



1-1-2013

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Recommended Citation

Kevin Heitz, *Chapter 160: Felons Who Violate “Public Trust” Banned from Elected Office*, 44 MCGEORGE L. REV. 639 (2013).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol44/iss3/12>

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Elections

Chapter 160: Felons Who Violate “Public Trust” Banned from Elected Office

Kevin Heitz

Code Section Affected

Elections Code § 20 (new).
AB 2410 (Fuentes); 2012 STAT. Ch. 160.

I. INTRODUCTION

In 2012, voters in California’s 39th Assembly District were stuck between a rock and a hard place as they chose between Los Angeles City Council Member Richard Alarcon and Raul Bocanegra.¹ At the time of the election, Alarcon was facing eighteen felony charges, including voter fraud, perjury, and living outside of his district.² Bocanegra, for his part, had been accused—by Alarcon—of engaging in insider trading to obtain an interest-free city loan to buy a condominium.³ Meanwhile, six legislators with recent arrest records were campaigning for reelection in California.⁴ For example, Senator Rodrick Wright faced eight felonies, including perjury and voter fraud.⁵

Although none of the aforementioned candidates had yet been convicted of the crimes charged, each was potentially guilty of violating public confidence.⁶ To ensure that persons like Alarcon and Wright would be ineligible to hold a public office in the state if convicted of certain felony charges, California State

1. Rick Orlov, *Richard Alarcon Survives, Will Face Raul Bocanegra*, L.A. DAILY NEWS (June 6, 2012, 7:25 PM), http://www.dailynews.com/news/ci_20799741/richard-alarcon-survives-will-face-raul-bocanegra (on file with the *McGeorge Law Review*).

2. Alice Walton, *State Bill: Convicted Politicians Banned from Office for 20 Years*, LATEST BLOG (May 17, 2012), <http://www.scpr.org/blogs/news/2012/05/17/6177/state-bill-convicted-politicians-banned-office-20/> (on file with the *McGeorge Law Review*).

3. Catherine Saillant, *Richard Alarcon Accuses Rival of ‘Insider Trading’*, L.A. TIMES (Apr. 24, 2012), <http://www.latimes.com/news/local/la-me-alarcon-race-20120424,0,4434536.story> (on file with the *McGeorge Law Review*).

4. *6 Calif. Candidates’ Records Show Arrests*, UNITED PRESS INT’L (May 5, 2012, 5:31 PM), http://www.upi.com/Top_News/US/2012/05/05/6-Calif-candidates-records-show-arrests/UPI-99641336253463/ (on file with the *McGeorge Law Review*).

5. *Id.*

6. See Press Release, Felipe Fuentes, Cal. State Assembly Member, Bill Banning Elected Officials Convicted of a Felony from Running for Office Passes State Assembly Unanimously (May 17, 2012) [hereinafter Press Release, Fuentes State Assembly] (on file with the *McGeorge Law Review*) (“[P]ublic officials have been accused or convicted of misusing their authority and violating the public’s trust.”).

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Assembly Member Felipe Fuentes introduced Chapter 160.⁷ Chapter 160, known as the Elective Office Felony Conviction Law,⁸ passed in the state legislature nearly unanimously (65–1),⁹ and the governor signed the bill into law on July 23, 2012.¹⁰

II. LEGAL BACKGROUND

This section begins with an examination of federal law regarding persons who are eligible to hold elected office. Part B discusses existing California law and the numerous restrictions on holding public office in California.¹¹

A. Federal Law

Pursuant to the United States Constitution, any person who satisfies an enumerated age, citizenship, and residency requirements may hold federal elected office.¹² For example, any person who is at least thirty years old, who has been a citizen of the United States for nine years, and who is an inhabitant of the state in which he or she is running can run for the Senate.¹³ Existing federal law disqualifies persons who commit certain offenses—such as treason and bribery of public officials—from holding federal public office.¹⁴ Furthermore, the Senate and House of Representatives can vote out members for “disorderly [b]ehaviour.”¹⁵ States cannot supplant the Constitution’s qualifications for

7. *Id.*

8. *Elective Office Felony Conviction Law*, CALIFORNIALITY (July 25, 2012), <http://www.californiality.com/2012/07/elective-office-felony-conviction-law.html> (on file with the *McGeorge Law Review*).

9. Press Release, Felipe Fuentes, Cal. State Assembly Member, Bill Banning Elected Officials Convicted of a Felony From Running for Office Passes State Legislature (July 5, 2012) (on file with the *McGeorge Law Review*).

10. CAL. ELEC. CODE § 20 (enacted by Chapter 160).

11. See *infra* notes 23–27 and accompanying text (discussing certain restrictions on holding public office in California).

