

Date of Hearing: March 30, 2016

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Shirley Weber, Chair

ACR 145 (Olsen) – As Introduced February 29, 2016

SUBJECT: Presidential primary elections: advisory ballots.

SUMMARY: Urges the Secretary of State (SOS) to prepare an advisory ballot for the presidential primary election that would allow a voter who did not request or vote a ballot of a political party in that election to submit an advisory vote for a candidate for the office of President of the United States (US). Specifically, **this measure:**

- 1) Urges the SOS to do all of the following:
 - a) Prepare an advisory ballot for the presidential primary election that would allow a voter who did not request or vote a ballot of a political party in that election to submit an advisory vote for a candidate for the office of President of the US.
 - b) List on the advisory ballot each qualified candidate for the office of President of the US, regardless of the candidate's political party preference.
 - c) Provide for the distribution of the advisory ballot to all voters who did not request or vote a ballot of a political party in that election.
 - d) Provide for the canvassing of the advisory ballots in the same manner, and at the same time and place, as the results of the presidential primary elections ballots for the political parties are canvassed.
- 2) Encourages each political party that participates in the presidential primary election to consider the results of the advisory ballots in selecting the party's nominee for the office of President of the US.
- 3) Makes various findings and declarations about the presidential primary election process, including all of the following:
 - a) The SOS has the authority to adopt regulations to assure the uniform application and administration of state election law.
 - b) Subdivision (a) of Section 5 of Article II of the California Constitution requires a voter-nominated primary election to be conducted to select the candidates for congressional and state elective offices in California, at which all voters, regardless of their political party preference, may vote for any candidate.
 - c) Voters in California have become accustomed to voter-nominated primary elections, and therefore, voters are likely to be confused if they cannot vote for the candidate of their

choice, without regard to political party preference.

- d) Pursuant to subdivision (c) of Section 5 of Article II of the California Constitution, the Legislature is required to provide for an open presidential primary election.
- e) The Legislature has provided for a semi-closed primary election system under which a voter who is not registered as disclosing a preference with any one of the political parties participating in the election may vote a ballot of a political party only if the party, by party rule duly noticed to the SOS, permits a person to do so.

EXISTING LAW:

- 1) Constitutionally requires the Legislature to provide for partisan elections for presidential candidates, including an open presidential primary whereby the candidates on the ballot are those found by the SOS to be recognized candidates throughout the nation or throughout California for the office of President of the US, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.
- 2) Permits a person to choose a political party preference when registering to vote. Voters who do not choose a political party preference are commonly referred to as “No Party Preference” (NPP) voters.
- 3) Permits a voter to change his or her political party preference by completing a new voter registration application. Provides that the deadline to register to vote for an election is the 15th day prior to the election, as specified.
- 4) Requires, at a presidential primary election, that a NPP voter be furnished only a nonpartisan ballot, unless he or she requests a ballot of a political party and that political party, by party rule noticed to the SOS, authorizes NPP voters to vote the ballot of that political party. Provides that the nonpartisan ballot shall contain only the names of candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. Requires each voter registered as preferring a political party participating in the election to be furnished only a ballot for which he or she disclosed a party preference, as specified, and the nonpartisan ballot, both of which are printed together as one ballot.
- 5) Provides that the SOS is the chief elections officer of the state. Requires the SOS to see that elections are efficiently conducted and that state election laws are enforced. Permits the SOS to adopt regulations to assure the uniform application and administration of state election laws.

FISCAL EFFECT: Unknown

COMMENTS:1) **Purpose of the Resolution:** According to the author:

California's semi-closed presidential primary means that political parties decide whether non-member voters have the right to participate in their presidential nomination proceedings.

California's Constitution provides for an open presidential primary. This means that voters have the constitutionally protected right to participate, unconditioned by their party affiliation.

California's current semi-closed primary system disenfranchises voters by conditioning the individual citizen's right to vote on the private decision-making authority of political parties.

While the modified semi-closed system protects the 1st amendment private right of political parties to determine their nominee as they see fit, it violates the California State Constitution's requirement that the Legislature provide voters with an open presidential primary. An open primary is one whereby every voter has an unconditioned right to participate.

