MEMORANDUM

BY ELECTRONIC MAIL

TO: Edward A. Hailes

FROM: Christopher Handman
Stephanie Gold
Martin Price

Date: October 27, 2005

RE: Virginia Restoration of Voting Rights

INTRODUCTION

You asked us to evaluate whether the Governor of Virginia, acting by Executive Order, has the authority to grant an across-the-board restoration of voting rights to all convicted felons in the Commonwealth of Virginia. As explained below, the answer to that question is yes.

The Virginia Constitution vests the Governor with plenary power to "restore political disabilities" to any and all convicted felons. Va. Const. art. V, § 12. How the Governor chooses to go about doing that—whether through an individualized application process or an immediate, blanket Executive Order—is for the Governor alone to decide (at least until the legislature affirmatively enacts a statute saying otherwise). Although the Virginia legislature, from time to time, has prescribed narrow procedural steps to streamline the restoration process, none of those statutes purport to limit or dictate how the Governor may exercise his broad constitutional power to "restore political disabilities." Id. Finally, not only would an across-the-board restoration be consistent with the constitutional and statutory framework in Virginia, but it would also promote important democratic principles.

DISCUSSION

1. Under The Virginia Constitution, the Governor Has Power To Restore Political Disabilities To Persons Convicted Of A Crime.

Under Article II, Section 1 of the Virginia Constitution, only the Governor "or other appropriate authority" has the power to restore the civil rights of a person who has been convicted of a felony. See Va. Const. art. II, § 1 ("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."). 1/ By the same token, Article V, Section 12 vests the Governor with sole and exclusive power to remove political disabilities:

> The Governor shall have the power to remit fines and penalties, under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment.

See id. art. V, § 12.

To be sure, this broad grant of power does impose narrow limits on how the Governor may remove some political disabilities. For example,

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1/ The phrase "or other appropriate authority" was added to the Virginia Constitution in 1971. In several cases, the Virginia General Assembly has questioned whether that amendment extends power to restore voting right to the legislature and/or the courts. The Attorney General's office has repeatedly concluded that "the phrase 'or other appropriate authority' was added 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" but not the General Assembly or the courts. See 1999 WL 1211275, at *2 (Va. A.G., Nov. 15, 1999); see also 1999 WL 1211285 (Va. A.G., Aug. 3, 1999).

Section 12 broadly grants the Governor authority "to remit fines and penalties," but then provides that that power may be qualified by "such rules and regulations as may be prescribed by law." Id. 2/ In contrast to this carefully crafted limitation on the Governor's executive power, Section 12 imposes no limitation at all on the Governor's authority "to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment." Id. The Framers of Section 12 obviously knew how to constrain the Governor's otherwise plenary clemency and restoration powers when they wanted to. That they chose to do so for certain political disabilities but not others reflects a purposeful distinction. See Jackson v. Fidelity & Deposit Co. of Md., 269 Va. 303, 312, 608 S.E.2d 901, 906 (2005); Gaffney v. Gaffney, 45 Va. App. 655, 667, 613 S.E.2d 471, 477 (2005). Based on the Constitution's plain language and structure, the Governor enjoys unfettered discretion to remove political disabilities.

Similarly, the Constitution expressly provides that the Governor "shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, or reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting or commuting the same." Id. At first blush, this mandate to offer "reasons for remitting, granting or commuting" suggests that the Governor might not be able to exercise those powers by issuing an across-the-board Executive Order. After all, by requiring the Governor to supply the

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2/ In Wilkerson v. Allen, 64 Va. 10 (1873), for example, the Virginia Supreme Court upheld a statute limiting the Governor's authority to "remit, in whole of in part, any fine or amercement assessed or imposed by any court of record, court martial or other authority having jurisdiction to assess the same, except as follows: Whenever judgment has been rendered against any person for contempt of court, other than for non-performance of, or disobedience to some order, decree or judgment, the Governor shall have the power to pardon the offense and remit the punishment, whether corporeal or pecuniary, either in whole or in part." The petitioner in Wilkerson was indicted and assessed a fine of $500. After receiving a full pardon, petitioner was incarcerated until he could pay the fine. Petitioner asserted that the pardon was intended to cover the fine. The Court disagreed, stating, "[the Governor] did not attempt to remit (as he had no power to remit) the fine."

