

Releasing the 1040, Not so EZ: Constitutional Uncertainties from Presidential Tax Return Release Laws[#]

Matthew M. Ryan*

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INTRODUCTION

On multiple fronts, Americans are pursuing President Trump’s tax returns: a senator through legislation, a district attorney and congressional committees through investigation, and voters through protest and persuasion.¹ None have succeeded.

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* Law clerk in the United States Court of Appeals for the Eighth Circuit; J.D. 2017, Harvard Law School. All ideas, opinions, and mistakes are solely my own. I owe much gratitude to Professor Laurence Tribe, Max Schulman, and Kripa Sreepada for their invaluable guidance.

1. *An Antidote to Donald Trump’s Secrecy on Taxes*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/an-antidote-to-donald-trumps-secrecy-on-taxes.html> [<https://perma.cc/3A5L-463M>] (Senator Ron Wyden proposed legislation to require major-party presidential candidates to disclose up to three years of tax returns); Williams K. Rashbaum & Benjamin Weiser, *Trump Taxes: President Ordered to Turn Over Returns to Manhattan D.A.*, N.Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/nyregion/trump-taxes-lawsuit-vance.html> [<https://perma.cc/RT5T-RHEJ>]; Lauren Fox, *Key House Democrat Issues Subpoenas for Trump’s Tax*

Last year, California jumped into the fray. It conditioned a candidate's placement on its presidential primary ballot on the release of their tax returns. Passage of the law finalized what many states—at least twenty-five thus far²—have considered.

Yet, California's aspirations died quickly. After a federal district court wounded the law with an injunction,³ the California Supreme Court dealt a fatal blow, ruling that California's release law violated the state constitutional provision requiring an open presidential primary.⁴

The law's death leaves important questions for another day. Release laws implicate hefty, unsettled constitutional doctrines, including a candidate's access to the ballot, the right of informational privacy, the Emoluments Clauses, and state power in electing the president.⁵

Returns, CNN (May 10, 2019), <https://www.cnn.com/2019/05/10/politics/democrats-subpoena-trump-tax-returns/index.html> [<https://perma.cc/C48W-GA5K>]; Greg Allen, *Protesters Use April 15 to Demand Trump's Tax Returns*, NPR (Apr. 15, 2017), <https://www.npr.org/2017/04/15/524122918/protesters-use-april-15-to-demand-trumps-tax-returns> [<https://perma.cc/8CZU-P9J3>].

2. Kira Lerner, *More Than Half of States are Trying to Force Trump to Release His Tax Returns*, THINKPROGRESS (Apr. 6, 2017, 8:39 PM), <https://archive.thinkprogress.org/state-legislation-trump-taxes-bd00db338546> [<https://perma.cc/GG5S-PELC>]; see also Alexi McCammond, *The Big Picture: The State Efforts to Keep Trump off the 2020 Ballot*, AXIOS (June 24, 2018), <https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html> [<https://perma.cc/7X2A-VACZ>].

3. See *Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019).

4. See *Patterson v. Padilla*, 451 P.3d 1171, 1189 (Cal. 2019); see also CAL. CONST. art. 2, § 5(c) (“The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, 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 or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.”) (emphasis added).

5. Many have commented on release laws' constitutionality, but no article has considered how such laws serve as a vehicle to examine unresolved and significant constitutional issues. See, e.g., Vikram D. Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot*, JUSTIA: VERDICT (Dec. 30, 2016), <https://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot> [<https://perma.cc/SF2H-TZ7B>]; Laurence H. Tribe, et al., *Candidates Who Won't Disclose Taxes Shouldn't Be On The Ballot*, CNN (Apr. 14, 2017, 5:21 PM), <http://www.cnn.com/2017/04/14/opinions/state-laws-requiring-tax-return-disclosure-legal-tribe-painter-eisen/index.html> [<https://perma.cc/28B6-CBJ2>]; see also Eric T. Tollar, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK. U. L. REV. 695 (2018); see also Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISC. 46 (2017); cf. Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L. J. 62 (2017). As of September 9, 2019, Derek T. Muller appears to have a forthcoming article arguing that the release laws are unconstitutional titled “Weaponizing the Ballot.” See Derek T. Muller, *Weaponizing the Ballot* (Abstract), SSRN (Sept. 9, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450649 [<https://perma.cc/RL8X-3FY2>].

