

Date of Hearing: June 19, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

SB 27 (McGuire) – As Amended May 29, 2019

SENATE VOTE: 27-10

SUBJECT: Primary elections: ballot access: tax returns.

SUMMARY: Requires a candidate for United States (U.S.) President and a candidate for California Governor, as a precondition for appearing on a California primary election ballot, to file copies of their income tax returns with the Secretary of State (SOS), as specified.

Specifically, **this bill:**

- 1) Defines “income tax return,” for the purposes of this bill, to mean any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of the Internal Revenue Code, and that is filed on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists that are supplemental to, or part of, the return so filed.
- 2) Prohibits the SOS from printing the name of a candidate for President of the U.S. or for California Governor on a primary election ballot, unless the candidate, at least 98 days before the presidential primary election, files with the SOS copies of every income tax return the candidate filed with the IRS in the five most recent taxable years, in accordance with the procedure set forth in this bill.
- 3) Requires a candidate, if a candidate has not filed the candidate’s income tax return with the Internal Revenue Service (IRS) for the tax year immediately preceding the primary election, to submit a copy of the income tax return to the SOS within five days of filing the return with the IRS. Provides that these provisions do not apply to any year in which the candidate was not required to file the candidate’s income tax return with the IRS.
- 4) Requires a candidate to submit the following to the SOS:
 - a) Two copies of each tax return required by this bill. Requires one copy of each tax return to be identical to the version submitted to the IRS, without redactions. Requires the second copy of each tax return to be redacted pursuant to provisions of this bill. Requires the tax returns to be provided to the SOS in hard-copy form.
 - b) A written consent form, signed by the candidate, granting the SOS permission to publically release a version of the candidate’s tax returns redacted pursuant to this bill. Requires the SOS to prepare a standard consent form consistent with this provision.
- 5) Requires the candidate to redact the following information from the redacted version of each tax return:
 - a) Social security number;

- b) Home address;
 - c) Telephone number;
 - d) Email address; and,
 - e) Medical information.
- 6) Permits the candidate to also redact the following information from the redacted version of each tax return:
- a) Names of dependent minors;
 - b) Employer identification number;
 - c) Business addresses; and,
 - d) Preparer tax identification number, address, telephone number, and email address of paid tax return preparers.
- 7) Requires the SOS to review the redacted copy of each tax return submitted by the candidate to ensure that the redactions comply with the provisions of this bill. Requires the SOS, if the SOS determines that the candidate has redacted information other than that permitted by this bill, to prepare a new version of the tax return with only the redactions permitted by this bill.
- 8) Requires the SOS, within five days of receipt of the candidate's tax returns, to make the redacted versions of the tax returns available to the public on the SOS's internet website.
- 9) Requires the SOS, if the SOS is required to prepare a redacted version of a tax return pursuant to this bill, to make public that version.
- 10) Requires the public versions of the tax returns to be continuously posted until the official canvass for the presidential primary election and the direct primary election are completed and requires the SOS, upon completion of the official canvass, to remove the public versions of the tax returns.
- 11) Requires the SOS to retain the paper copies of the submitted tax returns until the completion of the official canvass of the ensuing general election. Requires thereafter that the paper copies of the submitted tax returns to be destroyed as soon as practicable, unless the SOS has received a court order, or a lawful written request from a state or federal governmental agency, directing the SOS to preserve the submitted tax returns.
- 12) Contains an urgency clause, allowing this bill to take effect immediately upon enactment.
- 13) Makes various findings and declarations.

EXISTING FEDERAL LAW:

- 1) Provides that "[n]o person except a natural born citizen, or a citizen of the United States, at the time of adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."
- 2) Provides that federal tax returns are confidential.

EXISTING STATE LAW:

- 1) Permits a person to have their name placed on the ballot as a presidential candidate in the presidential primary election by either determination of the SOS that a person is a generally-recognized candidate or by circulating nomination papers, as specified.
- 2) Permits an otherwise qualified person to submit a statement of write-in candidacy as a presidential candidate for the presidential primary election, as specified.
- 3) Requires a candidate for Governor to abide by the following qualifications:
 - a) A U.S. citizen;
 - b) A registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued to the person;
 - c) Not have been convicted of a felony involving accepting or giving, or offering to give, any bribe, the embezzlement of public money, extortion of theft of public money, perjury, or conspiracy to commit any of those crimes; and,
 - d) Not have served two terms in the office sought since November 6, 1990.
- 4) Requires a candidate for state office, no later than the final filing date of a declaration of candidacy, to file a statement disclosing their investments, their interests in real property, and any income received during the immediately preceding 12 months, as specified.
- 5) Requires an elected state officer, within 30 days after assuming the office, annually thereafter and after leaving office, to file a statement disclosing their investments, their interests in real property held on the date of assuming office, and any income received, as specified.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

Transparency is a nonpartisan issue. And it's transparency that provides the basis for accountability in government. For the past forty years, every US President –

Republicans and Democrats alike – have released their tax returns. That is, until President Trump took office.

