

Date of Hearing: May 7, 2013

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Paul Fong, Chair

AB 938 (Weber) – As Amended: April 22, 2013

SUBJECT: Voting: felons: parolees.

SUMMARY: Makes significant changes to voter eligibility. Specifically, this bill:

- 1) Provides that a person loses his or her eligibility to register to vote as the result of being in prison for the conviction of a felony only if the prison where the person is housed is a state or federal prison.
- 2) Provides that a person loses his or her eligibility to register to vote as the result of being on parole for the conviction of a felony only if the person is on state or federal parole, or federal supervised release. Provides that "state parole" does not include a person on postrelease community supervision or on mandatory supervision pursuant to existing law.
- 3) Requires the clerk of the superior court in each county, when furnishing the elections official with a list of persons who have been convicted of felonies, to include only persons who have been convicted of a felony and sentenced to state prison, instead of including all persons who were convicted of felonies, whether they were sentenced to prison or not. Requires the clerk of the superior court of each county to include the last four digits of the social security number (SSN) of each person, if available, along with the other information as specified, on the list furnished to the county elections officials. Requires a county elections official to cancel the affidavit of registration of each person who is currently imprisoned or on state parole for the conviction of a felony whose name, address, date of birth, and, if available, the last four digits of his or her SSN, is the same as reported on the court clerk's statement, instead of cancelling the affidavits of registrations for all persons who were convicted of felonies.
- 4) Makes other conforming changes.

EXISTING LAW:

- 1) Permits a person who is a United States citizen, a resident of California, not in prison or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election, to register to vote.
- 2) Requires the clerk of the superior court in each county to furnish the chief elections official of the county, not less frequently than the first day of April and the first day of September of each year, with a statement showing the names, addresses, and dates of birth of all persons who have been convicted of felonies since the clerk's last report.
- 3) Requires the county elections official to cancel the affidavits of registration of those persons who are imprisoned or on parole for the conviction of a felony.

- 4) Requires the Legislature to provide for the disqualification of electors while imprisoned or on parole for the conviction of a felony.

FISCAL EFFECT: Keyed non-fiscal by the Legislative Counsel.

COMMENTS:

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

AB 938 clarifies that people sentenced pursuant to the Criminal Justice Realignment Act retain their constitutional right to vote. Under California law, a person sentenced to county jail and/or placed on formal probation (not pursuant to Realignment) retains the right to vote. Yet the Secretary of State, in the absence of guidance from the Legislature, has in the interim deemed that a person sentenced to a term in county jail and/or supervised by probation pursuant to Realignment is ineligible to vote. This has resulted in substantial confusion for California voters, courts, and county elections officials.

Even more confusion results from the lack of clear guidance regarding the information courts must send to elections officials regarding the eligibility of persons with a criminal conviction. The lack of accurate and complete information undermines elections officials' best efforts to maintain the integrity of their voter files. As a result, voter files may be over-purged (wrongfully disenfranchising eligible voters) or under-purged (allowing those who are ineligible to mistakenly register to vote.)

The integrity of our voting system depends on the accuracy of our voter rolls and the protection of every eligible person's right to vote. No eligible voter should be kept from fulfilling their responsibility and civic duty due to ambiguity in the law.

Moreover, voting creates a greater sense of citizenship, participation, and ultimately a vested interest in achieving the overall goals of the community.

"The right to vote is one of the defining elements of citizenship in a democratic polity and participation in democratic rituals such as elections affirms membership in the larger community for individuals and groups. Because of all that voting represents in this society, voting can be viewed as a proxy for other kinds of civil engagement associated with the avoidance of illegal activity." (Uggen & Manza, *Voting and Subsequent Crime and Arrest: Evidence From A Community Sample* (2004) 36 Colum. Hum. Rts. L. Rev. 193, 194 (hereinafter "Uggen & Manza").

If returning offenders see themselves as productive members of society, and are able to have input on policies affecting the entire community, this will have a noticeable impact on recidivism.

Uggen & Manza concluded in their study of voting rights and recidivism that,

"Voting appears to be part of a package of pro-social behavior that is linked to desistance from crime. . . . To the extent that felons begin to vote and participate as citizens in their communities, it seems likely that many will bring their

behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system.” (Uggen & Manza, 36 Colum. Hum. Rts. L. Rev. at 214-215.

