The Florida Senate

Interim Report 2011-119 *October 2010*

Committee on Ethics and Elections

LEGAL IMPLICATIONS OF CANDIDATE PARTY SWITCHING IN FLORIDA ELECTIONS

Issue Description

The issue is whether Florida law regarding candidates who change political parties while running for office is unambiguous *and* expansive enough to promote the State's interests in political stability and maintaining integrity in the various routes to the ballot. After careful review, some changes appear worthy of consideration.

Background

2010 U.S. Senate Race

On April 29, 2010, less than 24 hours before the end of federal candidate qualifying, Florida Governor Charlie Crist abandoned his allegiance to the Republican Party and announced an independent candidacy for the U.S. Senate,[1] or, in the vernacular of Florida "election speak," his intention to run as a candidate with no party affiliation ("NPA").[2] The switch, which Crist cited as the product of a broken political system,[3] vaulted him from a more than 20-point underdog in the Republican primary[4] to a small lead in a three-way general election race[5] against then-presumptive Republican and Democratic nominees Marco Rubio and U.S. Representative Kendrick Meek, respectively.[6] Noteworthy, also, is the fact that Crist did not actually change his party affiliation from Republican to NPA until May 12, 2010, 12 days *after* he qualified to run as an NPA candidate.[7]

Florida State University political science professor Robert J. Crew has been quoted as saying that "[n]othing like this has ever happen (sic) before in Florida; we have not had a candidate of his stature and with his resources run

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[1] Reuters Online, FLORIDA'S CRIST LAUNCHES INDEPENDENT SENATE BID (April 29, 2010) at: http://www.reuters.com/article/idUSTRE63R4UR20100430 [hereinafter Reuters, INDEPENDENT BID].

[2] Florida law uses the term NPA to avoid confusion with the State's several registered political parties whose names includes the word "independent" or "independence": the Independence Party of Florida ("IDP"); the Independent Party of Florida ("INT"); the Independent Democrats of Florida ("IDF"); and America's Independent Party of Florida ("AIP"). *See* Florida Division of Elections website at http://election.dos.state.fl.us/candidate/parties.shtml (listing the State's political parties).

[3] New York Times, FLORIDA'S SENATE SPECTACLE (April 29, 2010) at: http://www.nytimes.com/2010/04/29/us/politics/29cristcaucus.html?_r=1 [hereinafter FLORIDA'S SENATE SPECTACLE].

[4] Reuters, INDEPENDENT BID, *supra* note 1.

[5] NPA candidates skip the primary process and go right to the general election ballot. §99.0955(1), F.S.

[6] *See* Palm Beach Post, NEW POLL GIVES CRIST AN UPWARD BUMP IN SENATE RACE SINCE HIS "INDEPENDENT'S DAY" (May 4, 2010) at: http://www.palmbeachpost.com/news/state/new-poll-gives-crist-an-upward-bump-in-669752.html (Rasmussen poll taken shortly after qualifying showed Crist with a 4-point lead over Rubio and a 21-point lead over Meek). These spreads mirrored somewhat the results of a similar poll commissioned by Crist just *days before* the announcement, indicating that switching to an independent run would result in an 8-point lead over Rubio and a 13-point advantage over Meek in the hypothetical three-way general election race. *See* St. Petersburg Times, CRIST POLL SHOWS HIM IN THE LEAD (April 30, 2010) at http://blogs.tampabay.com/buzz/2010/04/crist-campaign-poll-shows-him-in-lead.html (Buzz political blog containing news from the Times staff).

