

99-098

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS) — EXECUTIVE.

Circuit courts of Commonwealth are not "other appropriate authority" entitled to restore felon's civil rights. Restoration of such rights within Commonwealth is linked to clemency power reserved exclusively to Governor. Circuit courts may not be imbued with authority to restore civil rights either by act of General Assembly or by executive order of Governor.

The Honorable Mary Margaret Whipple
Member, Senate of Virginia
November 15, 1999

You inquire on behalf of a joint subcommittee of the General Assembly¹ regarding whether the circuit courts of the Commonwealth constitute an "other appropriate authority" entitled pursuant to Article II, § 1 of the Constitution of Virginia (1971) to restore the civil rights of felons in Virginia. Article II, § 1 provides:

No 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.

You advise that the subcommittee has reviewed a 1999 opinion of the Attorney General affirming the conclusions in a 1974 opinion that "[a] felon's civil rights may be restored by the Governor or any "other appropriate authority," which would include the President of the United States, other governors, and pardoning boards with such authority."² You note that the subcommittee seeks additional advice as a result of its review of the process involved in petitioning the Governor for restoration of civil rights and the number of requests the Governor's office may experience due to the number of felons who may submit such petitions.

The term "civil rights" when used in this context "does not involve the connotations that presently attach to the term, namely the freedom from discrimination and prejudice,"³ but refers to "deprivations result[ing] from felonious criminal activity."⁴ Thus, "certain basic rights are lost automatically upon conviction of a felony. The loss of these rights arises by operation of law and is a simple consequence of conviction ... includ[ing] the loss of such rights as suffrage."⁵ Indeed, the right to vote "is the right most commonly denied the convicted felon."⁶

The restoration of civil rights is accomplished through varying methods. "In some jurisdictions the restoration of civil rights is simple and automatic and is accomplished as a matter of law."⁷ In such jurisdictions, "statutes provide that the rights that were lost when the sentence was imposed are restored when the sentence is completed."⁸ In other jurisdictions "civil rights lost upon conviction or sentence are subject to restoration at the discretion of an administrative agency, usually a pardon or parole board, or the court of conviction acting administratively."⁹ However, "[t]he best known method by which the rights of convicted persons are restored is the exercise of clemency by the head of a state."¹⁰ The term "clemency" refers to "various forms of leniency extended by branches of the government, most often the executive, to remit the punishment of those who have violated state or federal laws."¹¹ It is this method which is reflected in Article II, § 1.

Article II, § 1 mandates the automatic loss of voting rights by persons convicted of a felony, the origin of which first appeared in the 1830 Constitution.¹² Similarly, the authority of the Governor to restore the right of suffrage is long-standing and historically rooted.¹³ "The phrase 'or other appropriate authority' was added to the Constitution in 1971 ... to make clear that civil rights may

be restored for felons by the President of the United States, other governors, or pardoning boards with such authority."¹⁴ Consistent with this intention, prior opinions of the Attorney General conclude that "other appropriate authority" refers to the appropriate authority of other jurisdictions to restore a felon's civil rights and includes the President,¹⁵ governors of other states,¹⁶ and other states' laws entitling statutorily classified individuals to receive automatic restoration of their rights.¹⁷

In accord with these opinions, I have concluded that the General Assembly is not an "other appropriate authority."¹⁸ Thus, because the General Assembly is not an "other appropriate authority," it is also my opinion that the General Assembly is not authorized to enact a statute implementing a process for restoring the voting rights of felons. Similarly, it is my opinion that the circuit courts of the Commonwealth are not an "other appropriate authority" coming within the purview of Article II, § 1. The restriction contained in § 1 links the restoration of a felon's voting rights with the clemency power of the Governor of this Commonwealth. This constitutional limitation compels the conclusion that the restoration of a felon's voting rights within this Commonwealth is reserved exclusively to the Governor.

