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FILE NO. S-454

ELECTIONS:
Nominations - Judicial Elections

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Honorable W. Russell Arrington
State Senator
135 South LaSalle Street
Chicago, Illinois 60603

Dear Senator Arrington:

I have your letter wherein you state:

"On January 13, 1972, the General Assembly overrode the Governor's veto of House Bill 3623 which amended the Election Code to make primary provisions applicable to the nomination of judges. See PA 77-1805.

Because this legislation became effective after the time for filing petitions for the March 1972 primary had expired, serious doubt has arisen as to whether or not any judicial election can be conducted in 1972 to fill such vacancies as may have occurred in the court system of our State.

Because the General Assembly may have an opportunity to rectify this situation upon its return from recess on April 10, 1972, we would respectfully ask your opinion on the present status of

potential judicial elections this year. Specifically, please answer the following questions:

1. Under the provisions of PA 77-1805 and the Election Code, by what method, if any, may vacancies in nomination for the office of judge in any particular circuit or district be filled, if such vacancy will have occurred after the March primary election by reason of the lack of opportunity for potential judicial candidates to file nominating papers, as above set forth?

(See: The Progressive Party v. Flynn, 401 Ill. 573 (1948); Ill. Rev. Stats., Ch. 46, Sec. 7-61 and Sec. 8-17.)

2. Under the provisions of PA 77-1805 and the Election Code, what method, if any, is available to the electorate to 'write in' the name of any candidate for judicial office whose name does not appear on the ballot in (a) the March 1972 primary election and (b) the November 1972 general election?

3. Does a procedure presently exist which would allow an independent candidate for judicial office to petition directly on to the November 1972 general election ballot? If so, what is that procedure?

(See: Ill. Rev. Stat., Ch. 46, Sec. 10-3.)

4. Does a procedure presently exist which would allow a candidate for judicial office who is a member of an established political party to petition directly on to the November 1972 general election ballot? If so, what is that procedure?"

In answer to your first question, there is no method by which vacancies in nomination can be filled. With regard to that question you cited sections 7-61 and 8-17 of The Election Code (Ill. Rev. Stat., ch. 46, para. 7-61, 8-17) as construed by the court in The Progressive Party v. Flynn, 401 Ill. 573. Article 8 of The Election Code is applicable only to the election of members of the General Assembly and is not, therefore, pertinent. It is my view that the method of filling vacancies in nomination provided in section 7-61 cannot be used in filling vacancies in nomination for judicial office.

Section 10 of article VI of the Illinois Constitution of 1870 provided that judges shall be nominated "by party convention or primary." The legislature passed article 9 of The Election Code to provide a means for nominating judges by party convention. The party convention consisted of committees set up under article 7 of The Election Code.

The 1970 Illinois Constitution changed this language. Section 12(a) of the Judicial Article provides for nomination of judges "at primary elections or by petition." Note the deletion of "party conventions" and the addition of "by petition." The change in language indicates that the Constitutional Convention intended to prohibit further use of the party convention to nominate judges. The convention debates substantiate this opinion.

The original language proposed by the judiciary committee of the Constitutional Convention merely stated that judges "shall be nominated * * * as provided by law * * *." No mention was made of the method of nomination. The committee wanted to leave this up to the General Assembly:

> "The Committee Majority proposes that circuit judges be elected as provided by law. Repealed is the present requirement that judges be nominated by party convention or primary. The convention method of nomination has been particularly subject to criticism because of the tight political control exercised in such conventions by party functionaries such as ward and precinct committeemen and County Chairmen. The Committee Majority would leave the nomination and initial election process to legislative judgment. This would permit either

> the convention or party primary mechanism, or non-partisan primary nominations, and the ultimate election, including the time thereof, to be determined by the legislature. This flexibility is desirable for initial elections." 6th Ill. Const. Con., Committee on Judiciary Proposal No. 3, Pages 88 and 89.

On first reading Delegate Karns proposed an amendment adding "in primaries, or by petition":

> "PRESIDENT WITWER: 'In primaries or by petition,' is that the full sweep of it?
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> MR. KARNS: That is. And the necessity I feel for this amendment, Mr. President, arose yesterday, I believe, when in answer to a question asked by Mrs. Netsch, it was indicated, contrary I might add, to what I thought was the intent of the language, that the Majority Proposal would continue to allow circuit judges to be nominated by party convention.
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> The effect of the amendment would be to require that nominations must be in primaries or by petition, and that is of course, to take care of the problem suggested by Mr. Weisberg, of the independent candidate, and would refer that matter to whatever might be found in the Election Code as it now appears, or as it may be amended from time to time.
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> MR. KARNS: Very briefly, I think the matter of nomination by party convention caucus, or what you will, has been very well discussed in the Minority Report, and this would make the Majority and Minority parallel to that extent.
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> I think all of the delegates have an opinion on this. I know many have expressed an opinion

that the nomination by party convention is hardly a democratic process. We have witnessed, and are witnessing right now the chicanery that can go on in the selection of Judicial candidates by party convention.

