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01/05/88

Fourth Supplement to Memorandum 87-101

Subject: Topics and Priorities for 1988 and Thereafter (Suggested Topic for Study)

Attached to this supplementary memorandum is a letter suggesting that the Commission recommend the repeal of "all the unconstitutional and inequitable rules of law found in Chapter 6 of the California Elections Code." The staff has selected a few of the numerous attachments to the letter for reproduction here. One of the attachments not reproduced here is Chapter 6 of Division 6 of the Elections Code, which in fairly extensive detail governs nomination of independent candidates for public office.

This is a highly political matter in which the Legislature is actively involved; for these reasons, the staff does not believe the matter is appropriate for Commission study. In fact, the two provisions of Chapter 6 that are the subject of court cases attached to the letter--relating to filing fees and signatures required for nomination--have been substantially revised by the Legislature since the cases were decided.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Temporary Address:
720 Fourth Ave.
San Diego, California
92101

San Diego, December 23, 1987

California Law Revision Commission
4000 Middlefield Rd., Rm. D.2
Palo Alto, California

Please Read enclosure (1) and ask the State Legislature to repeal all the unconstitutional and inequitable Rules of law found in Chapter 6 of the California Elections Code.

I will be looking forward to hearing from you.

Very truly yours,
Antonio Cunha
PROF. ANTONIO CUNHA

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DONALD PAUL LUBIN, Etc., Petitioner,
v
LEONARD PANISH, Registrar-Recorder, County of Los Angeles

415 US 709, 39 L Ed 2d 702, 94 S Ct 1315

Argued October 9, 1973.
Decided March 26, 1974.

Decision: California election statutes requiring candidates' payment of filing fees for names to be placed on primary ballot, but not providing alternative means of access to ballot, held violative of equal protection rights of indigent candidates.

SUMMARY

An indigent person who sought nomination as a candidate for election to the Board of Supervisors for Los Angeles County was denied a place on the primary ballot when he was unable to pay a filing fee, required by state statutes governing nominations and elections for certain offices. Such person, with others, instituted a class action in the Los Angeles Superior Court, seeking a writ of mandate against certain public officers, and contending that the California filing fee statutes, which provided no alternative means of access to the ballot, deprived indigent persons of equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First Amendment. The Superior Court denied the writ of mandate, and subsequent petitions for writs of mandate

were also denied by the Court of Appeal, Second District, and by the California Supreme Court.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by **Burger,** Ch. J., expressing the view of seven members of the court, it was held that absent reasonable alternative means of ballot access, the state could not, consistent with constitutional standards under the equal protection clause, require that an indigent candidate pay filing fees to obtain a place on the ballot, since selection of candidates solely on the basis of ability to pay a fixed fee, without providing any alternative means of access to the ballot, such as a candidate's filing of a nomination petition signed by a substantial number of voters, was not reasonably necessary to the accomplishment of the state's legitimate election interest of maintaining the integrity of elections by limiting the size of ballots.

Douglas, J., concurring in the court's opinion, expressed the view that under equal protection standards traditionally disfavoring wealth discriminations, the state's inability to show a compelling interest in conditioning the right to run for office on payment of fees rendered the fee requirement unconstitutional.

Blackmun, J., joined by **Rehnquist,** J., concurring in part, agreed that the California Supreme Court's order should be reversed, and expressed the view that with regard to the absence of a realistic alternative access to the ballot for indigent candidates under the California system, the demands of the equal protection clause could be satisfied by allowing a write-in procedure for candidates, free of the fee presently required under California law, as well

as by a proper petitioning process, as suggested by the court's opinion.

COUNSEL

Marguerite M. Buckley argued the cause for petitioner.

Edward H. Gaylord argued the cause for respondent.

THOMAS TONE STORER et al., Appellants,
v
EDMUND G. BROWN, Jr., et al. (No. 72-812)

LAWRENCE H. FROMMHAGEN, Appellant,
v
EDMUND G. BROWN, Jr., et al. (No. 72-6050)

415 US 724, 39 L Ed 2d 714, 94 S Ct 1274

Argued November 5, 1973.
Decided March 25, 1974.

Decision: California election statute forbidding ballot position in general election to independent candidate who had been registered with political party within one year prior to preceding primary, held not violative of equal protection or freedom of political association under First and Fourteenth Amendments.