Furthermore, the Brennan Center for Justice and Democracy states,

Restoring the right to vote helps reintegrate people with criminal records into society and, by increasing voter participation, strengthen democracy. Civic participation instills in the offender a feeling of belonging in the community and a sense of responsibility toward others. This connection to others encourages former felons to be contributing members of society. (Brennan Center for Justice, Voting Rights Restoration: February 2006, available at [www.brennancenter.org/page/-/d/download\\_file\\_9846.pdf](http://www.brennancenter.org/page/-/d/download_file_9846.pdf).)

In contrast, refusing the right to vote instills a sense of exclusion and disconnectedness from the community. Denying Realignment offenders the right to vote creates yet another psychological impediment to reentry, and increases the likelihood of recidivism.

- 2) California Disenfranchisement Laws: Under California law, any person who is imprisoned or on parole for the conviction of a felony is prohibited from voting and elections officials are required to cancel the voter registrations of such individuals. However, a person who is on probation for conviction of a felony is permitted to vote. While it would seem that the determination of whether an individual is eligible to vote is fairly straightforward, there has been a great deal of confusion about what constitutes being "imprisoned" for the conviction of a felony.

For instance, it is not uncommon for a person who has been convicted of a felony to be ordered to serve time in county jail as a condition of probation. To the extent that a person is serving time in county jail as a condition of probation, that person is not considered to be "imprisoned" for the conviction of a felony under California law, and thus, that person remains eligible to vote, even while he or she is in the county jail.

On the other hand, due to a variety of reasons, a person who has been convicted of a felony and sentenced to serve time in state prison may nonetheless serve part or all of his or her sentence in a county or city jail due to a contractual agreement with the state. In such a circumstance, that person is not eligible to vote, and the elections official should cancel that person's registration, since he or she is not on probation – but rather has been convicted of a felony and was sentenced to state prison. The fact that the individual is serving that prison time in a local jail under a contractual arrangement is not relevant in determining whether that person has the ability to register to vote or to vote.

These interpretations of California's disenfranchisement laws were affirmed by the Court of Appeal for the State of California, First Appellate District, Division One, in League of Women Voters of California, v. McPherson (2006), 145 Cal.App.4th 1469. In that case, the court noted that "where a probationer is ordered to serve time in a local facility because either imposition or execution of sentence has been suspended, he or she has not been imprisoned for the conviction of a felony, but has been confined as a condition of probation."

- 3) Criminal Justice Realignment & Inmate Voting Eligibility: In 2011, California passed a series of bills known as the Criminal Justice Realignment Act (CJRA). Although prior to realignment, some felony sentences were served in county or city jails, most felony sentences were served in state prison. Under realignment, certain lower-level felony offenders, who would have been sentenced to state prison, are now sentenced to serve their time in custody in county jail. Additionally, after release from custody and depending on the offense and sentence, realignment changed the state's parole system and created the option for an inmate to be released to a term of "post-release community supervision" (under the control of the local probation department) or mandatory supervision. Thus, the enactment of the CJRA has caused an even greater deal of confusion and raised questions about the eligibility to vote for convicted felons sentenced to these new programs.

According to court documents, the Secretary of State's (SOS) office, at the request of county elections officials, issued a memorandum on December 5, 2011 which analyzed CJRA and its effect on voter eligibility. Consequently, the SOS's office concluded that realignment "does not change the voting status of offenders convicted of CJRA-defined low-level felonies, either because they serve their felony sentences in county jail instead of state prison or because the mandatory supervision that is a condition of their release from prison is labeled something other than 'parole.' Offenders convicted of CJRA-defined low-level felonies continue to be disqualified from voting while serving a felony sentence in county jail, while at the discretion of the court serving a concluding portion of that term on county-supervised probation, or while they remain under mandatory 'post release community supervision' after release from state prison."

Voting rights groups filed a lawsuit against the SOS arguing that realigned individuals have a right to vote. In March of 2012, a lawsuit was filed in the First District Court of Appeal to clarify that people who have been sentenced for low-level, non-violent offenses under the CJRA are entitled to vote in the 2012 elections and beyond (*All of Us or None et al. v. Bowen et al.* (2012) No. A134775). On May 17, 2012, the First District Court of Appeal summarily denied the petition, meaning that it refused to hear the case or issue an opinion. In response, petitioners filed another lawsuit in the California Supreme Court to review the case and decide the case on an expedited basis (*All of Us or None v. Bowen* (2012) No. S202885). The Supreme Court, which has the discretion to either hear the case, order the Court of Appeal to decide it, or deny review, denied review on July 25, 2012.