I.

U.S. TERM LIMITS, INC. V. THORNTON

Beginning with precedent, *U.S. Term Limits, Inc. v. Thornton* is the marquee case for analyzing the legality of release laws.⁶ In 1992, Arkansas amended its constitution to prohibit from its ballot House of Representatives members who had served three terms and Senators who had served two terms.⁷ The Supreme Court, in a 5-4 split, found the law unconstitutional.⁸

Term Limits settled two significant disputes: (1) whether states have the reserved power to add qualifications to congressional office and, if they do not, (2) whether term limits constitute an impermissible qualification.

For the question of reserved state power, both sides—Justice Stevens’s majority ruling no reserved power and Justice Thomas’s dissent arguing for a reserved power—bolstered their claims with historical analysis. The majority put forth *Federalist Papers* quotes.⁹ The dissent countered with post-ratification state laws.¹⁰ The justices also disagreed over the Constitution’s text. The majority read the Constitution’s enumeration of three qualifications to sit in Congress—age, years of citizenship, and residency¹¹—as an exhaustive list.¹² The dissent read that same list as a baseline from which states could expand.¹³

Because originalist and textualist principles provided no clear answer, the majority bolstered its position with two structural considerations. First, the Court looked to the fact that *the people* elect their congressperson—“a fundamental principle of our representative democracy” that states could not obstruct.¹⁴ Second, the Court cautioned that state-mandated qualifications would lead to a “patchwork of state qualifications,” and undermine Congress’s representation of all people.¹⁵

After determining that states do not have the reserved power to set qualifications for congressional office, the *Term Limits* Court attempted to comprehensively define qualification. Doing so proves no easy task.

6. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

7. *Id.* at 784.

8. *Id.* at 838.

9. *Id.* at 806–08 (quoting THE FEDERALIST NOS. 52, 57).

10. *Id.* at 905–10 (citing Virginia’s property qualification, and durational residency requirements in Georgia, North Carolina, and Virginia).

11. U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of Twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”); U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”).

12. *Term Limits*, 514 U.S. at 805.

13. *Id.* at 867 (“[T]hese different formulations—whether negative or affirmative—merely establish *minimum* qualifications.”) (emphasis in original).

14. *Id.* at 819–22.

15. *Id.* at 822.

II.

WHAT IS A QUALIFICATION?

The Constitution permits state legislatures to regulate the “times, places, and manner” of congressional elections¹⁶ and the “manner” of choosing electors for the Electoral College,¹⁷ yet states cannot place qualifications on holding federal office.¹⁸ A consistent line is elusive between regulating the “manner” of elections yet not imposing a “qualification” on obtaining the office. Justice Neil Gorsuch, in a law review article advocating for term limits before *Term Limits*, summarized the Court’s position as “know[ing] a qualification or manner regulation when it sees one.”¹⁹

Term Limits added two important guideposts: a qualification is an obligation (1) targeting a “class of candidates”²⁰ or (2) impermissibly “handicapping”²¹ or “barring”²² a candidate from office. If a law meets either standard, it is unconstitutional.

A. Targeting a Class of Candidates

Targeting a “class of candidates” means imposing a substantive qualification on federal office.²³ A substantive characteristic is something “inherent in [each] candidate,” the Third Circuit summarized in a case upholding a law that required a filing fee.²⁴ “Inherent” means it is “involved in the constitution or essential character of something,”²⁵ and “existing in something as a permanent, essential, or characteristic attribute.”²⁶

16. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).

17. U.S. CONST. art. II, § 1, cl. 2 (“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; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

18. See *Term Limits*, 514 U.S. 779; see also *Powell v. McCormack*, 395 U.S. 486 (1969).

19. Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA. L. REV. 341, 355 (1991).

20. *Term Limits*, 514 U.S. at 832.

21. *Id.* at 836.

22. *Id.* at 831.

23. *Id.* at 835; see also *Storer v. Brown*, 415 U.S. 724 (1974).

