

Date of Hearing: July 12, 2017

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

SB 149 (McGuire) – As Amended April 5, 2017

SENATE VOTE: 27-13

SUBJECT: Presidential primary elections: ballot access.

SUMMARY: Requires, as a precondition for appearing on a California primary election ballot, a candidate for United States (U.S.) President to file copies of his or her income tax returns with the California Secretary of State (SOS), as specified. Specifically, **this bill:**

- 1) Creates the Presidential Tax Transparency and Accountability Act and makes findings and declarations that a presidential candidate's income tax returns provide voters with essential information regarding the candidate's potential conflicts of interest, business dealings, financial status, and charitable donations. States that Donald Trump's refusal to release his income tax returns departed from decades of established political tradition, denying voters the opportunity to fully evaluate his fitness for the office of President of the U.S.
- 2) 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.
- 3) Prohibits the SOS, notwithstanding any other law, from printing the name of a candidate for President of the U.S. on a primary election ballot, unless the candidate, within a reasonable timeframe established by the SOS, files with the SOS a copy of every income tax return the candidate filed with the Internal Revenue Service in the five most recent taxable years. Requires a candidate, if he or she has not filed his or her income tax return with the Internal Revenue Service 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 Internal Revenue Service.
- 4) Prohibits votes for a write-in candidate for President of the U.S. in a presidential primary election from being counted unless the candidate, within a reasonable timeframe established by the SOS, files with the SOS a copy of every income tax return the candidate filed with the Internal Revenue Service in the five most recent taxable years. Requires a candidate, if he or she has not filed his or her income tax return with the Internal Revenue Service 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.
- 5) Requires the SOS to redact the social security number, address, or telephone number of any individual in an income tax return submitted pursuant to the provisions of this bill, and to make any other redactions necessary to protect individual privacy.

- 6) Requires the SOS, after redacting an income tax return, to make it available to the public on the SOS's Internet Web site.
- 7) Requires the SOS to adopt regulations to implement the provisions of this bill.

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 "[t]he executive Power shall be vested in a President of the United States of America. He shall... be elected, as follows... Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress..."
- 3) Provides that federal tax returns are confidential.

EXISTING STATE LAW:

- 1) Permits a person to have his or her 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.

FISCAL EFFECT: According to the Senate Appropriations Committee:

- 1) One-time costs of \$75,000 (General Fund) to the SOS to adopt regulations to implement the provisions of this bill.
- 2) Intermittent workload costs of \$55,000 (General Fund) every four years for SOS to comb through the various tax returns of each presidential candidate to redact certain information; the extent of work is dependent on the number of candidates and the volume of each candidate's income tax returns for the most recent 5-year period.
- 3) Minor workload costs (General Fund) to SOS to post income tax returns on his website.

COMMENTS:

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

Releasing tax returns to the public is a long held tradition by all major party Presidential candidates in the modern era. This practice assured the public that all potential Presidential candidates were complying with the emoluments clause.

The American public deserves to know that the individual they are selecting to be president will have their best interest at the heart of every decision, not the best

interests of any business venture or investment fund. Transparency is a non-partisan issue.

There are pressing questions for voters to have answered before an election, because unlike members of Congress and federal appointees, presidents are largely exempt from conflict-of-interest laws.

Voters not only deserve full disclosure of their future leader's tax returns, they should be entitled to them.

- 2) **Similar Legislation in Other States:** According to the National Conference of State Legislators' database, 24 states have introduced bills requiring future presidential candidates to disclose income tax returns in order to be placed on the ballot (Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Virginia).
- 3) **Constitutional?** As mentioned above, almost half of the states have introduced legislation to require future presidential candidates to disclose income tax returns in order to be placed on the ballot. Consequently, there have been 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 his or her 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. The Senate Judiciary analysis points out that the lower federal courts have applied the holdings in *Term Limits* and *Storer* in at least three different ways. Additionally, the Senate Judiciary Committee analysis further discusses how the previous cases, which examined restrictions on ballot access for congressional elections, might be similar and analogous to the presidential context and for that reason *Term Limits* and its progeny may guide decisions for any ruling on a challenge to the ballot access restriction proposed by this bill. Alternatively, the Senate Judiciary Committee analysis examines ways in which the courts might distinguish ballot access restrictions in the congressional context from those in the presidential context.

The Senate Judiciary Committee analysis concludes that this bill falls within a muddled and evolving area of constitutional jurisprudence. If enacted, it is likely to be challenged in court.

4) **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:

- a) 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.
 - b) What tax breaks a candidate claimed. Financial disclosures do not list what types of tax deductions a candidate has claimed.
 - c) 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.
 - d) Charitable giving. Financial disclosures do not include information on what, if anything, a candidate has given to charity.
 - e) 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.
 - f) 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.
- 5) **Brennan Center for Justice Paper:** In June of this year 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 he or she has 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 his or her 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 he or she owes 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 and agrees that legislation pending in Congress that requires disclosure of the president's personal tax returns is sound policy. 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.

- 6) **Arguments in Support:** California Common Cause, who has a support if amended position, writes:

SB 149 furthers the essential goal of holding power accountable. The President is the highest elected official in the nation and as such, as a candidate, should be held to the highest standards of transparency. Income tax returns can reveal conflicts of interest and give a member of the public important information about a candidate's financial interests and activities as they consider who should receive their vote.

While presidential candidates are already required to divulge certain financial information to the Federal Elections Commission within 30 days of declaring their candidacy, income tax returns provide a much more detailed and in-depth picture of a candidate's true financial situation. For example, unlike the required FEC information, income tax returns reveal what a candidate's effective tax rate is, what tax breaks the candidate has claimed, and whether the candidate has offshore accounts.

However, these arguments are equally persuasive as to the Governor of California, and we see no reason why the bill should not be extended to this office as well. As the highest elected officer of the sixth-largest economy in the world, the Governor of California should be held to a similarly high standard of transparency. While candidates for governor must file a Form 700 Statement of Economic Interest, this information falls well short of what would be contained in a tax return.

For decades, it had been the norm for presidential and gubernatorial candidates to release their returns. However, this past election, then-candidate, now-President Donald Trump bucked this longstanding norm by refusing to release his returns.

Similarly, in 2010, then-candidate, now-Governor Jerry Brown became the first governor in a generation to not release his returns.

- 7) **Related Legislation:** SR 23 (Wiener), urges President Trump to release his 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 passed the Senate Committee on Judiciary on a 4-1 vote and was adopted on the Senate Floor on a 24-10 vote.

REGISTERED SUPPORT / OPPOSITION:

Support

Americans for Tax Fairness
California Alliance for Retired Americans
California Common Cause (if amended)
California Federation of Teachers, AFT, AFL-CIO
California Labor Federation
California Teachers Association
City of West Hollywood
Courage Campaign
Democracy for America-Marin
Indivisible Sacramento
Los Angeles County Democratic Party
Mill Valley Community Action Network
Secretary of State Alex Padilla
Service Employees International Union California
10th AD Democrats
Two Individuals

Opposition

None on file.

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