- 4) Constitutional Issues: While the author's goal is to reduce the confusion caused by the impact of realignment and provide clarity with respect to the voting rights of felons, provisions of this bill may be in conflict with the California Constitution. Article II, Section 4 of the California Constitution disqualifies from voting those who are "imprisoned or on parole for the conviction of a felony." The California Constitution which is self-executing does not need the aid of legislation to give it effect.

This bill provides that a person is prohibited from registering to vote if he or she is in state or federal prison or on state or federal parole or federal supervised release, instead of imprisoned or on parole, for the conviction of a felony. The author contends that this bill, will clarify that people sentenced under realignment retain their constitutional right to vote. Moreover, the author states that due to the absence of guidance from the Legislature, a person sentenced to county jail and/or supervised by probation under CJRA are ineligible to vote.

As mentioned above, a person can be convicted and sentenced to state prison, but serve their sentence in county jail due to a contractual agreement between the county and the state. Thus, the location where the person is serving their sentence is irrelevant when determining whether that person has the ability to register to vote or not.

Furthermore, because the California Constitution uses the term "imprisoned," which is a broad term that could incorporate state prison, federal prison, or county jail, it could be argued that this bill, which narrows the scope of where a felon could be imprisoned and disqualified from voting, may be in conflict with the Constitution and could be susceptible to a court challenge if it were to become law.

In addition, as mentioned above, the California Constitution disqualifies those from voting who are "on parole for the conviction of a felony." This bill excludes postrelease community supervision and mandatory supervision under realignment from the definition of what is considered to be state parole. The term "parole" is a general rather than specific term and is defined by Black's Law Dictionary as "the conditional release of a prisoner from imprisonment before the full sentence has been served." Consequently, it can be argued that these new alternative post release supervised scenarios under the CJRA – post-release community supervision and mandatory supervision – are functionally equivalent to parole. While there may be slight differences in how the programs function for postrelease community supervision and mandatory supervision, they essentially require post release supervision by a governmental entity that if violated, can be revoked. Consequently, it can be argued that regardless of the name of the post release program in which a convicted felon is sentenced, their eligibility status remains the same. Thus, this bill, which excludes those that are on postrelease community supervision or on mandatory supervision under realignment under the definition of state parole, may not withstand constitutional scrutiny.

- 5) Voter File Maintenance: The California Constitution prohibits a person from voting if the person is imprisoned or on parole for the conviction of a felony. In accordance with that provision, Section 2212 of the Elections Code requires county elections officials to cancel the affidavits of registration of those persons who are imprisoned or on parole for the conviction of a felony. In order to enable the county elections official to comply with this requirement, Section 2212 of the Elections Code also requires the clerk of the superior court to furnish to the elections official a statement with the names, addresses, and dates of birth of all persons who were convicted of felonies since the court's last report. However, if a court adheres to a literal interpretation of this requirement, the county elections official does not have the information necessary to determine whether or not a voter's registration should be canceled, because the list would include any person who was convicted of a felony but not sentenced to prison.

Background information provided by the author's office argues that California's disenfranchisement laws are unclear, resulting in over-purging (wrongfully disenfranchising eligible voters) and under-purging (allowing those who are ineligible to mistakenly register to vote) of the voter rolls. Moreover, the integrity of elections depends on the accuracy of the voter rolls and the protection of every eligible person's right to vote. In order to provide more clarity, this bill requires the court to send the elections official a list of persons who have been convicted of felonies and sentenced to state prison, so that the county elections officials have the information necessary to comply with the requirement that they cancel the

registrations of those persons who are imprisoned or on parole for the conviction of a felony.

Despite these clarifications, it can be argued that other requirements in this bill actually make it more difficult to cancel the registrations of those persons who are imprisoned or on parole for the conviction of a felony. Provisions of this bill require the elections official to cancel the registration of each person who is currently imprisoned or on state parole for the conviction of a felony whose name, address, date of birth, and, if available, the last four digits of his or her social security number (SSN) is the same as reported on the court clerk's statement. A strict interpretation of this requirement may make it more difficult for an elections official to cancel a voter's registration as the bill requires that the name, address, birth date, and, if available, the last four digits of the voter's SSN, must match the information provided on the clerk's report. If the name and birth date match the report provided by the clerk, but the address does not match, then a strict read of the requirements in this bill would not allow the elections official to cancel the voter registration. Consequently, this bill may result in under inclusive purge of the voter rolls.