24. *Biener v. Calio*, 361 F.3d 206, 212 (3d Cir. 2004), quoting *Term Limits*, 514 U.S. at 800 (“[*Term Limits*] and the ‘impressive and uniform body of judicial decisions’ cited therein where courts have struck down laws on the basis that they improperly added qualifications to those found in the Qualifications Clause focus on qualifications that were inherent in each candidate. For instance, all of the following qualifications have been found unconstitutional: term limits; district residency requirements; loyalty oath requirements; voter registration requirements; and restrictions on those convicted of felonies.”).

25. *Inherent*, MERRIAM WEBSTER DICTIONARY ONLINE (2019), <https://www.merriam-webster.com/dictionary/inherent> [<https://perma.cc/Z92Y-D998>].

26. *Inherent*, OXFORD DICTIONARY (2019), <https://www.lexico.com/en/definition/inherent> [<https://perma.cc/GTC8-NGFF>].

Danielle Lang, in a UCLA law review article, clarifies that a qualification targets a “class of candidates” if it excludes access to the ballot “based on personal characteristics—things that cannot be changed, at least not at the point of election, such as age, residency, education, land ownership, and . . . past congressional service.”²⁷ Qualifications are unlike “laws that ask candidates to do something any candidate could do in order to gain ballot access, such as paying filing fees, gathering signatures, or resigning another public office.”²⁸

Courts should adopt these definitions. Under them, release laws clearly do not target a “class of candidates.” Any candidate can consent to release of their tax returns at the point of election. Refusing to consent is not a “permanent, essential, or characteristic attribute” of the candidate.²⁹ But satisfying the first guidepost—targeting a class of candidates—is just the beginning. The second guidepost presents the harder question: do release laws impermissibly bar or hinder candidates from appearing on the ballot?

B. Impermissibly Barring or Hindering Candidacy

For the second guidepost, the Court employs a balancing test to determine whether a law impermissibly hinders or bars a candidate from seeking office.³⁰ “A court must first consider the character and magnitude of the asserted injury to the [candidate’s] rights [to run for office] . . . It then must identify and evaluate the interests put forward by the State to justify the burden imposed by its rule.”³¹ The test derives from the First and Fourteenth Amendments, which protect two “overlapping” rights, forming “interwoven strands of liberty”: the right of the candidate to advance their political beliefs, and the right of voters to support candidates who share their beliefs.³²

On both sides of the scale, release laws implicate unsettled constitutional issues. They burden the individual interest in informational privacy, while advancing a public anti-corruption interest under the Emoluments Clauses.

III.

THE PROTECTION OF INFORMATIONAL PRIVACY

Release laws require candidates to reveal sensitive information. Tax returns can expose many private details, including gifts to friends and family,³³ medical

27. Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISC. 46, 55 (2017).

28. *Id.*

29. OXFORD DICTIONARY, *supra* note 26.

30. The same balance is applied to voting rights cases. *See, e.g., Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 190 (2008); *Burdick v. Takushi*, 504 U.S. 428 (1992).

31. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

32. *Id.* at 787 (citing *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)).

33. DEP’T of the TREAS., IRS, *Instructions for Form 709: United States Gift* (2018), <https://www.irs.gov/pub/irs-pdf/i709.pdf> [<https://perma.cc/7RHC-FTHR>].

surgery payments,³⁴ and business interests.³⁵ During the 2012 presidential election, for example, then-candidate Mitt Romney delayed releasing his tax returns. Some commentators suspected that he hesitated because the returns revealed his donations to the Church of Jesus Christ of Latter-day Saints—information easily abused by voters with animus toward his faith.³⁶

Release laws implicate the interest to protect informational privacy—an undefined area of constitutional law. In *NASA v. Nelson*, a contract employee sued NASA because it conducted a background check that collected information about recent drug use.³⁷ In deciding for NASA, the Supreme Court assumed a constitutional “interest in avoiding disclosure of personal matters,”³⁸ but subjected that “interest” to a deferential balancing test that tipped in favor of the government.³⁹ The Court ruled that preventing illicit drug use outweighed the privacy interest. Critical to the Court’s decision, the Privacy Act prevented public dissemination.⁴⁰

In *Whalen v. Roe*, thirty-four years before *Nelson*, the Court upheld a New York law allowing the state to collect personal information on all New Yorkers who were prescribed certain drugs.⁴¹ The Court believed that such a system—used to combat illicit drug use—was an “orderly and rational legislative decision.”⁴²

34. DEP’T of the TREAS., IRS, *Publication 502: Medical and Dental Expenses* (2018), <https://www.irs.gov/pub/irs-pdf/p502.pdf> [<https://perma.cc/X5T6-HWEB>].