legislature with "reasons" for why he acted in "every case of fine or penalty remitted, or reprieve or pardon granted," Section 12 of the Constitution seems to contemplate some sort of individualized inquiry. But be that as it may, Section 12 does not extend this same reporting requirement to the Governor's power to restore political disabilities. Again, that purposeful differentiation is crucial. It underscores that nothing in the Constitution limits how the Governor may exercise that core Executive power.

Although Virginia courts have never squarely addressed the question this memo analyzes, their decisions have consistently recognized the expansive authority the Governor enjoys when it comes to clemency and restoring political rights. Thus, the Virginia Supreme Court has made crystal clear that the Governor has exclusive authority to restore political disabilities. See In re Phillips, 265 Va. 81, 574 S.E.2d 270 (2003); see also United States v. Neely, -- F.3d --, 2003 U.S. App. LEXIS 8162 (4th Cir. Apr. 30, 2003) ("To regain his rights, a felon must receive a pardon from the governor.") (unpublished). And in the few cases that have recognized narrow limits on the Governor's power, the courts all pointed to an express constitutional grant to the legislature. *See, e.g., Jackson v. Hodges,* 176 Va. 89 (1940) (rejecting Governor's attempt to raise salary of Secretary of Commonwealth where state constitution expressly set yearly salary). As we explained above, the Virginia Constitution in no way limits the Governor's authority to restore political rights, nor does it assign the General Assembly any role in that process or power to interfere with that plenary Executive power.

To be clear: Virginia law does recognize a limited role for the courts and the legislature to play when it comes to restoring voting rights. But it is a purely procedural one; it does not grant them any power to meddle substantively with the Governor's power to restore rights as he sees fit. Thus, for example, in In re Phillips, the Virginia Supreme Court considered the constitutionality of a state statute that allows a convicted felon to petition the Circuit Court for a declaration that he or she has satisfied the terms of his or her conviction and is otherwise eligible for restoration of voting rights. See 265 Va. at 83. The lower court held that the provision violated the executive's exclusive authority over restoration of political rights. The Supreme Court reversed. But in doing so, the Court made clear that the legislature, by merely establishing a procedure for a convicted felon to

ascertain eligibility for restoration of rights, in no way interfered with the exclusive and plenary authority of the Governor to ultimately grant or deny petitions. As the Court emphasized, whatever else the General Assembly may do, "the decision whether to remove a petitioner's political disabilities still rests solely in the Governor, who may grant or deny any request without explanation." Id. at 85 (emphasis added). That same unqualified power to "grant or deny any request without explanation" that the Supreme Court recognized in Phillips strongly supports the Governor's power to issue an Executive Order granting an across-the-board restoration of rights.

The Attorney General has similarly opined that the "restoration of a felon's voting rights within this Commonwealth is reserved exclusively to the Governor," and that the General Assembly is not authorized to enact a statute implementing a process for restoring the voting rights of felons." 1999 WL 1211275 (Va. A.G. Nov. 15, 1999) at *2 (emphasis added). In fact, on two occasions, the Attorney General specifically disagreed with members of the General Assembly who argued that the 1971 amendment to add the phrase "or other appropriate authority," permitted the legislature and/or the courts to intercede in the restoration process. Id. at *2 (concluding that circuit court is not "other appropriate entity" entitled to restore felon's civil rights and may not be imbued with authority to restore civil rights either by act of the General Assembly or by executive order of the Governor); 1999 WL 121185 (Va. A.G., Aug. 3, 1999) (concluding that General Assembly is not "other appropriate authority" authorized to restore felon's voting rights).