12. See U.S. CONST. art. I, §§ 2–3 (providing the eligibility requirements for the House of Representatives and Senate).

13. U.S. CONST. art. I, § 3; see also *id.* art. I, § 2 (setting requirements for the U.S. House: individuals must be twenty-five years of age, a U.S. citizen for seven years, and an inhabitant of the state when elected); *id.* art. II, § 1 (stating that any “natural born [c]itizen” who reaches thirty-five years of age and has been a resident of the United States for fourteen years can run for President).

14. See 18 U.S.C. § 2381 (2006) (“Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason . . . and shall be incapable of holding any office under the United States.” (emphasis added)); *id.* § 201(b) (“Whoever [bribes] any public official . . . shall be fined . . . or imprisoned . . . , or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.”) (emphasis added).

15. U.S. CONST. art. I, § 5; see also *In re Chapman*, 166 U.S. 661, 669–70 (1897) (explaining that Congress’s right to expel a member “extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member”). In more than two-hundred years, Congress rarely has used its power to expel members. Ellen Sorokin, *In Congress’ 213-Year History, Expulsion ‘Exceedingly Rare’*, WASH. TIMES, July 25, 2002, at A10. In 2002, Representative James Traficant, Jr., became just the fifth

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eligibility to run for federal office; if a person meets the Constitution's age, citizenship, and habitability requirements for public office, state law cannot disqualify that person from holding federal office.¹⁶ Therefore, all state-level restrictions apply only to persons seeking state or local office.¹⁷

B. Existing California Law

The California Elections Code generally governs the procedures and regulations of elections in the state, including who can vote¹⁸ and who is eligible to be on the ballot.¹⁹ The California Constitution provides that a person convicted of bribery involving an election or appointment cannot hold elected office.²⁰ It also directs the legislature to create laws that “exclude persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes from office”²¹ Because that provision is not self-executing,²² the legislature enacted restrictions on holding office.²³ For example, a person convicted of bribing an executive officer to influence his or her actions cannot hold elected office in California.²⁴ The California Constitution allows for the removal of public officials for “misconduct in office,”²⁵ and various laws revoke a state official's right to run for office based on crimes committed against public power,²⁶ such as the crime of taking any gratuity or reward in exchange for appointing another person to public office.²⁷

member of the House to get expelled following his convictions of bribery, racketeering, and tax evasion. *Id.* The Senate has expelled fifteen members, with fourteen of those senators thrown out of office for supporting the Confederacy in the Civil War. *Id.* The only other senator kicked out of office was Senator William Blount in 1797, when he was expelled for treason. *Id.*

16. See JACK MASKELL, CONG. RESEARCH SERV., RL 31532, CONGRESSIONAL CANDIDACY, INCARCERATION, AND THE CONSTITUTION'S INHABITANCY QUALIFICATION 3 (2002) (“Once a person meets the three constitutional qualifications . . . that person, if duly elected, is constitutionally ‘qualified’ to serve in Congress . . .”).

17. *Id.*

18. CAL. ELEC. CODE § 2101 (West 2003).

19. *Id.* § 201.

20. CAL. CONST. art. VII, § 8.

21. *Id.*

22. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 951, 126 Cal. Rptr. 376, 381 (1st Dist. 1975) (“A constitutional provision contemplating and requiring legislation is not self-executing.”).

23. See CAL. GOV'T CODE § 1021 (West 2010) (“A person is disqualified from holding any office upon conviction of designated crimes as specified in the Constitution and laws of the State.”).

24. See CAL. PENAL CODE § 67 (West 1999) (disqualifying any person who gives or offers a bribe to influence an executive officer from holding any California office); see also *id.* § 165 (disqualifying any person convicted of bribing “any member of any common council, board of supervisors, or board of trustees” from holding office).

25. CAL. CONST. art. IV, § 18(b); see also *Morton v. Broderick*, 118 Cal. 474, 482–83, 50 P. 644, 646 (1897) (“[T]he legislature may provide that an act of misfeasance, nonfeasance, or malfeasance—in short, any dereliction in official duty—may work a forfeiture of office, yet that act need not necessarily be a crime.”).