35. See *Russell v. Bd. of Plumbing Exam’rs of Cty. of Westchester*, 74 F. Supp. 2d 339, 348 (S.D.N.Y. 1999) (striking down a New York law that required plumbers to release tax returns in order to receive plumbing license).

36. Doug Mataconis, *Should Presidential Candidates Be Expected to Release Their Tax Returns?*, OUTSIDE THE BELTWAY (Jan. 19, 2012), <http://www.outsidethebeltway.com/should-presidential-candidates-be-expected-to-release-their-tax-returns/> [<https://perma.cc/8TN6-ZZV9>]; see also Edward Morrissey, *Romney Voyeurs: Digging for Tax Return Porn*, FISCAL TIMES (Jan. 19, 2012), <http://www.thefiscaltimes.com/Columns/2012/01/19/Romney-Voyeurs-Digging-for-Tax-Return-Porn> [<https://perma.cc/YVH5-SGW2>]; see also Mitt Romney, *Tax Returns from 2011*, TAXNOTES 333 [http://www.taxhistory.org/thp/presreturns.nsf/Returns/9F81699BC7D6DE238525798F0051C35F/\\$file/M_Romney_2011.pdf](http://www.taxhistory.org/thp/presreturns.nsf/Returns/9F81699BC7D6DE238525798F0051C35F/$file/M_Romney_2011.pdf) [<https://perma.cc/YW7U-WAMW>] (showing a donation of \$1,115,484 to The Church of Jesus Christ of Latter-day Saints).

37. 562 U.S. 134, 138 (2011).

38. *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) and *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 457 (1977)).

39. The Court’s use of “interest,” as opposed to “right,” is significant. The Supreme Court has been hesitant to find a “right” to informational privacy. Many commentators have argued that such a right exists by combining the penumbra of the Constitution’s First, Fourth, Fifth, and Fourteenth Amendments along with seminal cases, such as *Griswold v. Conn.*, 381 U.S. 479 (1965); *Olmstead v. U.S.*, 277 U.S. 438 (1928); *Stanley v. Ga.*, 394 U.S. 557 (1969); and *Poe v. Ullman*, 367 U.S. 497 (1961). See, e.g., *Constitutional Law, The Supreme Court 2010 Term, Leading Cases*, 125 HARV. L. REV. 172, 237 (2011).

40. *Nelson*, 562 U.S. at 156 (citing 5 U.S.C. § 552a(e)).

41. 429 U.S. at 591 (1977).

42. *Id.* at 597.

The same year, President Richard Nixon claimed a privacy interest to prevent release of his presidential papers.⁴³ The Court concluded that the papers could be made public because they dealt with presidential duties, so the public interest in transparency outweighed President Nixon's personal privacy interest.⁴⁴

Release laws go beyond the governmental actions upheld in *Nelson*, *Whalen*, and *Nixon*. First, *Nelson* and *Whalen* found it significant that privacy statutes prevented public dissemination.⁴⁵ Release laws do the exact opposite, asking the candidate to consent to public release.⁴⁶ Second, unlike Nixon's presidential papers, release laws disseminate more personal material—a candidate's private finances. In dicta, *Nixon* acknowledged that “matters concerned with family or personal finances” may have some constitutional protection if those papers are “unrelated to any acts done by [the president] in their public capacity.”⁴⁷

Release laws bring *Nixon*'s hypothetical to life, raising two difficult questions. First, do presidential candidates have a privacy interest in their tax returns? Candidates certainly give up some privacy by entering the public arena,⁴⁸ but it is unclear just how much. Presidential candidates' modern practice of releasing their tax returns may lessen the expectation of privacy.⁴⁹ Second, and relatedly, do a candidate's tax returns concern acts they may take as president in their public capacity?⁵⁰ Tax returns could reveal purely family or personal issues—e.g., healthcare expenditures—but may also reveal information relevant to a president's public acts—e.g., foreign investments that impact foreign policy decisions. In fact, even a medical issue could be relevant to the president's ability

43. *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425 (1977).