By urging the [SOS] to provide a nonpartisan presidential primary ballot option, ACR 145 honors the State's constitutional obligation to provide voters the opportunity to cast a ballot at an important stage of the election process - whether or not they choose to join a party, while also protecting the right of political parties to determine who may or may not participate in their private nomination proceedings.

2) **What is an "Open" Primary?** There is no definition of the term "open primary" in California law, and in fact, the term has been used to mean different things at different times with respect to primary elections held in the state.

As detailed above, Article II, Section 5 of the California Constitution requires the Legislature to "provide for partisan elections for presidential candidates...including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation..." This language referring to an "open presidential primary" was added to the Constitution through the adoption of Proposition 4 at the June 1972 statewide primary election, which was placed on the ballot by the Legislature through the adoption of SCA 3 (Alquist), Resolution Chapter 274, Statutes of 1971. Based on news reports, legislative history, and the ballot arguments for and against Proposition 4, it is clear that the effect and intent of the constitutional amendment was to require the SOS to place on the ballot the names of recognized candidates for President of the US without the need for those candidates (or for delegates who were pledged to support those candidates) to circulate petitions. In this context, the term "open presidential primary" referred to the fact that the primary was *open* to any person who was generally recognized as a candidate for president, as opposed to being limited to candidates who were backed by a slate of delegates

who had circulated petitions to appear on the ballot.

The term "open primary" had a different meaning in the context of an initiative that was approved by the voters at the March 1996 statewide primary election. Proposition 198—also known as the "Open Primary Act" (Act)—provided for primary elections at which all candidates for a partisan office were listed on the same ballot, and all voters, regardless of party affiliation, were permitted to vote for any candidate regardless of the candidate's political party affiliation. The candidate of each political party who received the most votes became the nominee of that party at the general election. Elections were conducted under the provisions of the Act for the June 1998 statewide primary election and the March 2000 statewide primary election. In June 2000, the US Supreme Court invalidated the Act in *California Democratic Party v. Jones* (2000), 530 U.S. 567, finding that it violated a political party's First Amendment right of association, because it allowed individuals who were not members of a political party to be involved in choosing that party's nominee who would appear on the general election ballot. In response to the ruling, the Legislature enacted SB 28 (Peace), Chapter 898, Statutes of 2000. SB 28 implemented a "semi-closed" primary election system that permits voters not affiliated with a political party to participate in a political party's primary election if authorized by that party's rules. Although the state has subsequently moved to a "top two" primary election system for congressional elections and for elections for most state offices, presidential primary elections continue to be conducted under the "semi-closed" primary election system created by SB 28.

The author of this measure asserts, and the text of this resolution suggests, that California's current presidential primary system is inconsistent with the state Constitution because the state conducts a "semi-closed" presidential primary rather than an "open" presidential primary. This assertion, however, appears to be based on misunderstanding of the meaning of the phrase "open presidential primary" as it is used in the state Constitution. As detailed above, the constitutional requirement for an open presidential primary was intended to ensure that generally recognized candidates for President would automatically be placed on the primary election ballot by the SOS. California's current process for conducting presidential primary elections is wholly consistent with that requirement. Last month, Secretary of State Alex Padilla released the list of generally recognized candidates for President who will be placed on the June 7, 2016, presidential primary election ballot in California. In all, Secretary Padilla identified 43 candidates for inclusion on primary election ballots: seven in the Democratic Party primary; nine in the Republican Party primary; seven in the American Independent Party primary; five in the Green Party primary; 12 in the Libertarian Party primary; and three in the Peace and Freedom Party primary.

- 3) **Presidential Primary Election Options:** Under California's presidential primary system, a voter who is registered with a political party receives a ballot for that party's presidential primary election. For example, a voter who is registered with the Green Party receives a ballot containing the Green Party candidates for President. NPP voters (and voters who registered with a political body that is attempting to qualify as a party) can request the ballot of any political party that has notified the SOS that it will allow those voters to participate in its presidential primary election. For the June 7, 2016, statewide primary election, the Democratic Party, American Independent Party, and Libertarian Party have all indicated that they will allow voters who are not registered with a party to participate in their presidential

primary elections.

Under this system, every registered voter in California has the opportunity to participate in a presidential primary election. Voters who are registered with the Democratic, Republican, American Independent, Green, Libertarian, or Peace and Freedom Party will receive the primary election ballot for their respective parties. At the same time, voters who are not registered with a political party will have the option of choosing to receive a presidential primary election ballot for the Democratic Party, the American Independent Party, or the Libertarian Party. In all, voters who are not registered with a political party will be able to choose between 26 different candidates for president; on the other hand, voters who are registered with a political party will have a choice of between three and 12 candidates, depending on the party.

