



Senator DiAnna Schimek
Chair, Government, Military and Veterans Affairs Committee
PO Box 94604
State Capitol Building Room 1114
Lincoln, NE 68509

January 20, 2005

To Senator Schimek and the Committee:

We write in support of 2005 Nebraska Legislative Bill No. 53, which would restore voting rights to people with felony convictions once they have completed their criminal sentences. Re-enfranchising people who have served their sentences would advance basic fairness and justice. Voting is both a fundamental right and a civic duty. Restoring the right to vote strengthens democracy by increasing voter participation and helps ex-offenders to reintegrate into society. By exercising the franchise, an ex-offender reassumes one of the essential duties of full citizenship and takes a further step toward his or her rehabilitation.

The Attorney General's Office has long opposed legislation of this kind based on the view that it is unconstitutional under the Nebraska Constitution. We do not share this view. On the contrary, our analysis leads us to conclude that the bill is valid under both the state constitution and the decisions of the Nebraska Supreme Court.

The Nebraska Legislature has the constitutional authority to restore voting rights to people who have lost the franchise as a result of felony convictions. The Nebraska Constitution, art. VI, § 2, provides in part, "No person shall be qualified to vote who . . . has been convicted of . . . [a] felony under the laws of this state or the United States, unless restored to civil rights." Legislative Bill No. 53, § 1, would implement this constitutional provision as follows: "Any person sentenced to be punished for any felony, when the sentence is not reversed or annulled, is not qualified to vote until the sentence is completed, including any parole term. Upon completion, the disqualification is automatically removed." Section 2 of the bill would apply the same rule to any person convicted of a felony under the laws of any other state.

The bill straightforwardly applies the state constitutional rule, disfranchising people convicted of felonies for the duration of their criminal sentences and restoring their rights thereafter. As the Nebraska Supreme Court has stated:

The right to vote is a civil right, *Reynolds v. Sims*, 377 U.S. 533 (1964), and the restoration referred to in Neb. Const. Art. VI, § 2, is the restoration of the right to vote. Restoration of the right to vote is implemented through statute.

Ways v. Shively, 264 Neb. 250, 255, 646 N.W.2d 621, 626 (2002) (declining to address constitutional issues not raised below and interpreting Nebraska statutes not to restore voting rights to felon who had completed sentence).

The state constitution does not mandate the current statutory mechanism by which an ex-offender's voting rights may be restored. At present, Neb. Rev. St. § 29-112 allows restoration of the franchise only if a "person receives from the Board of Pardons of this state a warrant of discharge, in which case such person shall be restored to such civil rights and privileges as enumerated or limited by the Board of Pardons." The Legislature vested this authority in the Board of Pardons, and the Legislature can remove it and decide instead to restore the franchise automatically.

Contrary to this position, the Attorney General's Office has maintained in several opinions dating back to 1996 that the Board of Pardons has exclusive constitutional authority to restore civil rights, including the right to vote. Neb. Op. Atty. Gen. No. 1011; Neb. Op. Atty. Gen. No. 99025; Neb. Op. Atty. Gen. No. 96023. To support this proposition, the Attorney General relies on Nebraska Constitution, art. IV, § 13, which states in part, "The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment."

Nothing in this constitutional provision gives the Board of Pardons exclusive authority over the restoration of civil rights. The provision lists several kinds of reduction in punishment, over which the Board maintains exclusive control. The provision is silent, however, with respect to the franchise.

In a series of cases culminating in *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996), the Nebraska Supreme Court has reaffirmed the Board of Pardon's exclusive power under article IV, § 13, to do exactly what that provision says: "remit fines and forfeitures and . . . grant respites, reprieves, pardons, or commutations." In *Bainbridge*, the Court considered a statute that purported to give courts the authority to reduce a fifteen-year driver's license revocation. The Court explained that "[t]he essence of a commutation of sentence is the substitution of a milder punishment." 249 Neb. at 265, 543 N.W.2d at 158. Only if the license revocation was criminal punishment would the reduction of its span invade the powers of the Board of Pardons. *Id.* Noting, among other things, that the relevant criminal statute explicitly made fifteen-year license revocation "part of the judgment of conviction" after two or more drunk-driving offenses, the Court concluded that the revocation constituted "part of the overall punishment of the defendant, in conjunction with the fines and jail terms imposed." *Id.* at 266, 154 N.W.2d at 159. Any reduction in the term of the license revocation therefore amounted to a reduction in punishment or commutation of sentence. But, the Court held, only the Board of Pardons has the power to commute sentences under the Nebraska Constitution. A statute that "permits a judicial commutation of a sentence of punishment" therefore violates the separation of powers clause of the Nebraska Constitution, art. II, § 1. *Id.* at 265, 154 N.W.2d at 158-59.

