

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

Restoration of Civil Rights

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



**COMMONWEALTH OF VIRGINIA
RICHMOND
2003**

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I. Authority

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters “including apprehension, trial and punishment of criminal offenders.” Section 30-158(3) provides the Commission the power to “conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . . and formulate its recommendations to the Governor and the General Assembly.”

Using the statutory authority granted to the Crime Commission, the staff conducted a study on the restoration of voting rights for persons convicted of felonies in Virginia.

II. Executive Summary

Last year, the prison population in the United States rose for the twenty-eighth consecutive year. This rise in the prison population translates into a rise in the number of people who have lost civil rights. Specifically, felony convictions result in a loss of a variety of civil rights, including, the right to vote, the opportunity for public employment, and the ability to serve on a jury. For example, in Virginia, convicted felons forfeit their right to vote,¹ serve on a jury,² carry a firearm,³ and suffer a restorable loss of public employment opportunities, including the right to hold public office⁴ and be a notary public.⁵ Furthermore, although it does not constitute an absolute prohibition, various professional boards may refuse to grant, or may revoke, a professional license. For example, after conviction of certain felonies, Virginia prohibits persons from working in certain locations/professions, such as mental health facilities, child welfare agencies, and family daycare homes.⁶ Of these consequences, the loss of the right to vote is arguably the most controversial. The fact that the felon population continues to rise exacerbates this controversy. As the number of convicted felons continues to increase, so too will the number of convicted felons disqualified from the voting process.

The Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the United States Constitution guarantee the right of all United States citizens over eighteen years of age to vote.⁷ The right to vote is a fundamental right and restrictions on it must pass strict scrutiny review. However, strict scrutiny analysis may only require the state to demonstrate that a regulation denying someone the right to vote is narrowly tailored to promote a significant interest. A restriction on voting must be reasonable and non-discriminatory. Accordingly, in the case of *Richardson v. Ramirez*, the United States Supreme Court held that Section Two of the Fourteenth Amendment justified a state's denial of the right to vote to persons convicted of a

¹ Art. 2, §1 of the Virginia Constitution

² Va. Code §8.01-338

³ Va. Code §18.2-308.2

⁴ Art. 2 §5 of the Virginia Constitution

⁵ Va. Code §47.1-4.

⁶ Mental health facilities (Va. Code §§37.1-183.3, 37.1-197.2); child welfare agencies and family daycare homes (Va. Code §63.1-198).

⁷ John Nowak and Ronald Rotunda, *Constitutional Law*, §14.31 (2000). 2 *Richardson v. Ramirez*, 418 U.S. 24 (1974).

felony.⁸ Thus, although the right to vote is fundamental, the Fourteenth Amendment allows states to strip felons of their right to vote.

A 1998 study estimated that 3.9 million Americans have either currently or permanently lost their right to vote due to felony convictions.⁹ Of these, an estimated 1.4 million were ex-offenders who had already completed their sentence and another 1.4 million were on probation or parole.¹⁰ It was further estimated that over one-third of the population disqualified from voting consisted of African-American men.¹¹

All but two states have laws denying felons or ex-felons the right to vote. Less restrictive states provide for automatic restoration of the right to vote upon final discharge or at the end of incarceration. However, Virginia is among the most restrictive states denying the right to vote. Specifically, in the Commonwealth, the restoration of the right to vote is not automatic and can result in lifetime forfeiture absent executive clemency. As a result, the number of disqualified voters is particularly susceptible to increase in Virginia. Although Virginia has approximately 270,000 voters that have been disqualified in this manner, under the last four governors it has been stated that only an average of 134 per year had their right to vote restored.¹²

Over the past several years, several bills have been introduced during the Virginia General Assembly Sessions addressing the restoration of civil rights for persons convicted of felonies. After unsuccessful attempts to pass legislation during the 2001 Session of the Virginia General Assembly, it was requested that the Virginia State Crime Commission study the issue. Pursuant to this request, the Chairman of the Crime Commission authorized the formation of a Task Force on the Restoration of Civil Rights for Persons Convicted of Felonies, and appointed the Chairman. This study includes the findings and recommendations of the Task Force that have been formally adopted by the Crime Commission. Specifically, this study includes an analysis of Virginia's laws regarding the restoration of civil rights for persons convicted of felonies, as well as a comparison of laws across the United States with specific focus on the relevant laws in neighboring states. Additionally, this study outlines the applicability of the restoration process in the Commonwealth.