The Presidential Tax Transparency & Accountability Act will require basic tax information to be shared with California residents and require that all presidential candidates, and candidates for the Governor, release the last five years of their tax returns in order to appear on the California ballot. The returns will be made available to the public on the Secretary of State's website.

- 2) **Presidential Candidates' Tax Returns:** In 1973, the Providence Journal-Bulletin obtained and published data showing that President Richard Nixon had paid an astonishingly low amount in taxes in 1969 given his income for that year. After initially resisting calls for Nixon to do so, Nixon eventually released the taxes and underwent an IRS audit. It turned out Nixon had improperly claimed an exemption of \$500,000 for papers he donated to the National Archives.

Ever since this incident, it has been customary – though never required by law – for U.S. Presidential candidates to release their tax returns. Prior to 2016, only one candidate, President Gerald Ford in 1976, did not do so. Ford released a summary of his return instead.

During the 2016 campaign for U.S. President, Donald Trump broke with this longstanding tradition and refused to release his tax returns.

- 3) **Similar Legislation in Other States:** According to the National Conference of State Legislators' database, within the last two years, legislation has been introduced in just over half of the states requiring future presidential candidates to disclose income tax returns in order to be placed on the ballot. Additionally, this year a federal bill was introduced requiring presidential candidates to disclose their past 10 years' tax returns, as specified.
- 4) **Constitutionality:** As mentioned above, within the last two years, many states have introduced legislation to require future presidential candidates to disclose income tax returns in order to be placed on the ballot. While none of those bills have been signed into law, they have resulted in numerous media articles and reports discussing and questioning the constitutionality of these bills and specifically asking whether, under the U.S. Constitution, a state can require candidates for U.S. President to release their tax returns publicly as a precondition for appearing on the ballot.

In one media article, Rick Hasen, a law professor at the University of California, Irvine, states that the Constitution has conflicting provisions and "[the] question is whether a law that would deprive a presidential candidate of ballot access on the basis of a failure to provide tax return would be creating an unconstitutional additional qualification, or whether it would be permissible within the state's power to set the rules for presidential elections." According to Mr. Hasen, no court has ruled on this question.

While the courts have not ruled directly on this question, the U.S. Supreme Court has ruled on ballot access requirements for congressional candidates and has held that states and the federal government cannot add to the qualifications of senator or congressional representatives outlined in the federal Constitution. In 1995, the U.S. Supreme Court ruling in *U.S. Term Limits v. Thornton* (1995) 514 U.S. 779, held that Arkansas could not deny

ballot access to congressional candidates who served more than three terms or to Senate candidates who served more than two terms, essentially striking down measures the state had enacted to create congressional term limits. Furthermore the court ruled that the U.S. Constitution set the exclusive qualifications running for federal office (including age and citizenship requirements), and that states do not have the authority to alter or add to the terms contained in them.

The courts have also allowed states the authority to set reasonable conditions for candidates for federal elective office in order to ensure serious candidates appear on the ballot. Such conditions include common mechanisms such as a filing fee or securing a sufficient number of voters' signatures on a petition. However, such conditions cannot go further and set substantive conditions for who can run. In *Storer v. Brown* (1974) 415 U.S. 724, 732-733, the court upheld a California law that prohibited an independent candidate from running if he had registered with a party or voted in the preceding party primary and required candidates to complete a petition with 5% of signatures from the preceding general election, as specified. The court upheld the law as it applied to congressional candidates and affirmed that provisions that merely regulate access to the ballot are constitutionally permissible even though those requirements are not contained in the relevant constitutional Qualifications Clause:

[A] State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections... Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.

In sum, *Term Limits* stands for the proposition that states cannot use ballot access provisions to add or alter the qualifications for federal elective office, while *Storer* affirms that provisions that merely regulate access to the ballot are constitutionally permissible.