[7] St. Petersburg Times, CHARLIE CRIST CHANGES VOTER REGISTRATION AND HIS MIND ABOUT GIVING DONOR REFUNDS (May 13, 2010), available at http://www.tampabay.com/news/politics/stateroundup/charlie-crist-changes-voter-registration-and-his-mind-about-giving-donor/1094557. Florida law allows a party registrant to run for office as an NPA. §99.0955, F.S.; *accord*, Div. of Elections Opinion 82-21 (Aug. 13, 1982).

as an independent."[8] One prominent newspaper, in an article entitled *Florida's Senate Spectacle*, characterized the Governor's actions as "giving Florida a race that will once again make the state a gawk-worthy stage of American politics, where the country's desires, fears and conflicts play out."[9] Adding to the surreal atmosphere that surrounded Crist's announcement was the fact that he had been the overwhelming frontrunner for the Republican nomination in the Senate race back in 2009,[10] following speculation the previous year that he was a potential running mate to Republican presidential contender Sen. John McCain.[11]

Findings

Durational Political Party Affiliation and Disaffiliation Requirements

Florida Law

It is generally presumed that a person seeking partisan office who belongs to a political party is running for his or her party's nomination for that office.

Florida's only express requirements that *specifically* address party changes apply to candidates for partisan office who qualify for nomination as a political *party* candidate and run in the primary; there are no party affiliation or disaffiliation requirements for NPAs.[12] Specifically, *party* candidates must take an oath *at the time of qualifying* stating:

1. The party of which the person is a member; and,
2. That the person is not a registered member of any other political party and has not been a candidate for nomination for *any other political party* for a period of 6 months preceding the general election for which the person seeks to qualify.[13]

Thus, the requirements for party candidates contain both a political party *affiliation* component (must belong to the political party in whose primary a candidate seeks to run *at the time of qualifying*) and a political party *disaffiliation* component (must not have been a candidate for any *other* political party for 6 months preceding the general election).

Florida's 6-month disaffiliation requirement, however, is wholly illusory for federal candidates and has only a minimal party-switching deterrent effect on other partisan candidates for office. In the federal case, candidate qualifying ends *more than 6 months prior to the general election*.[14] Thus, Governor Crist *could have* chosen to run in the *Democratic* primary for U.S. Senate by switching his voter registration to "Democrat" prior to qualifying and signing the disaffiliation oath with impunity — since, at the time of qualifying, he would not have been a candidate for any *other* political party (other than the *Democratic* Party) "for a period of 6 months preceding the general election."[15] In the case of state and multicounty partisan candidates, who qualify about 4½

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[8] Washington Times, CRIST TO RUN AS INDEPENDENT (April 30, 2010), available at: http://www.washingtontimes.com/news/2010/apr/30/crist-meets-expectations-goes-independent/print/.
[9] FLORIDA'S SENATE SPECTACLE, *supra* note 3.
[10] St. Petersburg Times, POLL: CRIST 59, RUBIO 22; MCCOLLUM 41, SINK 39 (June 5, 2009) at http://blogs.tampabay.com/buzz/2009/06/poll-crist-59-rubio-22-mccollum-41-sink-39.html (Strategic Vision poll conducted May 29-31, 2009, showed Crist with a 37-point lead over Rubio in the Republican primary) (Buzz political blog containing news from the Times staff).
[11] Reuters, INDEPENDENT BID, *supra* note 1.
[12] §99.021(1)(b), F.S.
[13] *Id.* (emphasis added); Prior to 1970, Florida's disaffiliation requirement prohibited a party candidate from being a *registered member* of any other political party for *one year preceding the general election*. §99.021(1)(a)2., F.S. (1969); Ch. 70-269, LAWS OF FLA., §2, at 844-845.
[14] The qualifying period for federal candidates ends at noon on the 116th day before the primary election, which, in turn, takes place 9 weeks prior to the general. §99.061(1), F.S. For example, federal candidate qualifying for the 2010 election ended on April 30th, with May 2nd, marking 6 months before the general election.
[15] This curious situation exists because the 1989 Legislature moved up the qualifying period for federal candidates from about 4 months before the general election to just over 6 months, without any corresponding change to the party disaffiliation

months before the general election in mid-late June,[16] the 6-month party disaffiliation requirement merely requires an attestation that they have not been a candidate for any other political party since early May — about 6 weeks prior to the last day of qualifying. It would be far more intuitive to tie the relevant affiliation or disaffiliation period to dates *coinciding with or preceding the qualifying period.*[17]

