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FISCAL IMPACT REPORT

SPONSOR Tallman ORIGINAL DATE 02/16/21
LAST UPDATED 02/17/21 HB _____
SHORT TITLE Additional Oath for Certain Elected Officials SB 331
ANALYST Gaussoin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Relates to SJR10 and HB244.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Secretary of State (SOS)

New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of Bill

Senate Bill 331 would require an additional oath of office for the Secretary of State and county clerks affirming they will execute their duties in a “fair and neutral manner,” provide equal and ample opportunities for all eligible citizens to register to vote if registration is required, and ensure the results of elections accurately reflect all “valid” votes.

In addition, a county clerk or Secretary of State could not run for a different elective office during their term or for two years after their term; could not publicly endorse another candidate while holding office, could not participate in decision-making in their official capacity that could benefit their candidacy for re-election. In instances where the decision-making process could benefit their re-election, the deputy clerk or deputy Secretary of State would temporarily assume the duties of the county clerk or Secretary of State.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

The Secretary of State, responsible for overseeing elections and candidates, reports SB331 would have no fiscal impact on its agency.

SIGNIFICANT ISSUES

The apparent intent of SB331 is to improve the fairness of elections by addressing the integrity of those administering elections. However, SB331 conflicts with the conditions of office set in the state constitution and could face a legal challenge; the additional oath of office might be unnecessary; and the prohibition on endorsing other candidates could violate the right to free speech guaranteed in the U.S. Constitution.

Conditions on Holding Office. The Secretary of State indicates the bill’s restrictions on future candidacies is legally vulnerable because it conflicts with provisions of the New Mexico Constitution setting the composition and limitations on executive branch and county elected officials:

This bill could face a constitutional challenge as it could interfere with the terms of the affected elected officials that are proscribed in the Constitution. See *State v. Oliver*, 2020 -NMSC- 002. Article V, Sec 1, sets the composition and limitation on executive branch officers; such a proposed restriction is not there. Article X, Sec 2, states, “All county officers, after having served two consecutive four-year terms, shall be ineligible to hold any county office for two years thereafter.” Similar to the SOS, such a prohibition on county clerk’s candidacy is not in the Constitution either.

Oath of Office. The New Mexico Attorney General states the existing oath of office for state officials in Article XX, Section 1 – which requires elected officials to affirm they will uphold the New Mexico and U.S. constitutions and faithfully and impartially discharge the duties of their office – potentially negates the need for the additional oath. Further, language in the proposed additional oath could be interpreted to compel the secretary of state and county clerks to vote, an act that is considered a right but not compulsory. (See “Technical Issues” below.)

Restrictions on Political Activity. While the U.S. Supreme Court apparently has not directly addressed political endorsements by state elected officials, it has demonstrated a reluctance to limit the free speech rights of candidates, ruling in *Eu v. San Francisco County Democratic Central Committee* (1989) that the First Amendment protected the right of political parties to make political endorsements.

Similarly, Congress draws a bright line prohibiting the use of congressional resources for campaigns and political activity but does not limit the political activity by a member if the member does not use government resources. The U.S. House of Representatives Committee on Ethics warns that members cannot use their House office or any House resources to endorse a candidate for another office or reference the endorsement in any official communication but is silent on activities that do not use House resources.

The Hatch Act, which guides political activity by federal employees, prohibits a “less restricted” class of employee from participating in political activity while on duty but places no limits on political activities during their “free” time. Employees in the act’s more restricted category – generally presidential appointees and those in the senior executive service, intelligence

community, and law enforcement – are prohibited from all partisan or political acts, including sharing social media posts directly from a campaign or political party. However, *Government Executive*, an online publication aimed at federal administrators, reports changes to the Hatch Act have generally trended toward greater freedom of speech.¹