SUMMARY

Prior to the 1972 elections, separate actions for declaratory and injunctive relief were instituted in the United States District Court for the Northern District of California by persons (and their supporters) who sought ballot positions as independent candidates for President and Vice President of the United States, and for the United States Congress, and who challenged the constitutionality of certain California statutes prescribing qualifications for independent candidates. The statutes—attacked as infringing First and Fourteenth Amendment rights,

and as adding qualifications for the office of Congress contrary to Article 1, § 2, clause 2 of the Constitution—forbid a ballot position in a general election to an independent candidate if he had a registered affiliation with a qualified political party at any time within one year prior to the preceding primary election, and require that an independent candidate must file nomination papers signed by no less than five percent nor more than six percent of the entire vote cast in the preceding general election in the area for which the candidate seeks to run, which signatures must be obtained (a) during a 24-day period following the primary and ending 60 days prior to the general election, and (b) from persons who had not voted at the preceding primary elections. Dismissing the complaints, the three-judge District Court held that the statutes served a sufficiently important interest to sustain their constitutionality.

On direct appeals, the United States Supreme Court affirmed in part, and vacated and remanded in part. In an opinion by **White, J.**, expressing the view of six members of the Court, it was held that (1) the plaintiffs who sought ballot positions as independent candidates for Congress were properly barred for failure to comply with the party disaffiliation requirement under the California statute, which statute was not unconstitutional as adding qualifications for the office of Congress, or as violating equal protection or the right to associate for political purposes under the First and Fourteenth Amendments, since the disaffiliation requirement was supported by the state's compelling interest in protecting the direct primary process and in maintaining the stability of its political system, and since the

disaffiliation requirement involved no discrimination against independent candidates, the state's laws also providing that a party candidate must not have been registered with another party for one year before he filed his declaration prior to the primary; but (2) the District Court's judgment would be vacated and the case remanded as to the plaintiffs who sought ballot positions as independent candidates for President and Vice President (and who apparently had satisfied the disaffiliation requirement), since the record failed to include findings of critical facts necessary to determine whether the statutory requirements as to obtaining signatures for an independent candidate's nomination papers imposed an unconstitutional burden on the plaintiff's access to the ballot, such necessary findings including (a) the amount of the entire vote in the last general election and the number of qualified voters from which the signature requirement had to be satisfied within the specified 24-day period, (b) whether the available pool of signers was so diminished by the disqualification of those who had voted in the preceding primary that the signature requirement was too great a burden on the plaintiffs, and (c) whether the signature requirements were necessary to serve the state's compelling interest in maintaining a manageable ballot.

Brennan, J., joined by **Douglas** and **Marshall**, JJ., dissented on the grounds that (1) the party disaffiliation requirement, under which a person presently affiliated with a party was required to take affirmative action toward independent candidacy at least 17 months before the general election, was unconstitutional as imposing an impermissible burden on First and Fourteenth Amendment rights, since the state

failed to show that its interest in protecting the direct primary system could not have been protected in a less burdensome way, and (2) the record established that the signature requirements were unconstitutionally burdensome as applied to the plaintiffs who sought ballot positions as independent candidates for President and Vice President.

COUNSEL

Paul N. Halvonik and Joseph Remcho argued the cause for appellants.

Clayton P. Roche argued the cause for appellees.

Voters do not have to sign nomination papers.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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.

Congress has had the power under Article I, § 4, to legislate to protect that right against both official [14] and private denial.[15]

Clause 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 the State in which he shall be chosen.

QUALIFICATIONS OF MEMBERS OF CONGRESS

When the Qualifications Must Be Possessed

A question much disputed but now seemingly settled is whether a condition of eligibility must exist at the time of the election or whether it is sufficient that eligibility exist when the Member-elect presents himself to take the oath of office. While the language of the clause expressly makes residency in the State a condition at the time of election, it now appears established in congressional practice that the age and citizenship qualifications need only be met when the Member-elect is to be sworn.[1] Thus, persons elected to either the House of Representatives or the Senate before attaining the required age or term of citizenship have been admitted as soon as they became qualified.[2]

Exclusivity of Constitutional Qualifications

Congressional Additions.—Writing in *The Federalist* with reference to the election of Members of Congress, Hamilton firmly stated that "[t]he qualifications of the persons who may . . . be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." [3] Until the Civil War the issue was not raised, the only actions taken by either House conforming to the idea that the qualifi-

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Yarbrough, 110 U.S. 651, 663 (1884). *See also Wiley* v. *Sinkler*, 179 U.S. 58, 62 (1900); *Swafford* v. *Templeton*, 185 U.S. 487, 492 (1902); *United States* v. *Classic*, 313 U.S. 299, 315, 321 (1941).

[14] *United States* v. *Mosley*, 238 U.S. 383 (1915).