A. Findings

The Task Force on the Restoration of Civil Rights for Persons Convicted of Felonies found the following:

- Approximately 270,000 Virginians have lost the right to vote, translating to 4% of the eligible voting population. Of these Virginians, approximately 216,600 were ex-felons that had completed all of their sentences, including probation and parole.

⁸ *Richardson v. Ramirez*, 418 U.S. 24 (1974)

⁹ Jaime Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and the Sentencing Project, October 1998.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Give Back the Vote*, Opinion, Washington Post, February 23, 2001.

- From 1986 to 1998, Virginia governors granted approximately 1,743 applications for the restoration of civil rights.
- In 1999 and 2000, the Governor granted an additional 43 applications. In 2001, the Governor granted 74 applications.
- The Secretary of the Commonwealth is keeping a record of the number of 90 day petitions they have received. In 2000, their office received 6 petitions from circuits and all 6 were granted. In 2001, their office received 21 petitions and 20 were granted.
- Currently, the only means by which felons in Virginia can regain their civil rights, including their right to vote, is through the Governor.

B. Recommendations

- Amend the *Code of Virginia* §53.1-231.1 to require that the Director of the Department of Corrections provide notice to felons, on completion of sentence, of the processes to apply for restoration of voting rights and civil rights.
- Amend the *Code of Virginia* §53.1-231.1 to require that the Director compile information on the Department’s compliance with the notification requirements on an annual basis and report these findings the Virginia State Crime Commission.
- Amend the *Code of Virginia* §53.1-231.1 to require the Virginia Supreme Court to ensure that standardized petition forms are available at all Circuit Court Clerks’ offices.
- Non-violent felony offenders be given restoration of voting rights after 5 years.
- The Virginia State Crime Commission shall determine the administrative steps necessary for restoration and the legal definition of a non-violent felony.

III. Background

A. Virginia Law

Virginia Code §24.2-427 requires the general registrar to cancel the registration of all persons known by him to be disqualified to vote by reason of a felony conviction.¹³ Because of the strict wording of Virginia’s Constitution, only the Governor can restore a felon’s right to vote (and hold office) in Virginia, although other rights may be restored by statute. Attorney General’s Opinions have stated that the legislature may not create a restoration process that does not involve the Governor.¹⁴ However, there are currently two processes which can be used by persons convicted of felonies to have their voting rights restored. The “traditional” manner allows a person to write or petition the Governor for the restoration of his “civil rights”. With this method, no time limits are specified by statute and the process depends entirely upon the executive privilege of clemency as defined in Article II, §1 of the Constitution of Virginia. If a convicted felon has his right restored through the method of executive clemency, all of his civil rights are restored, with the exception of the right to carry a firearm.

¹³ Va. Code Ann. § 24.2-427. (See Attachment 1)

¹⁴ Opinions of the Attorney General of Virginia, OAG 99-098. (See Attachment 2).

The new process for a person convicted of a felony to have his voting rights restored was created by *Virginia Code* §§53.1-231.1 and 53.1-231.2 (2000, c. 969), and it applies only to the restoration of voting rights. Section 53.1-231.2 establishes the process by which persons convicted of certain non-violent felonies may apply for the restoration of their right to vote.¹⁵ This statute specifically excludes felons convicted of violent crimes, drug distribution crimes, and voting fraud. The statute establishes a procedure whereby the felon may petition the Circuit Court in the city or county in which he was convicted, or where he presently resides, for restoration of the right. The court may approve the petition if it is satisfied from the evidence presented that five years have passed since the petitioner completed service of any sentence including probation, parole and suspension of sentence. Before the court grants approval, the petitioner must also demonstrate civic responsibility through community or comparable service, and must not have committed any new crimes. If the circuit court approves the petition, it transmits an order to the Secretary of the Commonwealth stating that the petitioner's eligibility to register to vote may be restored. Then the Governor must either approve or deny the application within 90 days. A denial by the Governor shall constitute a final decision and the petitioner shall have no right to appeal. The Secretary of the Commonwealth maintains a record of the number of these "90 day petitions" they have received. In Calendar Year (CY) 2000, their office received 6 from circuit courts and all 6 were granted. In CY 2001, their office received 21, and 20 were granted.¹⁶

Section 53.1-231.1 requires that the Director of the Department of Corrections shall, at the completion of the sentence, probation, or parole, notify persons convicted of a felony of the loss of their civil rights and of the processes by which to apply for restoration of those rights.¹⁷ However, Crime Commission staff has found that often the Director of the Department of Corrections sends out a standard letter to convicted felons notifying them only of their right to restoration, without specifying the processes by which either a civil rights restoration or a voting rights restoration can take place.¹⁸

