1-231.1 (2009) (as recommended by the State Crime Commission in its 2003 report on the Restoration of Civil Rights, this section requires the Director of the Department of Corrections to notify felons on completion of sentence, period of probation or parole, or suspension of sentence of the processes available for the restoration of civil rights and voting rights).

that would not require a constitutional amendment. The committee discussed one alternative approach—admittedly innovative and untried in Virginia—in which the General Assembly would designate within the executive branch an agency to spearhead the rights restoration process on behalf of the Governor. This could be implemented by assigning the duties to an existing state agency. The agency would be led by a director appointed by the Governor, subject to confirmation by the General Assembly to give the legislative branch an additional role in the process. Guided by policies articulated by the Governor, this agency would do what is not practical now: lead a statewide, proactive outreach and educational effort to encourage individuals to apply for a restoration of their civil rights. Indeed, this type of executive agency approach would help ensure continuity and also make it easier to coordinate the energies of the many faith-based and other community groups with a proven interest in assisting deserving individuals who wish to become fully contributing members of society. This type of executive approach should be able to reach many who may feel they are not in a position to get a Governor’s attention. After processing applications received, this agency could formulate recommendations for the Governor who would make the decision on whether to remove political disabilities for each individual applicant. On balance, the committee found this alternative approach to be an intriguing idea with a great deal of practical appeal.

The Committee also discussed a second alternative approach that would augment the staff of the Secretary of the Commonwealth to handle the envisioned outreach and educational effort. The benefit of keeping the restoration of rights process with the Secretary of the Commonwealth is that this office also currently provides staffing for the Governor on other clemency matters involving grants of reprieves and pardons, and remissions of fines and penalties.²⁰

²⁰ See VA. CODE ANN. § 2.2-402(A) (Supp. 2012) (among the statutory duties of the Secretary of the Commonwealth is to “render to the Governor, in the dispatch of executive business, such services as he requires”).