The question as to whether states have the legal authority to impose certain requirements on presidential candidates as a condition for the candidate's name to appear on the ballot remains unclear. Some legal experts contend that the previous court's guidance regarding congressional candidates would likely extend to the office of the President. Other legal experts contend that similar tax disclosure bills are unconstitutional as the U.S. Supreme Court has repeatedly held that states cannot use the ballot as a political weapon.

The Senate Judiciary Committee, which did a thorough analysis of the constitutional questions and issues raised, further examines where the line between *Term Limits* and *Storer* lies and on which side a ballot access requirement to release tax returns fall. Additionally, the Senate Judiciary Committee analysis discusses ballot access restrictions and a citizens' First Amendment rights of freedom of expression and association under the U.S. Constitution. Moreover, the Senate Judiciary Committee analysis discusses the right to privacy and that courts have generally upheld laws requiring candidates for public office to disclose information about their finances on the grounds that the public's interest in revealing potential or actual conflicts of interest outweighs the privacy interest at stake.

The Senate Judiciary Committee analysis concludes there are strong arguments for the

constitutionality of this bill and legitimate counterarguments, and if enacted, determining the constitutionality of this bill will wind up in the hands of the courts.

5) **Differences Between a Tax Return and Existing Financial Disclosure Requirements:**

Candidates for U.S. President and Vice President are already required to disclose certain financial information to the Federal Election Commission (FEC) within 30 days of declaring their candidacy. The content of an FEC candidacy filing differs in scope and specificity from that contained in a tax return.

On an FEC filing, candidates report financial information in ranges, rather than in specific amounts. Moreover, certain financial information, such as a candidate's homes, cars, and federal retirement plan, is exempt from reporting. Thus, long before the controversy over Trump's tax returns, some journalists and transparency advocates were already criticizing the FEC filings for their limited utility.

A tax return, by contrast, contains specific financial figures. It also provides some information that is not required in the FEC filing. While this information still falls short of providing exhaustive detail about an individual's finances, it provides far more information than an FEC filing alone. Generally tax returns can provide voters with insight to a candidate's finances (success of business and charitable givings), any conflicts of interest, and honesty (were taxes lowered through legal tax avoidance or illegal tax evasion).

The following are differences between what can be learned about a candidate from a tax return as opposed to an FEC filing:

- How much a candidate paid in taxes. Financial disclosures do not include how much a candidate paid in taxes and, thus, what their effective tax rate was.
- What tax breaks a candidate claimed. Financial disclosures do not list what types of tax deductions a candidate has claimed.
- Whether a candidate has offshore accounts. Financial disclosures ask candidates to list assets but are not required to provide detailed information, so offshore accounts can be easily masked.
- Charitable giving. Financial disclosures do not include information on what, if anything, a candidate has given to charity.
- A more truthful picture. Financial disclosures are reviewed by the FEC for compliance with reporting requirements, but they are not audited for accuracy like tax returns which carry fines and possible jail time for fraud. Because of that, a tax return presents less of an opportunity to inflate claims of wealth.
- Numbers down to the cent. Financial disclosures report assets in broad ranges (e.g. \$1,001 - \$15,000; over \$1,000,000), while tax returns focus on the exact dollar figure of an asset.

- 6) **Brennan Center for Justice Paper:** In 2017 the Brennan Center for Justice at New York University School of Law, released a paper entitled, "Presidential Transparency: Beyond Tax Returns." The paper delves into the question of what personal tax returns would actually reveal to the public if they were released. According to the report, upon viewing a president's personal tax returns — including the standard form 1040 and accompanying schedules — the public would learn at least two things: how much a president is paying and has paid in federal taxes, and (from Schedule A) how much they have claimed in itemized deductions for things like charitable giving. This information can be highly relevant to determining the president's ethical fitness. Moreover, the report states that other information the public might learn from the president's full tax returns that are not included on any ethics forms, include important details related to potential conflicts of interest, foreign ties or business dealings and interests, information about negative –valued entities which may generate tax-deductible losses, additional information about sole proprietorships and how involved the president remains with the operation of their companies while serving as president, information on the personal impact of tax reform, and precise numbers and figures.

The report, however, further observes that a great deal of highly-relevant information about a president's business interests would simply not show up on any tax document. Moreover, personal tax returns are unlikely to shed light on the original source of revenue and debts (who is paying the president and to whom they owe money), business partners, or the extent of personal wealth or where assets are located.