Interestingly, no party affiliation or disaffiliation oath is required for a candidate running as an NPA (or write-in); *any* candidate running for partisan office, including one registered with a political party, may qualify to run as an NPA (or write-in) provided they meet the other statutory requirements.[18]

Expansion of Affiliation and Disaffiliation Requirements

In addition to having already specifically sanctioned Florida's current 6-month party disaffiliation requirement,[19] the courts have generally been receptive to even more expansive party affiliation and disaffiliation requirements — broader in terms of both time and scope.

For example, in the 1974 seminal case of *Storer v. Brown*,[20] the United States Supreme Court upheld against constitutional attack a California statute that required an *independent* candidate to "be clear of political party affiliations for *a year before the primary*."[21] (Because of the timing of the primary, the California statute at issue actually required disaffiliation about 17 months before the general election.)[22] The *Storer* Court reasoned that the disaffiliation period operated "against independent candidacies prompted by short-range political goals, pique, or personal quarrel" in order to foster greater political stability.[23] The Court further specified that the state's interest in political stability outweighed a candidate's late decision before an election to change his or her political affiliation.[24]

More recently, in the case of *Curry v. Bueschler*,[25] the 10th Circuit United States Court of Appeals, citing *Storer*, upheld the current Colorado statute requiring independent candidates for partisan public office to be registered as unaffiliated with a political party for nearly 17 months before the general election.[26] In *Curry*, a two-term Democratic Colorado state representative changed her party affiliation to unaffiliated in December 2009 in hopes of being re-elected as an independent candidate at the 2010 election.[27] The parties stipulated that the affiliation requirement was intended "to prevent partisan candidates from entering races as unaffiliated candidates in order to circumvent the party primary process or to bleed off votes from another candidate, and as part of a more general

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requirement. *See* Ch. 89-338, §6, at 2144, LAWS OF FLA. (moving the qualifying period for federal candidates from the 57th to 53rd day before the first primary to the 120th to 116th days before the first primary). When the 6-month disaffiliation requirement was initially adopted in 1970, federal candidates qualified for office between the 63rd and 49th days before the first primary. *See* Ch. 70-93, §1, at 212-213, LAWS OF FLA. (revising the federal candidate qualifying period); Ch. 70-269, §2, at 845, LAWS OF FLA. (enacting current 6-month party disaffiliation requirement).

[16] The qualifying period for state and multicounty candidates ends at noon on the 67th day before the primary election, which, in turn, takes place 9 weeks prior to the general. §99.061(2), F.S.

[17] The current California statute, for example, pegs its disqualification period for partisan candidates to 12 months preceding the candidate's filing of a "declaration of candidacy for partisan office," which this year resulted in the disqualification period beginning over a year and a half before the general election. California Elections Code §§8001(a); 8020 (2010). Effective for the 2012 election cycle, Colorado will tie its affirmative affiliation requirements to the first business day in January immediately preceding the primary or general election. 2010 Colorado House Bill No. 1271 (approved May 27, 2010).

[18] *See supra* note 7 and accompanying text (Florida law allowed Governor Crist to qualify as an NPA for the U.S. Senate while still a registered member of the Republican Party).

[19] *Polly v. Navarro*, 457 So. 2d 1140 (Fla. 4th DCA 1984).

[20] 415 U.S. 724 (1974).

[21] *Id.* at 733 (emphasis added).

[22] *See Curry v. Bueschler*, 2001WL 3446618 (10th Cir 2010) (slip opinion) (comparing Colorado's current statutory affiliation requirement to the California statute at issue in *Storer* with respect to proximity to the general election).

[23] *Storer*, 415 U.S. at 735.

[24] *Id.* at 736.