The Governor's broad power to restore voting rights is part of and consistent with the Governor's broad clemency power. Judicial recognition of the Governor's exclusive authority over restoration of voting rights is consistent with judicial recognition of the Governor's general clemency powers. *See Graham v. Angelone*, 73 F. Supp.2d 629 (E.D. Va. 1999) (refusing to hear review of denial of clemency petition because "Virginia does not place any limitations or conditions on the 'power' vested in Governor to commute capital punishment sentences"); Moffett v. Saunders, 170 Va. 153 (1938) ("The power to the governor as applies to the conditional pardon now under consideration, is not restricted by any constitutional or statutory provision . . . To hold otherwise, would place a restriction or limitation upon the chief executive of the State in the exercise of clemency,

which has not been done by congressional mandate or an act of the legislature.").

In addition to pronouncing the Governor's exclusive power to grant clemency and pardons, courts have not placed any limitations on the manner in which the Governor exercises that power. Blair v. Commonwealth, 66 Va. 850 (1874) (upholding Governor's grant of clemency before a conviction was entered); Lee v. Murphy, 69 Va. 789 (1872) ("The power of granting conditional pardons must reside somewhere; and by common consent of all the States it is vested in the executive department."). The bounds of that authority were tested in Moffett, where the petitioner was granted clemency by the Governor with the condition that he not commit a second felony. After petitioner's original sentence would have expired, he was convicted again of a felony and received an enhanced punishment as a second-time offender. On review of the petitioner's claim that the condition placed on him was invalid or had otherwise "expired" when his original sentence would have ended, the Supreme Court of Virginia held that the Governor may revoke a pardon, even if the condition of the pardon occurred after the period in which the original sentence would have expired. In proclaiming the unbound authority of the Governor to place conditions on grants of clemency, the court stated: "The authority to suspend the operations of laws is a privilege of too high a nature to be committed to many hands, or to those of any inferior offices of the state. If the chief magistrate can be trusted with the power of absolute and unconditional pardon, he is certainly a safe depository of the qualified power."

The Court has similarly upheld the Governor's autonomy pursuant to other grants of authority in the Constitution. In In re Allen, 151 Va. 21 (1928), for example, a taxpayer sought a writ of mandamus directing the Governor to fill two vacancies on the state Supreme Court. The Court analogized the Governor's authority to fill vacancies with his authority to remit fines and penalties and held that the Court had no power to direct the Governor to act. The filling of Court vacancies is a power vested exclusively in the Governor, who may also decline to exercise that power. See also Gilmore v. Landsidle, 252 Va. 388, 478 S.E.2d 307 (1996) (affirming Governor's unrestricted application of line-item veto authority vested by Article 5, Section 8 of State Constitution); Taylor v. Worrell Enterprises, Inc., 242 Va. 219, 409 S.E.2d 136 (1991) (holding that state Freedom of

Information Act was trumped by constitutional grant of Governor's authority to execute duties of the office); Brault v. Holleman, 217 Va. 441, 230 S.E.2d 238 (1976) (denying writ challenging validity of Governor's "line-item" veto of General Assembly's appropriation).

2. Virginia Statutes Do Not Impair The Governor's Power To Restore Voting Rights.

The Virginia Code reinforces the Governor's broad authority to restore voting rights. The Code provides that "[n]o person who has been convicted of a felony shall be a qualified voter unless his civil rights have been restored by the Governor or other appropriate authority." Va. Code Ann. § 24.2-101; see also Va. Code Ann. § 53.1-229 ("In accordance with the provisions of Article V, Section 12 of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor."). Although the Code plainly vests the Governor with exclusive power to decide whether to restore a felon's political rights, the General Assembly has enacted a handful of acts relating to the restoration process. None of these narrow provisions, however, curtails or modifies the Governor's essential power to restore voting rights by whichever means he alone deems appropriate.