The most recent calls for the restoration of the right to vote for Virginia felons pointed to a 1998 study by Human Rights Watch and the Sentencing Project. The study alleged that approximately 270,000 people in Virginia, or 5% of the voting age population, had lost the right to vote because they had been convicted of felonies.¹⁹ Of that number, 216,600 have already completed their criminal sentences, including probation and parole. As such, only an average of 134 felons have their right to vote restored each year.²⁰ From 1986 through 1998, the Office of the Governor of Virginia has granted approximately 1,743 applications for the restoration of civil rights. In CY 1999 and 2000, the Governor granted an additional 43 applications and in 2001, the Governor granted 74 applications. The Office of the Secretary of the Commonwealth does not keep a record of the number of petitions for civil rights received, but estimates that consideration of a petition takes about one year as opposed to the 90 days for circuit court orders.

¹⁵ Va. Code Ann. §53.1-231.1. (See Attachment 1)

¹⁶ Telephone interview with the Office of the Secretary of the Commonwealth.

¹⁷ Va. Code Ann. §53.1-231.2 (See Attachment 1)

¹⁸ Staff has not determined whether individual probation officers detail the processes by which convicted felons can have their civil rights restored. (See Attachment 2).

¹⁹ *Give Back the Vote*, Opinion, Washington Post, February 23, 2001.

²⁰ *Give Back the Vote*, Opinion, Washington Post, February 23, 2001.

Additionally, in 1998, auditors discovered that the voter rolls of the Virginia State Board of Elections contained 11,000 ineligible felons as well as 1,500 dead people. Moreover, in 1999, a Loudoun County grand jury indicted 15 people for lying about their criminal records on voter registration forms.²¹

B. State Comparison

Almost all states have enacted laws in some way disqualifying convicted felons from voting. Information from the National Conference of State Legislatures suggests that only two states, Maine and Vermont, do not have laws affecting the right of felons to vote. One more state, Massachusetts, provides for forfeiture only for corrupt election practices. Thirty-two states restore the right to vote at either the conclusion of incarceration, five years after the end of incarceration, or at final discharge. In fourteen states, including Virginia, there exists the possibility that felons will remain disqualified for life. Some of these states however, including Virginia, do provide for restoration by way of Executive Clemency or pardon. The following is a compilation of how different states treat the restoration of the right to vote for felons, listed in order from most restrictive to least restrictive.²²

Possibility of Disenfranchisement for Life	Right to Vote restorable at final discharge	Right to vote restorable at end of incarceration	Right to vote suspended or forfeited unless civil rights restored	Right to vote forfeited if judicially declared unqualified	Felony conviction has no effect on right to vote
Alabama Arkansas Delaware Florida Iowa Kentucky Maryland ²³ Mississippi Nebraska Nevada New Mexico Tennessee Virginia Washington	Alaska California Connecticut Georgia Illinois Kansas Louisiana Maryland ²⁴ Minnesota New Hampshire ²⁵ New Jersey North Carolina Oklahoma Rhode Island South Dakota Texas West Virginia Wisconsin	Colorado District of Columbia Hawaii Idaho Indiana Michigan Missouri ²⁶ Montana North Dakota Ohio Oregon Pennsylvania South Carolina ²⁷ Tennessee	Arizona Wyoming	Puerto Rico	Maine Massachusetts ²⁸ Vermont

²¹ Patricia Allard and Marc Mauer, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, The Sentencing Project, January 2000. (See Attachment 3)

²² National Conference of State Legislatures, 6/14/01. (See Attachment 4)

²³ In Maryland, a pardon is needed for a second conviction

²⁴ In Maryland, the right to vote is restorable only for a first conviction

C. States Neighboring Virginia

The following list provides a more detailed overview of the restoration of civil rights processes in the states neighboring Virginia.

- In North Carolina, a felon's civil rights (other than firearms privileges) are automatically restored upon an unconditional discharge of sentence.²⁹ A certificate evidencing unconditional discharge and restoration of the rights of citizenship is filed with the court in the county of conviction or the county of residence.³⁰
- In West Virginia, a felon's right to vote is restored automatically upon service of the sentence, including any period of parole. This has apparently been true for over a hundred years, and is due to case law interpretations of West Virginia's statutes and Constitution, rather than an explicit decree by the legislature.³¹
- In Maryland, a "first offender" felon has his right to vote restored automatically after the completion of his sentence, including probation or parole.³² This does not apply to those persons who have been convicted of bribery, attempted bribery, or buying or selling votes, as those felons are permanently disenfranchised, pursuant to the Constitution of Maryland, art. I, §6 and art. III, §50. A recidivist felon must obtain a gubernatorial pardon in order to regain his civil rights.³³
- In Tennessee, the date of the felony conviction, as well as the crime involved, determine the ability of a felon to have his voting rights restored.
 - 1) If the felony conviction occurred before July 1, 1986, the felon may have his rights restored by petitioning a circuit court, upon the expiration of the maximum sentence imposed.³⁴
 - 2) If the felony conviction occurred after July 1, 1986, but before July 1, 1996, a felon will have his rights automatically restored upon the expiration of the maximum sentence imposed, or after being granted final release from incarceration or supervision.³⁵ However, this does not apply to any person convicted of first

