

Legal Sidebar

Independent Bids for President

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[Speculation](#) has [arisen](#) that various contenders for each of the major parties' nomination for president might consider running as independent or third party candidates. There have, of course, been numerous instances of independent candidates running for, and having their electors appear on state ballots for, the office of President. However, if a candidate pursues an independent run for the presidency *after* participating in the nomination process of a major political party—including competing in state primaries and caucuses for delegates to the party's national nominating convention—a candidate could face several legal and practical obstacles.

These obstacles, involving “[ballot access](#)” requirements in the 50 states and the District of Columbia, could include:

1. “Sore loser” laws;
2. “Disaffiliation” requirements; and
3. Nominating petition deadlines.

Sore Loser Laws: [Almost every state](#) has a species of ballot access regulation that is often called a “sore loser” law. Generally, these laws provide that if an individual unsuccessfully runs in a state's primary for a party's nomination, subsequently, the individual can neither appear on the general election ballot as an independent nor as the nominee of another political party for the same office. The Supreme Court has [upheld](#) a state “sore loser” law against challenges under the [First and Fourteenth Amendments](#), and against claims that the law imposes additional [qualifications for office beyond those set forth in the U.S. Constitution](#). The Court held that the law constituted a legitimate ballot access regulation serving the interests of limiting the size of the ballot; eliminating voter confusion and the proliferation of frivolous candidates; and preventing extensive and continued intra-party conflict.

Although state sore loser laws could pose serious obstacles for a post-primary independent run for *most* offices, these state provisions might not apply with respect to presidential candidates. As a technical matter, candidates for President are not voted for directly by the voters of a state. Instead, their names appear on the ballot as surrogates for [presidential electors](#), who then, after elected, cast their ballots for President. Similarly, a state presidential primary does not directly nominate a candidate, but rather allocates state delegates to the party's national nominating convention. [One study](#) from several years ago suggested that sore loser laws would apply to the choosing of presidential electors in only four states. This study demonstrated that there is an absence of judicial interpretation of the issue of the applicability of sore loser laws to presidential bids in the various states. Therefore, to determine where sore loser laws would apply, the study looked not to judicial interpretation, but to past practice in a state of permitting the electors of an independent candidate for President to be on the general election ballot even if that candidate had previously participated in a party's presidential primary in that state. Given this lack of judicial interpretation, in at least some states, the application of sore loser laws to presidential candidates may be unclear.

Disaffiliation Laws: Generally, state “disaffiliation” laws serve to prevent ballot access to an independent candidate if he or she voted in the immediately preceding party primary or, had a registered party affiliation within a specific period of time prior to the preceding primary election. In the same case upholding a state sore loser law, the Supreme Court also [upheld](#) the constitutionality of a state disaffiliation law. Depending on the specific language, such laws may serve as an impediment to presidential candidates who have participated in a party's primary within a state, and now seek to appear on a general election ballot as an independent or third party candidate in the same election cycle. In some cases, candidates may need to seek court interpretation of the applicability of a specific disaffiliation law to presidential

candidates. Relatedly, for example, the office of the Ohio Secretary of State recently [announced](#) that a candidate who has filed for a party's presidential primary in Ohio could not "in good faith" disaffiliate from that party, as required under [Ohio law](#), in order to be eligible for the ballot as an independent in the general election.

Petition Deadlines: States have enacted deadlines for filing nominating petitions whereby after a certain date, no additional candidate names are eligible to be placed on a ballot. As a federal court has [found](#), states have a compelling interest in setting such deadlines in order to insure that ballots "can be properly and timely prepared and distributed." The Supreme Court has [held](#), however, that deadlines for nominating petitions may not be so long and onerous as to unfairly burden ballot access by independent and minor party candidates.

For example, although the Republican National Convention is scheduled earlier than in recent presidential election cycles—July 18-21, 2016—in at least a dozen states, petition [deadlines](#) for independent presidential candidates fall on dates that are prior to the convention. Therefore, potential independent candidates and their supporters could not wait until after the convention, and the determination of the party nominee, to comply with such deadlines. Additionally, other states have established deadlines for filing nominating petitions that are close to the time of the convention, and might therefore pose logistical and practical issues for garnering the requisite signatures.

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