44. *Id.* at 457–65.

45. *Nelson*, 562 U.S. at 156 (citing 5 U.S.C. § 552a(e)); *Whalen*, 429 U.S. at 601–02 (looking to state law protections against public disclosure).

46. *Cf.* 26 U.S.C. § 6103(a)(2). Professor Michael McConnell argues that the federal statute requiring some financial disclosure preempts release laws such as California's. See Ed Kilgore, *California Threatens to Ban Trump from 2020 Primary Ballot Unless He Releases Tax Returns*, NEW YORK MAG. (May 3, 2019), <http://nymag.com/intelligencer/2019/05/california-may-ban-trump-from-primary-unless-taxes-released.html> [<https://perma.cc/3XLH-GL3B>].

47. *Nixon*, 433 U.S. at 457.

48. *Cf.* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

49. Karen Yourish, *Clinton Released Her Taxes. Will Trump Follow This Tradition?*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/interactive/2016/08/05/us/elections/presidential-tax-returns.html> [<https://perma.cc/G73S-VXFF>]. When determining that the president's accountants needed to comply with a subpoena from a district attorney, the Second Circuit “note[d] that the past six presidents . . . all voluntarily released their tax returns . . . [so it] is unlikely to impair the president in performing the duties of his office.” *Donald J. Trump v. Cyrus R. Vance, Jr., et al.*, 941 F.3d 631, 641 n.12 (2d. Cir. 2019).

50. *Nixon*, 433 U.S. at 457.

to perform his duties.⁵¹ *Nixon*'s dicta, therefore, highlights the privacy issues implicated in release laws, and yet, answers very little.⁵²

IV.

ANTI-CORRUPTION INTEREST: EMOLUMENTS CLAUSES

On the other side of the equation, release laws advance the public interest to prevent corruption,⁵³ and thus raise a novel justification to police the presidency with the Domestic and Foreign Emoluments Clauses. The Domestic Emoluments Clause forbids the president from accepting money—and other things of value—from the federal and state governments, while allowing for a salary from the federal government.⁵⁴ The Foreign Emoluments Clause forbids the president from accepting things of value from foreign governments, unless Congress consents.⁵⁵ For most of American history, the clauses were relatively unexamined, but nevertheless, they exist to prevent “external influence”⁵⁶ over and “corruption”⁵⁷ of federal officials. The Framers feared that, without these clauses, other governments might curry favor with United States’ federal officeholders, which would undermine the republic.⁵⁸

The release of tax returns may reveal a candidate’s financial entanglements with other sovereigns, foreign and domestic. Without public exposure of such entanglements, a president could violate a constitutional provision with impunity. The Emoluments Clauses, therefore, offer states a constitutional hook to challenge presidential conflicts of interest. And yet, courts have never had

51. See U.S. CONST. amend. XXV.

52. *Trump v. Mazars USA, LLP*, a dispute over whether Congressional committees can subpoena the president’s financial documents, may clarify how a president’s financial papers implicate his presidential duties. During oral argument on May 12, 2020, the justices wrestled with whether a president’s financial documents are pertinent to Congress’s legislative power in Article I, and whether obtaining those documents—which expand beyond the president’s tax returns—unduly burden the president’s ability to perform his duties in Article II.

53. Cf. *Buckley v. Valeo*, 424 U.S. 1 (1976) (ruling it is a compelling justification to limit actual, and appearance of, corruption); *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 357 (2010) (acknowledging *Buckley*’s anticorruption interest, and ruling it was not sufficient to displace corporate independent expenditures).

54. U.S. CONST. art. II, § 1, cl. 7 (the president is prohibited from receiving “any other Emolument from the United States, or any of them”).

55. U.S. CONST. art. I, § 9, cl. 8 (“no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”).

56. David Cole, *Trump is Violating the Constitution*, N.Y. REVIEW OF BOOKS (Feb. 23, 2017), <http://www.nybooks.com/articles/2017/02/23/donald-trump-is-violating-the-constitution/> [<https://perma.cc/D2B3-LWRZ>] (citing 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 389 (1987)).

57. *Id.* (citing 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 327 (1987)).