You also ask whether the Governor may, by executive order, authorize circuit courts to restore a felon's civil rights.

Article V, § 1 provides that "[t]he chief executive power of the Commonwealth shall be vested in a Governor." Article V, § 7 further provides that "[t]he Governor shall take care that the laws be faithfully executed."

Prior opinions of the Attorney General note the inherent authority of a Governor to issue executive orders.¹⁹ Examples of situations in which executive orders are appropriate include (1) when the Virginia Code expressly confers such authority on the Governor; (2) when there is a genuine emergency requiring the Governor to issue an order; and (3) when the order is administrative, rather than legislative, in nature.²⁰ Thus, the Governor may exercise his power as "chief executive" to ensure that "[the] laws be faithfully executed" [a]s long as that exercise of power does not exceed the authority "bestowed upon him by the constitution and the laws."²¹ Because I conclude that the circuit courts of the Commonwealth are not an "other appropriate authority" under Article II, § 1, it is my opinion that an executive order in which the restoration of a felon's civil rights is transferred to circuit courts would contravene such constitutional limitation.²²

Based on the above, it is my opinion that the circuit courts of the Commonwealth are not an "other appropriate authority" as that phrase is used in Article II, § 1 of the Constitution and may not be imbued with such authority either legislatively or through an executive order issued by the Governor.

¹ See 1999 Va. Acts H.J. Res. 605, at 2828 (directing Joint Subcommittee Studying Election Laws Innovations, Improved Methods to Inform Voters About Ballot Issues and Candidates, and Developments in Virginia's Voter Registration and Election Processes to study voting rights of felons in Virginia).

² Op. to Hon. Emmett W. Hanger Jr., Mbr., Va. Sen., at 2 (Aug. 3, 1999) (quoting 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 345-46 (1974) (footnote omitted)) *aff'g* 1974-1975 Op. Va. Att'y Gen. 197, 198.

³ Joseph H. Kelley, Notes, *Restoration of Deprived Rights*, 10 Wm. & Mary L. Rev. 924, 925 (1969).

⁴ *Id.*

⁵*Id.* at 925-26.

⁶Howard E. Hill, Comments, *Rights of the Convicted Felon on Parole*, 13 U. Rich. L. Rev. 367, 367 (1979).

⁷See Kelley, *supra* note 3, at 930.

⁸*Id.* at 931.

⁹*Id.* (footnote omitted).

¹⁰*Id.* at 930.

¹¹James N. Jorgensen, Clemency and Pardons Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. Rich. L. Rev. 345, 347-48 (1993).

¹²See 1 Howard, *supra* note 2, at 344.

¹³See art. III, § 1, art. IV, § 5 (1887); art. II, § 23, art. V, § 73 (1902).

¹⁴1976-1977 Op. Va. Att'y Gen. 201, 202.

¹⁵See *id.* at 202 (regarding restoration of voting rights of person convicted of federal felony).

¹⁶See 1974-1975 Op. Va. Att'y Gen., *supra* note 2, at 198.

¹⁷See 1979-1980 Op. Va. Att'y Gen. 153, 153-54.

¹⁸Op. to Hon. Emmett W. Hanger Jr., *supra* note 2, at 2.

¹⁹See Op. Va. Att'y Gen.: 1990 at 1, 3; 1945-1946 at 144.

²⁰1990 Op. Va. Att'y Gen., *supra*, at 3.

²¹*Id.* at 4 (quoting art. V, §§ 1, 7; *Lewis v. Whittle*, 77 Va. 415, 420 (1883), respectively).

²²Note, however, that no constitutional provision is necessary to authorize the "creation of an advisory board whose counsel the Governor could seek in deciding whether to exercise his powers of executive clemency." Walter A. McFarlane, Clemency and Pardons Symposium, *The Clemency Process in Virginia*, 27 U. Rich. L. Rev. 241, 244 (1993) (quoting 2 Howard, *supra* note 2, at 644).