- 6) Arguments in Support with Concerns: The California Association of Nonprofits (CAN), which is in support of AB 938, however, has concerns regarding those individuals placed on federal supervised release. In its letter to the committee, CAN writes:

There is no current California statute that disqualifies individuals under federal supervised release (FSR) from voting. However, the Secretary of State has held for many years that FSR is analogous to state parole and thus supervisees are disqualified.

The most recent amendments to AB 938 would codify that individuals placed under FSR are ineligible to vote. It should be noted to the committee and stakeholders that this amendment disenfranchises a class of individuals whom, until now, have not been statutorily disenfranchised.

The similarity between state parole and FSR has been debated. The clear distinction between that two is that:

- State parolees continue to be under the authority of the California Department of Corrections and Rehabilitation while under supervision and any revocation and return to custody occurs under that authority. Parole is, in essence, a community extension of the prison sentence.
- Conversely, individuals are released from the custody and authority of the Federal Bureau of Prisons prior to being placed on federal supervised release. Individuals on FSR are placed under the authority of United States Probation. Any revocation proceedings (or alternatively, proceedings to terminate supervision early), do not involve the Bureau of Prisons, but rather are handled by U.S. Probation and the Courts. The term of supervised release is a separate, consecutive portion of an individual's sentence. In this regard, it is similar to California felony probation.

As another related point of clarification, FSR is distinct from federal parole. While federal parole is no longer granted, it does still exist for individuals sentenced prior to 1984. The construct of federal parole is analogous to state parole, as described above, and would logically follow that individuals (while few) placed under federal parole are

ineligible to vote pursuant to current statute.

- 7) Arguments in Opposition: The California District Attorneys Association writes in opposition:

One of the key features of realignment is that felons, regardless of where they are incarcerated or who supervises them, are still felons. AB 938 would allow felons who are housed in county jail, on [postrelease community supervision], or on [mandatory supervision] to vote despite that fact that if there were no realignment, these very same offenders would be in state prison or on parole, and therefore ineligible to vote. Merely changing the location or nature of a felon's custody or supervision does not justify allowing him or her to avoid the sanctions attendant to a felony conviction.

- 8) Previous Legislation: AB 742 (Saldaña) of 2009, which was similar to certain provisions of this bill, would have required the clerk of the superior court in each county, when furnishing the elections official with a list of persons who have been convicted of felonies, to include only persons who have been sentenced to state prison, instead of including all persons who were convicted of felonies, whether they were sentenced to prison or not. Governor Schwarzenegger voted this measure, stating that "[s]uperior [c]ourt clerks throughout the state have worked with local elections officials to provide this information in a format that is most appropriate for their jurisdiction. Therefore this bill is unnecessary."

AB 1308 (Hagman) of 2009, would have prohibited a person who is on probation for conviction of a felony from voting. AB 1308 failed passage in this committee on April 21, 2009 on a 2-5 vote, but was granted reconsideration.

#### REGISTERED SUPPORT / OPPOSITION:

##### Support

American Civil Liberties Union of California (co-sponsor)  
City and County of San Francisco Office of the Sheriff (co-sponsor)  
Greenlining Institute (co-sponsor)  
Lawyers' Committee for Civil Rights of the San Francisco Bay Area (co-sponsor)  
League of Women Voters of California (co-sponsor)  
All of Us or None  
A New Way of Life Re-Entry Project  
Asian Americans for Civil Rights & Equality  
Asian Law Caucus  
Asian Pacific American Legal Center  
California Association of Clerks and Election Officials  
California Association of Nonprofits  
California Attorneys for Criminal Justice  
California Catholic Conference of Bishops  
California Common Cause  
California Correctional Peace Officers Association  
California Federation of Teachers  
East Bay Community Law Center  
Justice Not Jails

Legal Services for Prisoners with Children  
Los Angeles Regional Reentry Partnership  
NAACP Legal Defense & Educational Fund, Inc.  
Rock the Vote  
San Francisco District Attorney's Office  
Project Vote

Opposition

California District Attorneys Association  
California State Sheriffs' Association

Analysis Prepared by: Nichole Becker / E. & R. / (916) 319-2094