58. See generally Norman L. Eisen, et al., *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS (Dec. 16, 2016), <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/> [<https://perma.cc/WZ57-XW4Z>].

occasion, until recently, to define these clauses.⁵⁹ Difficult questions arise.⁶⁰ For instance, do the Clauses prohibit interest income from Treasury bonds?⁶¹ Or receipt of the Nobel Peace Prize?⁶² Elementally, do they even apply to the president?⁶³

The burden on privacy and the benefit to end corruption via the Emoluments Clauses are two key considerations in deciding whether release laws bar or hinder a candidate's right to run for office, the second guidepost to determine whether release laws are a qualification.

In addition to this balance, a powerful, structural question remains: how much power do states have in presidential elections?

V.

STATE POWER IN PRESIDENTIAL ELECTIONS

Separate from the issue of what constitutes a qualification for the office, release laws require courts to wade into murky terrain: the power of states in presidential elections. *Term Limits*—despite addressing a law that targeted only congressional candidacies—offhandedly noted that states retain the same limited powers in presidential elections as in congressional elections.⁶⁴ It may be true that states have no greater *reserved* powers emanating from the Tenth Amendment for presidential elections than for congressional elections.⁶⁵ But the Constitution's Electoral College delegates much greater power over presidential elections to states.⁶⁶

59. See, e.g., Sharon LaFraniere, *Judge Rejects Government's Request to Halt Emoluments Suit Against Trump*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/politics/trump-emoluments-lawsuit.html> [<https://perma.cc/E7GF-VZBC>]; cf. Donald J. Trump, et al. v. Mazars USA, LLP, 940 F.3d 710, 734 (D.C. Cir. 2019) (“If the President may accept no domestic emoluments and must seek Congress’s permission before accepting any foreign emoluments, then surely a statute facilitating the disclosure of such payments lies within constitutional limits.”).

60. Recently, the Fourth Circuit acknowledged that “emoluments” is ambiguous. See *In re Trump*, 2020 WL 2479139, at *6 (4th Cir. May 14, 2020) (“The President’s insistence that ‘emoluments’ indisputably include only ‘profit arising from office or employ’ (that is, payment for services rendered in performance of a formal job), while possible, is certainly not indisputable. Respondents [District of Columbia and Maryland] assert that emoluments include ‘all profits and other benefits [accepted from a foreign or domestic government] that [the President] accepts through the businesses he owns.’ Before this litigation commenced, no court had ruled on this question . . .”).

61. Andy Grewal, *Should Congress Impeach Obama for His Emoluments Clause Violations?*, YALE J. REG. (Dec. 13, 2016), <https://www.yalejreg.com/nc/should-congress-impeach-obama-for-his-emoluments-clause-violations/> [<https://perma.cc/T9BS-GCT8>].

62. Andy Grewal, *What DOJ Opinions Say about Trump and the Foreign Emoluments Clause*, YALE J. REG. (Dec. 7, 2016), <https://www.yalejreg.com/nc/what-doj-opinions-say-about-trump-and-the-foreign-emoluments-clause/> [<https://perma.cc/DM5Y-N2EE>].

63. *Id.*

64. *Term Limits*, 514 U.S. at 803–04 (quoting 1 Story § 627) (“Representatives and Senators are as much officers of the entire Union as is the President. States thus ‘have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.’”).

65. *Id.*

66. U.S. CONST. art. II, § 1, cl. 2.

Yet, the breadth of state power in the presidential election remains unsettled.⁶⁷ This is not due to any ambiguity in the text, in isolation. The Constitution delegates the power to choose the president to the *state legislatures* and the power to choose Congressmen to the *people*. Article I provides that, “[t]he House of Representatives shall be composed of Members chosen every second year *by the People* of the several States.”⁶⁸ Likewise, in the Seventeenth Amendment, “[t]he Senate of the United States shall be composed of two Senators from each State, elected *by the people* thereof.”⁶⁹ Article II, on the other hand, assigns that “[e]ach *State* shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors” and the electors then choose the president.⁷⁰ In choosing the president, the people (shockingly) need not be involved.⁷¹

Term Limits relied on “the people” directly choosing their congressmen. As the Court summarized, “the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and *chosen directly, not by States, but by the people.*”⁷² The Court also observed that senators used to be chosen by “the Legislature thereof,”⁷³ but now (because of the Seventeenth Amendment) are chosen by direct election.⁷⁴ It conceded that, prior to the Seventeenth Amendment, state legislatures maintained a greater “express delegation of power” in choosing senators.⁷⁵ Despite these observations, the Court did not consider the implications for Article II, which still grants the power to state legislatures to choose the president. It is unclear, therefore, how *Term Limits* applies when Article II—and not Article I—is at issue.