Finally, as noted above, any voter can update his or her political party for the primary election by re-registering to vote through the 15th day prior to the election. For this June's presidential primary election, voters have until May 23, 2016, to re-register and change political parties for the purposes of the presidential primary election.

- 4) **Secretary of State Authority:** The text of this resolution urges the SOS to "exercise his or her authority to establish a new advisory voting process that would allow certain voters to cast an advisory ballot in the presidential primary election." It is not clear, however, that the SOS has the authority to establish such a process absent a change in state law.

In fact, existing state law appears to prohibit the type of advisory ballot that is envisioned by this resolution. Section 13102 of the Elections Code requires that voters who are not registered with a political party be provided only with a nonpartisan ballot *unless* the voter requests the ballot of a political party that has authorized voters who are not registered with a political party to participate in its primary election. Section 13102 further provides that the nonpartisan ballot shall contain only the names of candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. President of the US is neither a nonpartisan nor a voter-nominated office. Furthermore, while state law requires the SOS to enforce the provisions of the Elections Code and to see that elections are efficiently conducted and that state election laws are enforced, nothing in state law appears to give the SOS the discretionary authority to establish an advisory voting process that is neither required nor authorized by statute. If the SOS attempted to create a new "advisory voting process" for the presidential primary election as urged by this resolution, such an action would appear to be in direct conflict with state law.

- 5) **Logistical Issues:** The existence of an advisory ballot could create confusion that, in turn, could prevent voters from casting votes that count for the purposes of determining the political parties' nominees for President. For example, for this June's presidential primary election, an NPP voter has the option of requesting the presidential primary ballot for the Democratic Party, the American Independent Party, or the Libertarian Party. If an NPP voter wants to vote for a Libertarian Party candidate for President, that voter can do so by requesting the Libertarian Party ballot. If the NPP voter also had the option of voting an advisory ballot that contained the Libertarian Party candidates for President, however, and voted for the Libertarian Party candidate on the advisory ballot, would that vote be

recognized by the Libertarian Party as part of the official results the Party's primary? If not, could confusion about the different types of ballots that are available inadvertently disenfranchise voters who vote on advisory ballots, instead of selecting the ballot of a political party?

Relatedly, for this June's presidential primary election, if a NPP voter wanted to vote for a Republican candidate for President, that voter could do so by re-registering as a Republican through the 15th day prior to the election. But if that voter had the option of voting for a Republican candidate on an advisory ballot, would some voters be misled into believing that they could have their votes counted in the Republican presidential primary election without re-registering and changing their party preferences? If so, the existence of the advisory ballot could disenfranchise voters who otherwise would have chosen to re-register with a political party in order to vote for their favored candidate.

This resolution urges the SOS to prepare an advisory ballot, to list specified candidates on that advisory ballot, to provide for the distribution of that ballot, and to provide for the canvassing of advisory ballots in a specified manner. Although the SOS is the chief elections officer of the state, none of these tasks currently are performed by the SOS. Instead, for statewide elections, the preparation of ballots, the listing of candidates on ballots, the distribution of ballots, and the canvassing of ballots are all performed by county elections officials. Even if the SOS has the authority to create an advisory voting process for the presidential primary election (which, as detailed above, is unclear), the SOS does not actually conduct elections and it is unclear whether or how the SOS could compel county elections officials to conduct an election that is not provided for under state law.

Furthermore, it is unclear whether it is the intent of this resolution that voters be provided with an advisory ballot at this year's presidential primary election, or if the resolution is seeking such a process for future elections only. To the extent that the author of this resolution is seeking a change in this year's presidential primary process, it is unclear whether such a goal is realistic. Ballots for this June's primary election will start being sent out to overseas and military voters just nine days after this resolution is scheduled to be heard in this committee. The creation of an entirely new type of ballot—and the coordination that would be necessary with county elections officials to produce that ballot, make it available to specified voters, and canvass the results of that ballot—would be a significant undertaking. Attempting to make such a significant change less than 70 days before the presidential primary election could jeopardize the conduct of that election.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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