²⁵ In New Hampshire, restoration is allowed upon final discharge except for the offenses of bribery, treason, and election fraud which require restoration by the Supreme Court.

²⁶ In Montana, restoration is allowed upon final discharge except for felony offenses connected with the right of suffrage.

²⁷ In South Carolina, restoration is allowable upon final discharge except for election law violations.

²⁸ In Massachusetts, felony convictions have no effect on the right to vote except for corrupt election practices which result in forfeiture.

²⁹ N.C. Gen. Stat. §13-1.

³⁰ N.C. Gen. Stat. §13-2.

³¹ Webb v. County Court of Raleigh County, 113 W. Va. 474, 168 S.E. 760 (1933); Osborne v. Kanawha County, 68 W. Va. 189, 69 S.E. 470, 32 L.R.A. (N.S.) 418 (1910); 51 Op. Att'y Gen. W. Va. 182 (1965).

³² Md. Ann. Code, art. 33, §3-102(b)(1).

³³ Md. Ann. Code, art. 33, §2-102(b)(1).

³⁴ Tenn. Code Ann. §§40-29-101 (a)(c); 40-29-105(a).

³⁵ Tenn. Code Ann. §40-29-105(b)(1)(B)(C).

degree murder, aggravated rape, treason, or voter fraud, as those persons are permanently disenfranchised.³⁶

3) If the felony conviction occurred after July 1, 1996, then the felon must petition the circuit court to have his voting rights restored.³⁷ There is a legal presumption that the felon's full citizenship rights should be restored, and this presumption may only be overcome upon proof by a preponderance of the evidence that either the petitioner is not eligible for restoration, or that there is otherwise good cause to deny the petition.³⁸ However, any person convicted of murder, rape, treason or voter fraud is still permanently barred from voting.³⁹

- In Washington D.C., a felon automatically regains his right to vote once he has been released from imprisonment.⁴⁰
- In Pennsylvania, a felon regains his right to vote upon his release from prison.⁴¹ A statute was passed in 1995 that in part prohibited a felon from registering to vote if he had been confined in a penal institution within the past five years for a conviction of felony.⁴² This portion of the statute was overturned in 2000 by the Commonwealth Court of Pennsylvania, though, as being in violation of the Constitution of Pennsylvania. As a result, felons who have been released from incarceration are now allowed to register to vote immediately, pursuant to the Pennsylvania Commonwealth Court's ruling.⁴³

D. Modern Trends

The legislatures of Alabama, Florida, Pennsylvania, and Nevada have recently proposed the automatic restoration of voting rights.⁴⁴ In Connecticut, where the right to vote is currently restorable at final discharge, the legislature recently proposed the restoration of voting rights for probationers and parolees.⁴⁵ In Alabama, where felons forfeit their right to vote, legislation that would have required the restoration of the right upon completion of the sentence ended in defeat in 1999.⁴⁶ In Delaware, one of the states in which felons can lose the right to vote for life, a bill was passed by the House of Representatives that would allow certain categories of former felons to vote once they complete their entire sentence and remain crime free for five years. The

³⁶ Tenn. Code Ann. §40-29-105(2).

³⁷ Tenn. Code Ann. §40-29-105(c)(1).

³⁸ Tenn. Code Ann. §40-29-105(c)(3).

³⁹ Tenn. Code Ann. §40-29-105(c)(2)(B).

⁴⁰ D.C. Code Ann. §§1-1001.02(2), 1-1001.02(7)(A).

⁴¹ 25 Pa. Cons. Stat. §§2602(w); 3146.1.

⁴² 25 Pa. Const. Stat. §961.502.

⁴³ Mixon v. Commonwealth, 759 A.2d 442 (2000).

⁴⁴ Patricia Allard and Marc Mauer, *Regaining the Vote: an Assessment of Activity Relating to Felon Disenfranchisement Laws*, The Sentencing Project, January 2000.