[25] *Curry*, 2001WL 3446618 (10th Cir 2010).

[26] *Id.*

[27] *Id.* at 1.

statewide policy intended to promote political stability and protect the integrity of Colorado's political process."[28] The Court determined that the State's interests outweighed the magnitude of the asserted First Amendment injury to Curry in pursuing an independent candidacy after the statutory deadline.[29] Further, the underlying district court decision held:

> As the Supreme Court in *Storer* notes, state legislatures are given great deference in drawing the lines that both accommodate and restrict electoral participation by independent candidates. … It [Colorado's affiliation requirement] is set early enough in the election cycle to generally accommodate those who leave their party due to longstanding policy differences, but late enough to prevent late-breaking departures from parties based on pique or political opportunism.[30]

Indeed, Florida's own Fourth District Court of Appeal hinted that longer time frames would likely be viewed favorably in approving the State's current 6-month party disaffiliation requirement. Citing and comparing the Florida statute to the one-year (17 months before the general election) disaffiliation requirement at issue in *Storer*, the Court in *Polly v. Navarro*[31] reasoned:

> In the case before us the relevant disaffiliation period is *only* six months. Furthermore, the governmental interests of maintaining the integrity of different routes to the ballot and of stabilizing the political system are clearly served … and, therefore, it [the Florida statute] is constitutional.[32]

In support of its conclusion, the *Polly* Court went on to cite two federal district court cases, one from the Northern District of Ohio and the other from the Northern District of Illinois, *upholding 4-year and 2-year disaffiliation requirements*, respectively.[33]

From the foregoing cases, several legal principles about party changing statutes seem clear:

1. They can take the form of mandatory *affiliation* and/or *disaffiliation* requirements;
2. They can embrace *independent candidacies*, not just party candidates seeking to compete in a primary (as Florida's statute currently does); and,
3. They can be longer than 6 months before the general election (as Florida's statute currently provides).

With respect to this last point, it's not *entirely* clear how far the State could go in establishing affiliation and disaffiliation time frames. As previously noted, some federal and state courts have sanctioned periods as long as

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[28] *Id.* at 2. "In more detail, the parties agreed that the statute serves Colorado's interests by thwarting frivolous or fraudulent candidates, avoiding voter confusion, preventing the clogging of election machinery required to administer an election, maintaining the integrity of the various routes to the ballot (i.e., preventing a potential candidate defeated in a primary from petitioning onto the ballot, thereby defeating the purpose of the primary system), presenting the people with understandable choices between candidates who have not previously competed against one another in a primary, refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot, working against independent candidacies prompted by short-range political goals, pique, or personal quarrel, providing a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party, ensuring that voters are not presented with a laundry list of candidates who have decided on the eve of a major election to seek public office, reserving the general election ballot for major struggles and not allowing it to be used as a forum for continuing intraparty feuds, and limiting the names on the ballot to those who have won the primaries and those independents who have properly qualified." *Curry*, 2001WL 3446618 at 2, fn.4.

[29] *Id.* at 6.

[30] *Riddle v. Daley*, 2010 WL 2593927 at 10 (D.Colo. 2010), *aff'd*, *Curry v. Bueschler*, 2001WL 3446618 (10th Cir 2010).

[31] 457 So. 2d 1140 (Fla. 4th DCA 1984).

[32] *Id.* at 1143 (emphasis added).

[33] *Id.* The Court cited *Lippitt v. Cipollone*, 337 F. Supp. 1405 (N.D. Ohio 1971), *aff'd mem.,* 404 U.S. 1032 (1972), and *Bendinger v. Ogilvie*, 335 F. Supp. 572 (N.D. Ill. 1971). As the citation indicates, the 4-year disaffiliation requirement in the *Lippitt* case was affirmed by the U.S. Supreme Court without a written opinion.

two years and four years.[34] First and Fourteenth Amendment constitutional challenges to disaffiliation periods have proven unsuccessful, failing largely due to the "sufficiently important state interest" in "maintaining the integrity of the various routes to the ballot."[35] Whatever date the Legislature selects, it would have to further Florida's interests in maintaining the integrity of the ballot process; the further removed it is from the election, the weaker this interest becomes.