The report concludes that a president's personal tax returns would certainly reveal more than any ethics forms about potential conflicts or other ethical issues. However, the paper also contends that this information would almost certainly not provide a complete picture of the president's finances and that no compilation of returns is likely to reflect all of the president's original sources of income, major creditors, or key business partners. While the report insists that this information is crucial to determining the extent of conflicts of interest and other ethical violations, it recommends that a better way to secure it would be to amend the Ethics in Government Act to strengthen existing ethics disclosure requirements.

- 7) **Financial Disclosures Required by a Candidate for Governor:** The Political Reform Act of 1974 (PRA) provides for a comprehensive regulation of government ethics in California, including reporting and disclosing campaign finance, financial conflicts of interests by public officials, and gifts and honoraria given to public officials and candidates. Pursuant to the PRA, every candidate and elected officer for state office (including the Governor) are required to submit a Statement of Economic Interests (also know as Form 700) with the Fair Political Practices Commission (FPPC), as specified. The Form 700 provides transparency and ensures accountability by providing necessary information to the public about an official's personal financial interests to ensure that officials are making decisions in the best interest of the public and not enhancing their personal finances and it serves as a reminder to the public official of potential conflicts of interest so the official can abstain from making or participating in governmental decisions that are deemed conflicts of interest. According to the FPPC, common reportable interests include, investments (such as stocks and bonds), business entities or trusts (such as sole proprietorships, partnerships, limited liability corporations), real property (such as rental property in the filer's jurisdiction), income (such as non-governmental salaries), gifts from businesses, vendors or other contractors, and travel payments made by third parties.

8) **Arguments in Support:** In support, the California Labor Federation writes:

The current president's refusal to release his income tax returns departs from over four decades of established political tradition respected by both Republicans and Democrats alike. This decision, as disrespectful to voters as it is corrosive to our democracy, denies voters the opportunity to fully evaluate his fitness for the office of President of the United States. Transparency is a nonpartisan issue and one that clearly needs more attention, given the apparent willingness of even presidential candidates to withhold such essential information.

This information is important for a variety of reasons, but primarily because it gives voters valuable details regarding the candidate's potential conflicts of interest, domestic and international business dealings, financial status, and charitable donations. These are pressing questions for voters prior to an election as presidents, unlike members of Congress and federal appointees, are largely exempt from conflict-of-interest laws.

This legislation does not exclude or constrain candidate participation; rather, it is a procedural ballot access requirement—similar to determining filing fees and the number of signatures required—in which states are exercising their broad powers to make ballots for any office, including a federal office, comprehensive and informative to voters.

9) **Arguments in Opposition:** In opposition to a prior version of this bill, We The People Rising wrote:

SB 27 is unconstitutional. There is no law that requires presidents or presidential candidates to reveal their tax returns. California state legislators should be following established protocol if they seek that presidential candidates present their tax returns by working with federal House of Representatives members in order to enact a federal law.

10) **Related Legislation:** SB 505 (Umberg), which is also being heard in this committee today, clarifies the criteria that a candidate must meet in order to appear on the California presidential primary ballot, as specified.

11) **Previous Legislation:** SB 149 (McGuire) of 2017, would have required, as a precondition for appearing on a California primary election ballot, a candidate for U.S. President to file copies of their income tax returns with the SOS, as specified. Governor Brown vetoed the bill stating:

Although tax returns are by law confidential, many presidential candidates have voluntarily released them. This bill is a response to President Trump's refusal to release his returns during the last election.

While I recognize the political attractiveness -- even the merits -- of getting President Trump's tax returns, I worry about the political perils of individual states seeking to regulate presidential elections in this manner. First, it may not be constitutional. Second, it sets a "slippery slope" precedent. Today we require tax

returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards? And will these requirements vary depending on which political party is in power?

A qualified candidate's ability to appear on the ballot is fundamental to our democratic system. For that reason, I hesitate to start down a road that well might lead to an ever escalating set of differing state requirements for presidential candidates.

SR 23 (Wiener) of 2017, urged President Trump to release tax returns as part of its broader call for an independent investigation into connections between Russia and Trump's presidential campaign and administration. SR 23 was adopted by the Senate.

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation
California Teachers Association (prior version)
City of West Hollywood
Independent California (prior version)
Los Angeles County Democratic Party (prior version)
Secretary of State Alex Padilla

Opposition

America First Latinos
Libertarian Party of California (prior version)
The Remembrance Project
We The People Rising (prior version)
One Individual (prior version)

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