The line between speech constituting a Hatch Act violation and speech protected by the First Amendment has generally been pretty clear. While the Hatch Act has been around since 1939, it has been repeatedly amended in favor of allowing speech and restricting its [the act’s] reach rather than free speech. The Supreme Court established in *Pickering v. Board of Education* that “citizens do not surrender their First Amendment rights by accepting public employment.” In *Lane v. Franks*, the Court explained why: “There is considerable value ... in encouraging, rather than inhibiting, speech by public employees. ... Government employees are often in the best position to know what ails the agencies for which they work. ... The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”

Challenging Election Law. In analysis of Senate Joint Resolution 10, which asks voters to amend the state constitution to make elections for the Secretary of State and county clerks nonpartisan, the State Ethics Commission notes the state faces a high legal hurdle in defending election laws that seem to conflict with the constitution:

Determining the constitutionality of a state’s election laws requires a court to balance “the character and magnitude of the asserted injury” to protected constitutional rights against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983); *see also Crum v. Duran*, 2017-NMSC-013, 10, 390 P.3d 971 (“When a court reviews a challenge to a state election law, it must weigh the asserted injury the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.”) (internal quotation marks omitted). If a regulation imposes “severe burdens” on a party’s associational rights, it must be “narrowly tailored to serve a compelling state interest.” *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (citation omitted). “However, when regulations impose lesser burdens, a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Id.* at 586-587 (internal quotation marks omitted).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Joint Resolution 10 would ask voters to amend the state constitution to provide for nonpartisan elections for county clerks and the Secretary of State and creates an additional oath of office identical to that in SB331.

House Bill 244 clarifies the duties of the State Ethics Commission and the Secretary of State in the administration of campaign laws, creates financial disclosure rules for the commission, and sets new standards for campaign treasurers.

Other election-related bills include HB74 concerning the voting rights of released inmates, HB79 concerning primary election voting by independent voters, HB153 concerning campaign finance

¹ “Complying with the Hatch Act Isn’t That Difficult,” *Government Executive*, August 15, 2019. <https://www.govexec.com/about/?oref=ge-nav>

reporting, SB14 concerning automatic voter registration, SB48 concerning same-day and absentee voting practices, SB100 concerning minor party candidates, SB160 and SB298 concerning public campaign financing, SB235 concerning absentee voting, SB266 on judicial terms, SB254 and SB286 concerning the election to fill an empty congressional seat, SB311 concerning campaign advertising, SB336 concerning voting for 16 year olds, SB356 concerning solicitation of campaign donations, and a number of bills on redistricting.

TECHNICAL ISSUES

The oath proposed in SB331 includes an affirmation the office holder will “provide equal and ample opportunity for all eligible citizens to register to vote, if registration is required by law, *and to vote and ensure* that the results of elections accurately reflect all valid votes.” (Emphasis added.) While the intent seems to be to affirm the office holder will provide an opportunity for all eligible citizens to register to vote and vote, the language is ambiguous and could be interpreted as compelling the office holder to vote. From NMAG: “If intended, the requirement compels an activity that eligible voters hold by right. Under SB331 as drafted, a county clerk or the SOS could be compelled to vote as a duty resulting from holding their office, trust or station.”

According to USA.gov, a website created by the U.S. General Services Administration’s Technology Transformation Service to make government information more accessible, the U.S. Constitution makes voting a right and a privilege, but despite many constitutional amendments, nothing makes voting mandatory for U.S. citizens. “In the U.S., no one is required by law to vote in any local, state, or presidential election.”

Legal scholars argue mandatory voting is a violation of the constitutional protections for speech because the freedom to speak necessarily includes the freedom not to speak.² However, those same legal arguments note compulsory voting with secret ballots is essentially a mandate to show up at the polling booth; the voter can choose to leave the ballot blank.

SOS notes SB331 does not provide any penalty provisions if SOS or county clerks were to engage in the prohibited activities. In addition, SOS notes, “It may be difficult to discern what type of ‘decision making’ could benefit a person’s candidacy while running for re-election. For example, would the support of a certain policy, like voter ID or same day voter registration, which could appeal to a candidate’s voting base, be seen as decision making that could benefit a person’s candidacy?”

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² *The Case for Compulsory Voting in the United States*, 121 Harvard Law Reviews 591, 601–603 (2007).