Requiring ***party*** candidates to be continuously affiliated with the political party whose nomination they seek for one year before qualifying would result in a time frame almost mirroring the 17-month disaffiliation period approved in *Storer*; federal candidates would have to be registered with their party about 18 months before the general election and other partisan state and multicounty candidates for about 16½ months prior. Similarly, candidates seeking to qualify as ***NPAs*** could be required to have been continuously registered with no party affiliation (or otherwise been unaffiliated with any political party) for the same period before qualifying.

Not only has the one-and-a-half-year time frame been specifically sanctioned by the U.S. Supreme Court to withstand constitutional scrutiny, but requiring a candidate to make an ultimate decision on party membership or NPA status 16-18 months before the general election would effectively eliminate or drastically reduce last-minute, self-serving decisions regarding candidacy: the dynamics of a particular race are almost never clear that far in advance of an election.[36] (If the Legislature deemed this too long, a shorter time-frame, like Colorado's first business day in January of an election year affiliation requirement — that goes into effect for the 2012 elections — could suffice.) Further, switching to a party/NPA *registration requirement*[37] instead of a disaffiliation requirement tied to the initial timing of a person's "candidacy" is more straightforward, provides greater practical certainty, and is easier to enforce.

Sore Loser Statute

Florida Law

Implicit in Florida's candidate qualifying scheme is the notion that a candidate qualifies to run for an office as *either* a party candidate *or* an NPA, and that a party candidate who loses in the primary cannot turn around and run in the general election for the same office as an NPA (or write-in): such has been the custom and practice.[38] However, the statutes do not *specifically* spell this out, and there is enough potential ambiguity that it is worth considering adoption of an express "sore loser" statute.

NPA candidates seeking to qualify for "election" to partisan office must submit their qualifying papers[39] by a date certain and either pay a 4% qualifying fee[40] or submit a sufficient number of validated signatures to qualify by the petition method.[41] Upon qualifying, NPA candidates are entitled to have their name printed on the general election ballot.[42] Party candidates seeking to qualify for "nomination or election" to office must submit the ***same***

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[34] *See id.* and accompanying text (discussing *Lippitt* and *Bendiger* cases).
[35] *Storer*, 415 U.S. at 724.
[36] *See supra* note 10 and accompanying text (showing Crist with a 37-point lead over Rubio in the Republican primary in May 2009).
[37] *See supra* note 13 (clarifying that Florida law tied its political party disaffiliation requirement to party *registration* prior to 1970).
[38] For example, the Florida Department of State has adopted separate forms containing the various requisite oaths and affirmations — one for candidates *with* a party affiliation and the other for candidates *with no* party affiliation. *See* Form DS-DE 27 (form for federal candidates with a political party affiliation); Form DS-DE 27B (form for federal candidates with no party affiliation); Form DS-DE 24 (form for non-federal candidates with party affiliation); Form DS-DE24B (form for non-federal candidates with no party affiliation), *available at* http://election.dos.state.fl.us/forms/index.shtml#can.
[39] Qualifying papers for an NPA candidate consist of the requisite candidate's oath and loyalty oath, a form appointing a campaign treasurer and designating a campaign depository, and the candidate's full and public financial disclosure form. §§99.061(7), 99.0955(1), F.S.
[40] The qualifying fee for NPAs consists of a filing fee equal to 3% of the annual salary of the office sought and an election assessment equal to 1% of the annual salary of the office sought. §§99.092(1), 99.0955(2), F.S.
[41] §§99.092(1), 99.0955 F.S.
[42] §99.0955(1), F.S.