* * * * *

MR. TECSON: Mr. Chairman, I rise to oppose this amendment. I prefer the Majority Report as it stands right now. The General Assembly can add this language, and can make this provision if it so desires. I think it's legislative in nature, and I urge the defeat of this amendment.

* * * * *

MR. FAY: Mr. President, and fellow delegates, the Committee has no fixed opposition to this, if this is the will of the body.

We know that there are a lot of people that voiced objections to the Convention process. It was our opinion that we should leave the legislature flexibility in this area, as they have at present. As I indicated to you yesterday, we did remove the partisan requirement in the elective process, so they could move to a non-partisan type of thing. And that, of course, would obviously mean something other than conventions.

We are not wedded to the idea of retaining a convention, the convention method, but we do stand on our position that the legislature, if we're going to keep on electing judges should have quite a little freedom of choice in the manner of election." 6th Ill. Con. Conv. verbatim transcript, July 8, 1970, pages 99 through 105.

This amendment passed 74 to 8.

On second reading several additional references were made to the intention of prohibiting nomination of judges by party conventions.

> "MRS. KINNEY: This would preclude only nominating conventions and I will accept that and add it.
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> * * * * *
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> MRS. KINNEY: I think the big change is the elimination of party conventions.
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> MR. PECCARELLI: Agreed. Well, I understand that.
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> * * * * *
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> MR. KARNS: Mr. Peccarelli, I think it was my language and it was, as we say, added hastily on the floor, but my intent was to make it clear that the General Assembly could not provide for nominations by party conventions.
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> * * * * *
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> MR. KARNS: Yes, if the General Assembly so provides. The big thing this does is rule out nominating conventions.
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> MR. COLEMAN: Yes, I understand that."
> 6th Ill. Con. Conv. verbatim transcript, August 11, 1970, pages 83, 91, 92, 99.

The convention debates therefore substantiate what appears obvious from the language change. Judges are not

to be nominated by party conventions. Filling vacancies in nomination by party committees (Ill. Rev. Stat. 1971, ch. 46, par. 7-61) is comparable to nomination by convention, and also prohibited. Further, the Constitution only authorizes nomination by primary election or petition. Election means popular vote. (See Ill. Rev. Stat. 1971, ch. 46, par. 1-3.) "Primary election", as used in the Constitution, is not subject to any definition that would include a procedure for filling nominations by party committee, particularly in view of the convention's obvious aversion to the naming of candidates by party action.

Therefore, there is no method available to fill the vacancies in nomination for the office of judge.

Taking your questions out of sequence, the answer to your fourth question is in the negative. I have assumed by that question you want to know whether a member of an established political party can petition directly on to the November ballot <u>under his party designation</u>. There is nothing in the statutes nor in the Constitution which would authorize such action. In this latter connection, see also the discussion hereinafter, in response to your question number two, which deals with

the concept of self-executing provisions of the Constitution. Article 7 of The Election Code provides the means by which established political parties can, through the primary election proceeding, place the names of their candidates on the November ballot. An established political party is one which polled more than 5% of the vote at the last general election, while a minor political party is one which polled 5% or less. (Ill. Rev. Stat. 1971, ch. 46, pars. 7-2, 10-1, 10-2.) Nothing in Article 7 authorizes either a candidate or his party to, by petition, place the candidate's name directly on the November ballot. As you have pointed out, the mechanisms for nomination by primary election set forth in Article 7 were made applicable to judicial elections (P.A. 77-1805) too late to be utilized during the March 1972 primary.

Article 10 of The Election Code is specifically limited in application to minor political parties and independents. The mechanics of Article 10 cannot be employed by established political parties or their candidates.

In response to your third question concerning whether independent judicial candidates can, by petition, place their names on the November ballot, I must reply in the negative. It is true that there is statutory provision for such procedure. (Ill. Rev. Stat., 1971, ch. 46, par. 10-3.) Furthermore, there are provisions for a judicial candidate of a minor political party to have his name placed on the November ballot. (Ill. Rev. Stat., 1971, ch. 46, par. 10-2.) But to allow judicial candidates, of minor parties or independents, to have their names placed on the ballot, while denying a ballot position to Republican and Democratic judicial candidates, in my opinion, places unconstitutional burdens on the rights of individuals to associate for the advancement of political beliefs, and the rights of qualified voters to cast their votes effectively. These rights are fundamental to our democracy and are guaranteed under the first amendment to the United States Constitution. (Yick Wo v. Hopkins, 118 U.S. 356, 370; N.A.A.C.P. v. Alabama, 357 U.S. 449, 461; Wesberry v. Sanders, 376 U.S. 1, 17; Reynolds v. Sims, 377 U.S. 533, 562; Kramer v. Union School District, 395 U.S. 621,

626.)