26. PENAL § 88; see also GOV'T § 9055 (West 2005) (“Every member of the Legislature convicted of any crime defined in this article . . . forfeits his office and is forever disqualified from holding any office in the

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California’s courts recognize that a person’s right to participate in politics “is a fundamental principle of a democratic society”²⁸ and that disqualifying persons from holding public office is a “significant civil disability.”²⁹ However, the state’s interest in promoting confidence in its elected officials takes precedence over a person’s right to hold office.³⁰ For example, in *Lubin v. Wilson*, the California Court of Appeal, Fourth District noted that withholding the right to hold public office from felons is “a consequence of a reasonable and sound public policy”³¹

III. CHAPTER 160

Chapter 160 adds Section 20 to the California Elections Code.³² Chapter 160 establishes certain felonies as violations of public trust and bars those convicted of such felonies from running for public office.³³ Felonies that violate the public trust are bribery, embezzlement, “extortion[,] or theft of public money, perjury, or conspiracy to commit any of those crimes.”³⁴ Under Chapter 160, unless a “public trust” felon obtains an official pardon, he or she cannot run for elected office.³⁵ Further, Chapter 160 does not limit the felony convictions to those prosecuted in California, but includes convictions from another state or country, of any crime that would be one of the listed felonies if committed in California.³⁶

IV. ANALYSIS

Chapter 160 expands the existing limitations on candidate eligibility.³⁷ The goal is to ensure that candidates for state and local offices are “honorable,

State.”); *id.* § 1770(h) (West 2010) (including “conviction of a felony or of any offense involving a violation of . . . official duties” in the list of events causing an elected office’s vacancy).

27. PENAL § 74.

28. *Lubin v. Wilson*, 232 Cal. App. 3d 1422, 1428, 284 Cal. Rptr. 70, 73 (4th Dist. 1991) (quoting *Fort v. Civil Serv. Comm’n*, 61 Cal. 2d 331, 334, 392 P.2d 385, 387 (1964)).

29. *Helena Rubenstein Int’l v. Younger*, 71 Cal. App. 3d 406, 418, 139 Cal. Rptr. 473, 481 (2d Dist. 1977).

30. *Lubin*, 232 Cal. App. 3d at 1429, 284 Cal. Rptr. at 73.

31. *Id.*

32. CAL. ELEC. CODE § 20 (enacted by Chapter 160).

33. *Id.*

34. *Id.*; see also ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING, COMMITTEE ANALYSIS OF AB 2410, at 3–4 (May 1, 2012) (enumerating felonies that violate the public trust to include “[t]heft of government property, [f]inancial conflict of interest, . . . mail and wire fraud, mortgage fraud, tax offenses, false claims, perjury, government contract fraud, receipt and payment of kickbacks on government contracts, bank fraud, perjury, and [m]oney laundering”).

35. ELEC. § 20 (enacted by Chapter 160).

36. *Id.*

37. *Id.*

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upstanding” individuals.³⁸ However, there is no ban on felons holding federal office.³⁹ Chapter 160, therefore, only pertains to elected officials in the state of California.⁴⁰

A. Chapter 160 Passes Constitutional Muster

Chapter 160 is unique in that it can disqualify a person from holding office based on felonies committed prior to serving in public office, but its limitations are reasonable, and most importantly, constitutional.⁴¹ The United States Supreme Court has held that it is constitutional for states to impose reasonable, non-discriminatory limitations on who is eligible to run for office.⁴² For example, in *Anderson v. Celebrezze*, the Court explained that not all eligibility restrictions “impose constitutionally suspect burdens,” and that there is no “litmus-paper test” to resolve constitutional challenges to a state’s election laws.⁴³ In separating valid from invalid restrictions, a court considers whether the state’s interest in imposing a restriction is such that it is “necessary to burden the plaintiff’s rights.”⁴⁴ In *Lubin v. Wilson*, the California Fourth District Court of Appeal held that a disqualification from office pending appeal of felony convictions does not violate a person’s right to hold public office because the state had a compelling interest in safeguarding confidence in government.⁴⁵ If challenged, Chapter 160’s ban on public-trust felons holding office will likely be seen as furthering the state’s compelling interest in ensuring the general public’s confidence in the government it elects.⁴⁶ The interest in public confidence is “greater than the convicted person’s interest in [holding elected] office.”⁴⁷

B. California Joins Growing Trend

By passing Chapter 160, California joins a growing trend barring felons from holding office beyond their incarceration period, with a number of states taking a

38. Press Release, Fuentes State Assembly, *supra* note 6.

39. U.S. CONST. art. I.

40. ELEC. § 20 (enacted by Chapter 160).

41. *Id.*; see also *Lubin v. Wilson*, 232 Cal. App. 3d 1422, 1429, 284 Cal. Rptr. 70, 73 (4th Dist. 1991) (holding that disqualification from office pending appeal of conviction was “simply a consequence of a reasonable and sound public policy[] . . . in furtherance of the public interest in good government”).

42. Andrea Steinacker, *The Prisoner’s Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 B.Y.U. L. REV. 801, 813 (2003).

43. 460 U.S. 780, 788–89, 805–06 (1982) (holding that a state’s early filing deadline for independent candidates for president placed an unconstitutional burden on voters’ “freedom of choice and association”).

44. *Id.* at 789.