[15] *United States* v. *Classic*, 313 U.S. 299, 315 (1941).

[1] *See* S. Rept. No. 904, 74th Congress, 1st sess. (1935), reprinted in 79 *Cong. Rec.* 9851–9853 (1935).

[2] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 418; 79 *Cong. Rec.* 9841–9842 (1935); cf. Hinds' *Precedents*, *supra*, § 420.

[3] No. 60 (Modern Library ed. 1937), 391. *See also* 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 623–627 (relating to the power of the States to add qualifications).

cations for membership could not be enlarged by statute or practice.[4] But in the passions aroused by the fratricidal conflict Congress enacted a law requiring its members to take an oath that they had never been disloyal to the National Government.[5] Several persons were refused seats by both Houses because of charges of disloyalty [6] and thereafter House practice, and Senate practice as well, was erratic.[7] But in *Powell v. McCormack* [8] it was conclusively established that the qualifications listed in cl. 2 were exclusive [9] and that Congress could not add to them by excluding Members-elect not meeting the additional qualifications.[10]

Powell was excluded from the 90th Congress on grounds that he had asserted an unwarranted privilege and immunity from the process of a state court, that he had wrongfully diverted House funds for his own uses, and that he had made false reports on the expenditures of foreign currency.[11] The Court determination that he had been wrongfully excluded proceeded in the main from the Court's analysis of historical developments, the Convention debates, and textual considerations. This process led the Court to conclude that Congress' power under Article I, § 5 to judge the qualifications of its Members

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[4] All the instances appear to be, however, cases in which the contest arose out of a claimed additional state qualification.

[5] Act of July 2, 1862, 12 Stat. 502. Note also the disqualification written into § 3 of the Fourteenth Amendment.

[6] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 451, 449, 457.

[7] In 1870, the House excluded a Member-elect who had been re-elected after resigning earlier in the same Congress when expulsion proceedings were instituted against him for selling appointments to the Military Academy. 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 464. A Member-elect was excluded in 1899 because of his practice of polygamy, id., §§ 474–480, but the Senate refused, after adopting a rule requiring a two-thirds vote, to exclude a Member-elect on those grounds. Id., §§ 481–483. The House twice excluded a socialist Member-elect in the wake of World War I on allegations of disloyalty. 6 C. Cannon's *Precedents of the House of Representatives* (Washington: 1935), §§ 56–58. *See also*, S. Rept. No. 1010, 77th Congress 2d sess. (1942), and R. Hupman, *Senate Election, Expulsion and Censure Cases From 1789 to 1960*, S. Doc. No. 71, 87th Congress, 2d sess. (1962), 140 (dealing with the effort to exclude Senator Langer of North Dakota).

[8] 395 U.S. 486 (1969). The Court divided eight to one, Justice Stewart dissenting on the ground the case was moot.

[9] The Court declined to reach the question whether the Constitution in fact does impose other qualifications. 395 U.S., 520 n. 41 (possibly Article I, § 3, cl. 7, disqualifying persons impeached, Article I, § 6, cl. 2, incompatible offices, and § 3 of the Fourteenth Amendment). It is also possible that the oath provision of Article VI, cl. 3, could be considered a qualification. *See Bond* v. *Floyd*, 385 U.S. 116, 129–131 (1966).

[10] 395 U.S., 550.

[11] H. Rept. No. 27, 90th Congress, 1st sess. (1967); 395 U.S., 489–493.

was limited to ascertaining the presence or absence of the standing qualifications prescribed in Article I, § 2, cl. 2, and perhaps in other express provisions of the Constitution.[11] The conclusion followed because the English parliamentary practice and the colonial legislative practice at the time of the drafting of the Constitution, after some earlier deviations, had settled into a policy that exclusion was a power exercisable only when the Member-elect failed to meet a standing qualifications,[12] because in the Constitutional Convention the Framers had defeated provisions allowing Congress by statute either to create property qualifications or to create additional qualifications without limitation,[13] and because both Hamilton and Madison in the *Federalist Papers* and Hamilton in the New York ratifying convention had strongly urged that the Constitution prescribed exclusive qualifications for Members of Congress.[14]

Further, the Court observed that the early practice of Congress, with many of the Framers serving, was consistently limited to the view that exclusion could be exercised only with regard to a Member-elect failing to meet a qualification expressly prescribed in the Constitution. Not until the Civil War did contrary precedents appear and later practice was mixed.[15] Finally, even were the intent of the Framers less clear, said the Court, it would still be compelled to interpret the power to exclude narrowly. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2 *Elliot's Debates* 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress' own post-Civil War exclusion cases, against 'vesting an improper and dangerous power in the Legislature.' 2 Farrand 249." [16] Thus, the Court appears to say, to allow the House to exclude Powell on this basis of qualifications of its own choosing would impinge on the interests of his constituents in effective participation in the electoral process, an