⁴⁵ *Id.*

⁴⁶ *Id.*

legislation excluded the crimes of murder, manslaughter, felony sexual offenses, bribery, and undue influence. The bill was to be considered by the Senate in the year 2000.⁴⁷

Other states tightened their restrictions on disqualified felons. Utah was one of four states that allowed inmates to vote. However, in 1998 over 80% of the electorate of Utah voted to disqualify inmates, thereby reducing the number of states allowing inmates to vote from four to three.⁴⁸ In Massachusetts, where a felony conviction unrelated to corrupt election practices currently has no effect on one's right to vote, the legislature approved a constitutional amendment depriving inmates of the right to vote.⁴⁹ This legislation was prompted by the Governor after inmates formed a political action committee. The amendment was set for a second vote in 2000.

Until recently, Louisiana provided for automatic restoration of the right to vote for first offenders never previously convicted of a felony upon the completion of their sentence. However, in 1999, the Louisiana electorate voted for a constitutional amendment limiting this provision to certain felony offenses.⁵⁰ In Pennsylvania, where inmates are denied the right to vote and must wait five years after the completion of their prison terms before the right can be restored, a bill that would have repealed the five year post-release ban was defeated by a large margin.⁵¹

Some states have expressed concerns regarding the ability of prisoners to influence elections, particularly in localities where the prison population is greater than the local population. For example, in Oregon, where only state inmates are barred from voting, 1,800 federal inmates housed in a prison in a town with a population of only 1,662 caused concern that the inmates might pool their voting power to influence the outcome of the local elections. In response to this concern, a law was passed prohibiting federal prisoners from voting in local elections.⁵²

On the federal level, the Subcommittee on the Constitution of the House of the Judiciary Committee considered restoring federal voting rights to ex-felons. Although the subcommittee members generally supported measures allowing ex-felons to vote, they had concerns regarding the constitutionality of the legislation.⁵³

Existing states laws denying felons the right to vote are also being challenged in the courts. In New Hampshire, a trial court found that two state laws prohibiting felons from voting while in prison violated the state's constitution. However, the state appealed the decision to the New Hampshire Supreme Court and members of the state legislature took action to ensure the disqualification of felons. In addition, the legislature may consider a constitutional amendment to ban the right of inmates to vote.⁵⁴ In Washington state, ex-felons have brought suit alleging the state law violates the Voting Rights Act.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

IV. Findings and Recommendations

Although most states throughout this nation's history have denied felons the right to vote and a majority of these states deny the right to felons even after their sentences have been served, many jurisdictions are considering less restrictive alternatives. As the prison population increases, and with it the population of convicted felons disqualified from the voting process, the debate over when felons should have their right to vote restored will heighten. This will be particularly apparent in Virginia, one of the most restrictive states in the United States.

Because Virginia remains one of the most restrictive states with regard to the restoration of civil rights for persons convicted of felonies, the Task Force on the Restoration of Civil Rights for Persons Convicted of Felony Offenses recommended:

Recommendation 1:

The *Code of Virginia* §53.1-231.1 be amended to require that the Director of the Department of Corrections provide notice to felons on completion of sentence of the processes available for restoration of voting rights and civil rights.

Recommendation 2:

The *Code of Virginia* §53.1-231.1 be amended to require that the Director compile information on the Departments compliance with the notification requirements on an annual basis and report these findings the Virginia State Crime Commission.

Recommendation 3:

The *Code of Virginia* §53.1-231.1 be amended to require the Virginia Supreme Court to ensure that standardized petition forms are available at all circuit court clerks' offices.

Recommendation 4:

Restore the right to vote to non-violent felony offenders after 5 years.

Recommendation 5:

The Virginia State Crime Commission shall determine the legal definition for non-violent and the administrative processes for restoration.

These recommendations were adopted by the Virginia State Crime Commission, and House Bill 1298, incorporating these recommendations, was introduced during the 2002 Session of the Virginia General Assembly.⁵⁵

Because of the strict wording of Virginia's Constitution, only the Governor can restore a felon's right to vote (and hold office) in Virginia, although other rights may be restored by statute. Attorney General's Opinions have further stated that the legislature may not create a restoration process that does not involve the Governor. Although the Task Force on the Restoration of Civil Rights for Persons Convicted of Felony Offenses discussed amending the

⁵⁵ House Bill 1298 (See Attachment 5)

Constitution of Virginia to allow for the restoration of civil rights and presented possible constitutional amendments to the Virginia State Crime Commission, the Crime Commission did not adopt any recommendations pertaining to such an amendment.