qualifying papers (plus the written statement of party affiliation and disaffiliation) by the ***same date certain*** and either pay the ***same 4% qualifying fee*** (plus a 2% party assessment)[43] or submit the same number of validated signatures to qualify by the petition method.[44] Thus, although party candidates have *additional* qualification requirements,[45] party candidates who qualify for office will have met **all** the qualifying requirements of NPA candidates for the same office.[46] Thus, there is an argument that a losing primary candidate, having met all the qualification requirements of an NPA, is entitled to have his or her name placed on the general election ballot — as the law specifically provides; there is no *express* prohibition against re-characterizing or transforming one's candidacy after a losing primary race from a partisan bid to an unaffiliated one.

Similarly, while Florida's resign-to-run law specifically precludes a candidate from qualifying for "more than one public office" if any portion of the terms of the two offices run concurrently,[47] and there is an express provision prohibiting someone from qualifying as a *write-in candidate* if he or she has otherwise qualified for the same office,[48] there is *no analogous prohibition* with respect to qualifying to run as both an NPA and a party candidate for the *same office*. Thus, a candidate could argue that the statutes allow for qualification as both an NPA and a party candidate for the same office.

Explicit Sore Loser Statute

Leaving the door even *slightly* ajar for political party candidates to also qualify up-front as NPAs or to re-cast a failed primary bid as an unaffiliated, general election candidacy contravenes the State's interests in ensuring integrity and stability of the political system and many of the other interests discussed in the context of party disaffiliation statutes.[49] Several states have enacted an express "sore loser" statute in order to "[work] against independent candidacies prompted by short-range political goals."[50] For example, California law explicitly provides that a candidate who ran in a primary election seeking a party's nomination but was defeated is barred from running for the same (or any other) office as an independent candidate.[51] The law also provides that a candidate may not "file nomination for a [political] party nomination and an independent nomination for the same office."[52] Adopting similar language would definitively close any potential loopholes in current Florida law.

Options

- Extend ***durational party affiliation requirements*** for candidates seeking partisan office from 6 months before the general election to 1 year before the candidate qualifies, effectively preventing last-minute party switching for personal political gain. *(If the Legislature deems that period too long, it could consider requiring affiliation from the beginning of an election year.)*

    - Require *party* candidates to be continuously registered with the political party whose nomination they seek for one year before qualifying. This would mean that federal candidates would have to be registered with their party for just over 18 months before the general election and other state and multicounty candidates for about 16½ months before the general.

[43] The qualifying fee for party candidates consists of the same 3% filing fee and 1% election assessment paid by NPA candidates, along with an additional 2% political party assessment. §§99.061(1),(2), 99.092(1), F.S.
[44] §§99.061, 99.092(1), F.S.
[45] Party candidates must file the 6-month party disaffiliation oath as part of their qualifying papers, and party candidates *not qualifying* by the petition method must remit an additional 2% political party assessment as part of their qualifying fee.
[46] The same cannot be said of party candidates with respect to meeting the qualification requirements of write-in candidates, who have a unique residency requirement mandating that they reside in the district they seek to represent at the time of qualifying. §99.0615, F.S.
[47] §99.012(2), F.S.
[48] §99.061(4)(b), F.S.
[49] *See supra* note 28 and accompanying text (detailing state interests in the context of disaffiliation statutes).
[50] *Storer*, 415 U.S. at 725; *see, e.g.*, California Elections Code §8003 (2010).
[51] *Id.* at §8003(a).
[52] *Id.* at §8003(b).

  - Require *NPA* candidates for partisan office to be continuously registered with no party affiliation (or otherwise been unaffiliated with any political party) for one year prior to qualifying.

- Adopt express "***sore loser"*** provisions, prohibiting:

  - A candidate whose name has been on the ballot in a party primary and who has been defeated for that nomination from running as a write-in candidate or an NPA candidate for any office (including Lieutenant Governor, who qualifies within 9 days after the end of the primary).
  - A candidate from qualifying to run for a party nomination and as an NPA for the same office.