45. 232 Cal. App. 3d at 1429, 284 Cal. Rptr. at 73.

46. *Id.*

47. *Id.*

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similar path to protect the public trust.⁴⁸ For example, recently West Virginia State Senator Corey Palumbo wanted to keep felons off the ballots in response to a former sheriff's campaign for the same office after spending a year in prison for buying votes in every election for fourteen years.⁴⁹ In 2010, Michigan voters approved an amendment to the state's constitution disqualifying certain felons from holding public office.⁵⁰ And in 2012, South Carolina considered a bill that would extend that state's ban on felons holding office from fifteen years to a lifetime.⁵¹ Five states forever deny convicted felons the right to hold office, regardless of whether there is a restoration of other civil rights.⁵² More than a dozen states restore the right to hold office at the same time the right to vote is restored,⁵³ and a handful of states take the federal approach and allow convicted felons to run for office.⁵⁴

C. Is Chapter 160 Needed?

Chapter 160 may be more about "send[ing] a clear message" than solving an existing problem.⁵⁵ According to Assembly Member Fuentes, Chapter 160 is meant to create accountability while ensuring that only those worthy of holding public office will have the right to represent Californians.⁵⁶ For example, if either Wright or Alarcon were convicted of the felony charges facing them in 2012,⁵⁷ they would be disqualified from holding office under Chapter 160.⁵⁸ However,

48. See MARGARET COLGATE LOVE & SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY app. A (1996), available at <https://www.ncjrs.gov/pdffiles1/pr/195110.pdf> (on file with the *McGeorge Law Review*) (providing a list of rights lost by state); Press Release, Fuentes State Assembly, *supra* note 6.

49. Editorial, *Our Views: The State Must Ban Felons as Candidates One of Crime's Consequences Should Be a Loss of Rights*, CHARLESTON GAZETTE & DAILY MAIL, May 22, 2012, at 4A.

50. M.L. Elrick et al., *Ban on Felons in Office Passes*, DETROIT FREE PRESS (Nov. 3, 2010), <http://www.freep.com/article/20101103/NEWS01/11030516/Ban-felons-office-passes> (on file with the *McGeorge Law Review*).

51. Jennifer Bellamy, *Proposed Bill Would Prevent Convicted Felons from Holding Office*, WLTX.COM (Apr. 18, 2012, 6:44 PM), <http://www.wltx.com/news/story.aspx?storyid=184612> (on file with the *McGeorge Law Review*).

52. Steinacker, *supra* note 42, at 807.

53. *Id.* at 806.

54. *Id.* at 804; see also Christopher Keating, *Former Prisoner Ernie Newton Wins Democratic Endorsement*, HARTFORD COURANT (May 21, 2012), <http://www.courant.com/news/connecticut/hc-newton-wins-0521-20120521,0,18320.story> (on file with the *McGeorge Law Review*) (reporting that former Connecticut state Senator Ernie Newton won the Democratic endorsement for his old post just two years removed from serving time in federal prison on corruption and bribery charges).

55. Press Release, Fuentes State Assembly, *supra* note 6.

56. ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING, COMMITTEE ANALYSIS OF AB 2410, at 3–4 (May 1, 2012).

57. *6 Calif. Candidates' Records Show Arrests*, *supra* note 4.

58. CAL. ELEC. CODE § 20 (enacted by Chapter 160).

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there is little evidence that felons are being elected to public office in the state.⁵⁹ The Assembly Committee on Elections and Redistricting also noted that there is no information showing that “convicted felons are being elected to office in California.”⁶⁰

V. CONCLUSION

Under Chapter 160, individuals convicted of certain felonies are banned from holding any public office in the state of California.⁶¹ Despite a lack of evidence that public-trust felons have been elected in the state, Assembly Member Fuentes, Chapter 160’s author, hopes that the law will promote accountability and foster confidence in elected officials by guaranteeing that violators of the public’s trust are not allowed to represent the citizens of California.⁶² Chapter 160 constitutionally expands restrictions on eligibility for elected office to those convicted of certain felonies deemed as violations of public trust.⁶³ With the passage of Chapter 160, individuals convicted of the felonies of bribery, embezzlement of public money, extortion of public money, theft of public money, or perjury, are forever ineligible to run for public office in California.⁶⁴

59. *Id.* at 7.

60. ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING, COMMITTEE ANALYSIS OF AB 2410, at 7 (May 1, 2012).

61. ELEC. § 20 (enacted by Chapter 160).

62. See Press Release, Fuentes State Assembly, *supra* note 6 (“People who have already demonstrated they are not worthy of the public’s trust should suffer more severe consequences.”).

63. ELEC. § 20 (enacted by Chapter 160).

64. *Id.*