Historically, the Supreme Court has recognized expansive state power in presidential elections. In 1892, in *McPherson v. Blacker*, the Court acknowledged states’ “plenary authority” to choose how they assign their

67. Three decades before *Term Limits*, Justice Potter Stewart argued that the states had broad discretion in establishing qualifications because of the powers delegated to them in Article II. See *Williams*, 393 U.S. at 48–51 (Stewart, J., dissenting) (finding that a state can set qualifications so long as the law does not violate the Fifteenth, Nineteenth, or Twenty-Fourth Amendments).

68. U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

69. U.S. CONST. amend. XVII (emphasis added).

70. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

71. Since the mid-1800s, all states assign their electors for the Electoral College based on the popular vote, but the Constitution does not mandate such a system. See AKHIL R. AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 152–56 (2005). On May 13, 2020, in *Chiafalo v. Washington* and *Colorado Department of State v. Baca*, the Court heard oral argument on whether Article II or the Twelfth Amendment prohibit states from banning “faithless electors,” Electoral College participants who break their pledge, and cast their Electoral College ballot for someone who did not win the state’s popular vote.

72. *Term Limits*, 514 U.S. at 821 (emphasis added).

73. U.S. CONST. art. I, § 3, cl. 1.

74. *Term Limits*, 514 U.S. at 821.

75. *Id.* at 804 n.16.

electoral votes.⁷⁶ *McPherson* observed that the state legislatures retained absolute power—including directly choosing who received electoral votes—in the first presidential election.⁷⁷ This continued for many presidential elections.⁷⁸ Based on this historical practice, as well as the Constitution’s text, *McPherson* concluded that Article II “convey[s] the broadest power of determination” to the states.⁷⁹ More recently, *Bush v. Gore* echoed *McPherson*’s reading, with all sides acknowledging that the federal government must take a state’s election processes “as they come.”⁸⁰

Yet, despite the Constitution’s text and history supporting broad state power in choosing the president,⁸¹ such an outcome clashes with *Term Limits*’ structural analysis, which read the Constitution to prevent a “patchwork of state qualifications” on a candidate’s right to obtain federal office. This clash arises from a tension internal to the Constitution: it has separated what chooses the president from whom the president represents.⁸² The president is chosen by 50 separate sovereigns via the Electoral College but represents all Americans.

Permitting states to add qualifications to the presidency would lead to severe fragmentation. It is one thing for the State of Arkansas to limit who can become an Arkansas Senator; it is quite another for Arkansas to limit who becomes president—or more accurately, for Arkansas to limit who can win its six electoral votes, and thus impact who becomes president. As noted in *Anderson v. Celebrezze*, “in the context of the presidential election, state-

76. *McPherson v. Blaker*, 146 U.S. 1, 27 (1892) (“The [C]onstitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.”) (emphasis added); see also *Burroughs v. U.S.*, 290 U.S. 534 (1934) (granting plenary power to choose the manner of appointing electors under U.S. CONST. art. II, § 1).

77. *McPherson*, 146 U.S. at 8; see also Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 199 (2004) (“What is most striking about the limited [Founding] debate was the dominance of one position—a distrust of the “people” to elect the President.”).

78. *McPherson*, 146 U.S. at 8–9.

79. *Id.* at 13.

80. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting); see also *id.* at 148 (Breyer, J., dissenting) (arguing that state constitutional provisions regulate the state legislature as well); see also *id.* at 113 (Justice Rehnquist arguing that a federal question is raised if the state departs significantly from its own legislative process); see also Richard L. Hasen, *How States Could Force Trump to Release His Tax Returns*, POLITICO MAG. (Mar. 30, 2017), <https://www.politico.com/magazine/story/2017/03/donald-trump-tax-returns-release-214950> [<https://perma.cc/2MBT-4GWC>] (noting that *Bush v. Gore*’s focus on state power in electing the president bolsters release laws).