The first of these process-related acts is Section 53.1-231.1. That provision requires the Director of the Department of Corrections to notify everyone who has been convicted of a felony about the civil rights they have lost as well as the processes for applying to have their civil rights—including voting rights—restored. See Va. Code Ann. § 53.1-231.1. Under this provision, the Director must also assist the Secretary of the Commonwealth in administering the process that the Governor has established for reviewing civil-rights-restoration applications: "To promote the efficient processing of applications to the Governor," the Secretary must record certain information related to applications for restoration of rights. Id.

These provisions do not shackle the Governor's unfettered discretion to establish a restoration process or to make restoration determinations however he sees fit. Rather, the provisions serve only to facilitate the restoration process established by the Governor. Although the provisions contemplate that the Governor may use an application process

when considering whether to restore a felon's voting rights, they notably do not require an application process. Moreover, the provisions plainly recognize that the Governor alone is free to establish whatever process—if any—he deems appropriate.

A second process-related law provides that certain felons may petition the circuit court for a declaration that they have satisfied the terms of their conviction and are otherwise eligible for restoration of voting rights. See Va. Code Ann. § 52.1-231.2. The Governor must make a decision regarding restoration of the felon's voting rights within 90 days after the courts order. See id. Like the provisions described above, the circuit-court procedure and related requirements serve to facilitate the restoration process.

Indeed, the Virginia Supreme Court has expressly held that this statute "does not authorize a circuit court to exercise the 'whole power,' or any part of the power, granted to the Governor to remove political disabilities resulting from a felony conviction." In re Phillips, 574 S.E.2d at 272. As the Court explained, the circuit court's function under the statute is limited to making a determination whether a petitioner has presented competent evidence supporting the specified statutory criteria. A felon seeking restoration of rights is not required to file a petition in a circuit court before applying to the Governor for such relief. Nor is the Governor bound by the court's determination. Thus, the statute merely supplements the Governor's rights-restoration procedure; it does not cabin the Governor's restoration powers vel non. That power remains firmly vested with the Governor alone, who may grant or deny any request without explanation.

CONCLUSION

The Virginia Constitution entrusts the Governor with one of the essential attributes of Executive power: the ability to restore a convicted felon's political rights. That grant is plenary; it allows the Governor to restore political rights for whatever reason he deems appropriate and through whichever mechanisms he opts to implement.

An Executive Order providing across-the-board restorations of political rights is not only constitutional, but it makes good sense. One in

four African American males in Virginia is a convicted felon. See Human Rights Watch and The Sentencing Project, Losing the Vote, the Impact of Felony Disenfranchisement Laws in the United States (1998). A legal regime that disproportionately excludes such a large segment of the African American population from exercising the franchise undermines the civic and democratic virtues that the Commonwealth of Virginia stands for.

Moreover, an Executive Order restoring all political rights would be entirely consistent with a growing National trend. In Iowa, for example, the Governor recently signed an Executive Order restoring the rights to vote and hold office to all Iowa citizens who have fully served their criminal sentences. See State of Iowa, Executive Order No. 42, July 4, 2005 (available at http://www.governor.state.ia.us/legal/41_45/EO_42.pdf). The Order also establishes a mechanism for ongoing restorations as others complete their sentences. In Nevada, the Governor recently signed legislation that established a mandatory restoration of voting rights merely upon application. See 2001 Nev. Stat. 358. In 1999, Texas enacted similar legislation extending the franchise to those who have "fully discharged [their sentences], including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court." Tex. Elec. Code Ann. § 11.002(4)(A). And in New Mexico, the State recently repealed its lifetime disenfranchisement law, replacing it with an automatic restoration provision upon conditional discharge or completion of probation or parole. See N.M. Stat. Ann. § 1-4-27.1. Indeed, so pervasive is this trend that "[m]ore than fifteen states took this step between the late 1960s and 1998." Alexander Keyssar, The Right To Vote: The Contested History of Democracy in the United States 303 (2000).

An Executive Order automatically restoring the political rights for felons who have completed their sentence would be consistent with both the Constitution of this State and the emerging consensus within the Nation.