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[11] *Powell v. McCormack*, 395 U.S. 486, 518, 547 (1969).
[12] Id., 522–531.
[13] Id., 532–539.
[14] Id., 539–541.
[15] Id., 541–547.
[16] Id., 547–548.

interest which could be protected by a narrow interpretation of Congressional power.[18]

The result in the *Powell* case had been foreshadowed earlier when the Court held that the exclusion of a Member-elect by a state legislature because of objections he had uttered to certain national policies constituted a violation of the First Amendment and was void.[19] In the course of that decision, the Court denied state legislators the power to look behind the willingness of any legislator to take the oath to support the Constitution of the United States, prescribed by Article VI, cl. 3, to test his sincerity in taking it.[20] The unanimous Court noted the views of Madison and Hamilton on the exclusivity of the qualifications set out in the Constitution and alluded to Madison's view that the unfettered discretion of the legislative branch to exclude members could be abused in behalf of political, religious or other orthodoxies.[21] The First Amendment holding and the holding with regard to testing the sincerity with which the oath of office is taken is no doubt as applicable to the United States Congress as to state legislatures.

State Additions.—However much Congress may have deviated from the principle that the qualifications listed in the Constitution are exclusive when the issue has been congressional enlargement of those qualifications, it has been uniform in rejecting efforts by the States to enlarge the qualifications. Thus, the House in 1807 seated a Member-elect who was challenged as not being in compliance with a state law imposing a twelve-month durational residency requirement in the district, rather than the federal requirement of being an inhabitant of the State at the time of election: the state requirement, the House resolved, was unconstitutional.[22] Similarly, both the House and Senate have seated other Members-elect who did not meet additional state qualifications or who suffered particular state disqualifications.

[18] The protection of the voters' interest in being represented by the person of their choice is thus analogized to their constitutionally secured right to cast a ballot and have it counted in general elections, *Ex parte Yarbrough*, 110 U.S. 651 (1884), and in primary elections, *United States* v. *Classic*, 313 U.S. 299 (1941), to cast a ballot undiluted in strength because of unequally populated districts, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot, *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

[19] *Bond* v. *Floyd*, 385 U.S. 116 (1966).

[20] Id., 129–131, 132, 135.

[21] Id., 135 n. 13.

[22] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 414.

Unconstitutional requirements:
1) signatures from voters, 2) fees.

Los Angeles Times

28 Part I/Thursday, September 17, 1987

Reagan and Burger Lead Salute to Constitution

WASHINGTON (AP)—President Reagan saluted the Constitution, "our blueprint for freedom," on the eve of its 200th birthday and led thousands of children Wednesday in the Pledge of Allegiance at a colorful celebration of American citizenship.

As former Chief Justice Warren E. Burger read the Constitution's preamble, many of the children gathered on the west lawn of the Capitol joined him in reciting it, beginning with the ringing, "We, the people of the United States."

Stock Trading Halts

At the New York Stock Exchange, trading halted briefly in the afternoon, and workers waved American flags on the trading floor. In Boston, workers took off their hard hats, dropped their tools and joined Reagan in the televised pledge. Congress temporarily adjourned for the ceremony and hundreds of federal workers were given an extra 90 minutes on top of their usual one-hour lunch to attend.

"We're a part of history," said Holly Maultz, 16, one of 108 pupils who recited the pledge a half-hour before Reagan on the flight deck of the aircraft carrier Kitty Hawk, in Pennsylvania for an overhaul.

A star-spangled spectacle cranks up in Philadelphia today, the anniversary of the signing of the Constitution, with a parade, picnic, presidential speech, international bell-ringing ceremony, show business fanfare and fireworks. Hundreds of descendants of the Founding Fathers arrived Wednesday, along with chief justices from each of the original 13 states.

Hand on his heart, Reagan recited the pledge Wednesday, and moments later red, white and blue balloons were released over the Capitol at the tribute, called "A Celebration of Citizenship."

'Blueprint for Freedom'

"Times have changed, but the basic premise of the Constitution hasn't changed," Reagan said. "It's still our blueprint for freedom."

"All of us have an obligation to study the Constitution and participate actively in the system of government that it establishes," he said later. "And there is no better time than right now . . . to rededicate ourselves to the Constitution and the values it contains."