81. See U.S. CONST. art. II, § 1, cl. 2 (In Article II, there are a few limits to state power in the Electoral College, including how many electors each state receives, who may be an elector, and when the electors must vote.). See also U.S. CONST. amend. XII (further describing the Electoral College process).

82. Cf. Heather Lardy, *The Constitutional Limits of Democratic Choice: US Term Limits Inc. v. Thornton*, 25 ANGLO-AM. L. REV. 376, 391 (1996) (analyzing the political theory for electing congressmen).

imposed restrictions implicate a uniquely important national interest . . . [f]or the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.”⁸³ Justice Thomas, despite arguing for broad state powers in *Term Limits*, addressed the negative externalities for presidential elections and concluded that Arkansas cannot set qualifications for the president.⁸⁴

Further, the Fourteenth Amendment’s structural federalism may require uniformity—and the preference of one federal system over fifty independent sovereigns. *McPherson*’s observation—made in 1892 during the post-Reconstruction expansion of states’ rights—that states have plenary power, narrowly read the Fourteenth Amendment as “not . . . radically chang[ing] the whole theory of the relations of the state and federal governments to each other.”⁸⁵ This reading is inaccurate today.⁸⁶

Additionally, the Fourteenth Amendment’s Due Process Clause may prevent additional qualifications. As Justice Harlan argued, the Electoral College is a state institution and, therefore, it must hear from all persons who want to support a candidate.⁸⁷ Qualifications keeping candidates off the ballot prevent an open process.

Yet, these arguments have never been cemented in Supreme Court case law. Instead, states are left with an undefined amount of power to choose the president. Given the tensions among text, history, and structure emanating from the Electoral College, release laws offer a new opportunity to establish the power states have in choosing the president.

VI.

SLIPPERY SLOPE

If a tax return release law is passed and upheld, states could mandate release of other personal documents, such as school transcripts and medical records.⁸⁸

83. *Anderson*, 460 U.S. at 794–95 (footnote omitted).

84. *Term Limits*, 514 U.S. at 861 (Thomas, J., dissenting) (“Even though the Arkansas Legislature enjoys the reserved power to pass a minimum-wage law for Arkansas, it has no power to pass a minimum-wage law for Vermont. For the same reason, Arkansas may not decree that only Arkansas citizens are eligible to be President of the United States; the selection of the President is not up to Arkansas alone, and Arkansas can no more prescribe the qualifications for that office than it can set the qualifications for Members of Congress from Florida. But none of this suggests that Arkansas cannot set qualifications for Members of Congress from Arkansas.”).

85. *McPherson*, 146 U.S. at 12.

86. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964).

87. *See Williams*, 393 U.S. at 42 (Harlan, J., concurring).

88. Eric T. Tollar, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK. U. L. REV. 695, 726–27 (2018) (“However, obtaining tax returns by way of state ballot restrictions could easily open the door to perverse results . . . We must ask ourselves if we are willing to transform ballot restrictions from procedural roadblocks designed to prove a candidate’s political viability, into proverbial crowbars used to pry loose information that some simply want from a candidate. It begins with tax returns but could quickly lead to drug tests and medical histories. Or birth certificates.”).

These documents flip the political calculus. In 2012, President Trump sought President Obama's college applications and transcripts.⁸⁹ Four years later, he suggested Secretary Clinton release her health records.⁹⁰

A political tug-of-war over release laws is even more reason to find coherent, comprehensive solutions to the constitutional ambiguities they raise. After California's failed efforts because of its constitution, there is no telling when courts will review release laws. But when they do, they must take care in weighing hefty constitutional issues.

89. Russell Goldman, *Donald 'Bombshell' Fails to Blow Up*, ABC NEWS (Oct. 24, 2012), <http://abcnews.go.com/Politics/OTUS/donald-trump-fails-drop-bombshell-offers-cash-obama/story?id=17553670> [<https://perma.cc/YY5A-3ET4>].

90. Dan Merica, *Clinton Campaign Releases New Health Information*, CNN, (Sept. 15, 2016, 12:55 AM), <https://www.cnn.com/2016/09/14/politics/clinton-campaign-releases-new-health-information/index.html> [<https://perma.cc/8AHZ-DUWZ>].