In several analogous cases, the Nebraska Supreme Court has enforced the separation of powers clause by preventing any encroachment on the Board of Pardons' power to lighten or lift punishments. *See State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995) (invalidating a statute that would have allowed courts to reduce the prison sentences of certain sex offenders); *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994) (invalidating a statute that would have allowed a court to reduce a criminal sentence it had previously imposed); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992) (holding that the Nebraska courts have no jurisdiction to review a Board of Pardons decision to grant or deny clemency in a death penalty case).

When a person “is not exempted from the punishment imposed for the crime,” however, the Court has found no separation of powers violation. *State v. Spady*, 264 Neb. 99, 104, 645 N.W.2d 539, 543 (2002). In *Spady*, the Court upheld a statute that gave the courts the power to set aside convictions and restore limited civil rights to certain ex-offenders upon completion of sentence. *Id.* at 101-04, 645 N.W.2d at 541-43 (quoting relevant portions of statute). The law is “not a commutation statute because it does not substitute a milder punishment.” *Id.* at 103, 645 N.W.2d at 542. Moreover, the statute “does not nullify *all* of the legal consequences of the crime committed because certain civil disabilities . . . are not restored, as occurs when a pardon is granted.” *Id.* at 105, 645 N.W.2d at 543 (emphasis added). The Court thus found that the statute did not enable courts to reduce sentences or to restore all civil rights, as a pardon does. Based on these findings, the Court concluded that the statute “does not infringe upon the power expressly delegated to the Board of Pardons and does not violate the separation of powers clause of the Nebraska Constitution.” *Id.*, 645 N.W.2d at 545.

Legislative Bill No. 53 falls safely on the constitutional side of the lines drawn in *Spady*. The restoration of voting rights does not “substitute a milder punishment.” *Id.* at 103, 645 N.W.2d at 542. The disfranchisement provisions in the Nebraska Constitution and statutes do not bear any of the indicia of a criminal sentence. These provisions are located in article VI of the constitution governing suffrage, Neb. Const., art. VI, § 2; in chapter 32 of the Revised Statutes governing elections, Neb. Rev. St. § 32-313; and in chapter 29 governing criminal procedure, Neb. Rev. St. Neb. Rev. St. §§ 29-212, 29-113; but not in chapter 28 governing crimes and punishments. Disfranchisement is not made proportionate to the criminal act and is not part of the judgment of conviction. Therefore, in Nebraska, loss of voting rights is not part of “a sentence of punishment.” *Bainbridge*, 249 Neb. at 265, 154 N.W.2d at 158-59; *see also Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (“[B]ecause the purpose of [a felony disfranchisement] statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.”). If disfranchisement is not punishment, then re-enfranchisement is not the alleviation of punishment. Re-enfranchisement is not, therefore, within the sole purview of the Board of Pardons.

Moreover, far from restoring all civil rights in the nature of a pardon, Legislative Bill No. 53 restores one. Although it need not do so, the bill leaves the restoration of all other civil rights squarely within the province of the Board. *See* § 3. Because the bill would not usurp any power that the constitution vests exclusively in the Board of Pardons, the bill presents no separation of powers problem.

Where the franchise is concerned, there is yet another reason to conclude that the Board of Pardons cannot wield exclusive control. The constitutional powers of the Board extend only to “cases of conviction for offenses against the laws of this state.” Neb. Const., art. IV, § 13. The Board has no authority to reduce or remove punishments imposed by the United States or other states. Yet the Nebraska Constitution disfranchises people convicted of . . . [a] felony under the laws of this state *or the United States*, unless restored to civil rights.” Nebraska Constitution, art. VI, § 2 (emphasis added). And Nebraska law disfranchises people convicted of felonies in other states. Neb. Rev. St. § 29-113. If the Board could claim exclusive control over restoration of the right to vote, those convicted in federal or out-of-state jurisdictions would have no way of regaining their rights. The Nebraska Supreme Court would be loath to read the state constitution to produce so discriminatory and arbitrary a result. Unlike the Board of Pardons, the Legislature has the power to restore the fundamental right to vote to all ex-felons equally. Legislative Bill No. 53 would accomplish this result. Indeed, the establishment of a general rule for re-enfranchising people with felony convictions is peculiarly within the Legislature’s competence as it sits to pass general laws, not, like the Board of Pardons, to decide which individual offenders may deserve to be punished less or not at all.

In the spirit of democracy, we urge passage of Legislative Bill No. 53. People who have served their sentences on felony convictions should reenter the political community as participants, eligible to exercise the right and to fulfill the responsibility to vote.

Respectfully submitted,

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