It is no answer to say that a party member can get on the ballot by petitioning as an independent. The term "independent" is a political classification. A candidate's right to freely associate is violated when he is required to accept the designation of "independent" in order to get on the ballot. I see no distinction between forcing a candidate to accept the designation of "independent", and forcing him to run under a minor party designation. I do not hold that requiring all candidates to run without designation would be an unconstitutional infringement of these rights. Independent does not equate with the absence of party designation. The instant situation is similar to that in Ohio in Williams vs. Rhodes, 393 U.S. 23, except in Ohio the established political parties were favored rather than the independents and the minor parties. In Williams at pages 30-31 the court discussed the rationale of its decision:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights - the right of individuals to associate for the advancement of political

beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'

No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can

justify limiting First Amendment freedoms.' NAACP v. Button, 371 U.S. 415, 438 (1963)."

Perhaps Mr. Justice Douglas in a concurring opinion at pages 38-39 explained the principles even better:

"The First Amendment, made applicable to the States by reason of the Fourteenth Amendment, lies at the root of these cases. The right of association is one form of 'orderly group activity' (NAACP v. Button, 371 U.S. 415, 430), protected by the First Amendment. The right 'to engage in association for the advancement of beliefs and ideas' (NAACP v. Alabama, 357 U.S. 449, 460), is one activity of that nature that has First Amendment protection. As we said in Bates v. Little Rock, 361 U.S. 526, 523, 'freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.' And see Louisiana v. NAACP, 366 U.S. 293, 296. At the root of the present controversy is the right to vote - a 'fundamental political right' that is 'preservative of all rights.' Yick Wo v. Hopkins, 118 U.S. 356, 370. The rights of expression and assembly may be 'illusory if the right to vote is undermined.' Wesberry v. Sanders, 376 U.S. 1, 17.

* * * * *

The Equal Protection Clause of the Fourteenth Amendment permits the States to make classifications and does not require them to treat different groups uniformly. Nevertheless, it bans any 'invidious discrimination.' Harper v. Virginia Board of Elections, 383 U.S. 663, 667.

> That command protects voting rights and political groups (Carrington v. Rash, 380 U.S. 89), as well as economic units, racial communities, and other entities. When 'fundamental rights and liberties' are at issue (Harper v. Virginia Board, supra, at 670) a State has less leeway in making classifications than when it deals with economic matters. I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects.
>
> Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. * * *."

Although the Williams case concerns in part the rights of minority parties, established political parties are entitled to those same rights. Majorities have no fewer rights than minorities.

Such burdens on the rights of individuals to associate and voters to cast their votes effectively will stand only if necessary to protect a "compelling state interest". In the instant case, these burdens are not the result of any specific design on the part of the legislature, but are the indirect and unintended consequences of the late effective date of Public Act 77-1805 as related to

the filing dates contained in The Election Code. I see no compelling State interest in the protection of such an unfortunate circumstance.

In addition to the foregoing reasons for my holding that the independent petition provisions of Article 10 of The Election Code are not applicable to the November 1972 election, there is substantial basis for interpreting the Judicial Article of the new constitution so as to prohibit the sole use of a petition as a means of being placed upon the ballot for judicial office. Professor Rubin G. Cohn of the University of Illinois College of Law stated the argument concisely:

> " * * * Finally, though the language could be construed to permit the abolition of primary elections and to require nomination by petition only, it is not likely that such a construction would be sustained, since section 12(c), which deals with vacancies in judicial office for which the legislature has not adopted a law, permits interim appointments by the supreme court and keys the duration of such appointments to the time interval preceding 'the next primary election to nominate judges'. Additionally, section 12(a) permits a candidate to cause his name to appear on the ballot at the primary election. These several provisions strongly suggest that nomination by petition

> without any form of primary election was not intended to be a permissible option." Cohn, Judicial Changes - 1970 Constitution, 1971 Ill. L.F., 355, 396 (1971).

The answer to your second question is also in the negative. A voter cannot write-in the name of a candidate for judicial office on the November, 1972 ballot. Provisions for write-in votes are found in sections 17-11, 24-14 and 24A-7 of The Election Code. (Ill. Rev. Stats. 1971, ch. 46, pars. 17-11; 24-14 and 24A-7; see also pars. 17-19, 24-16, 24A-10.) It is apparent that the legislature intended by those sections to authorize write-in votes only as part of the total election machinery established by The Election Code. A statute must be construed in its entirety and each part must be interpreted harmoniously with all other parts of the statute and consistent with legislative intent. (Scofield v. Board of Education, 411 Ill. 11; Lincoln Nat. Life Ins. Co. v. McCarthy, 10 Ill. 2d 489; Carnigan v. Liquor Control Com., 19 Ill. 2d 230.) Since those parts of the election machinery dealing with primary elections and petitions are, as heretofore set forth, not operative

in the present situation, the legislature did not anticipate or contemplate use of the write-in provisions as the sole means of electing candidates for judicial office.

In addition there is no statutory provision specifically directing that any judicial office shall be filled at the November, 1972 election. Sections 2-7.1 and 2-9 of The Election Code (Ill. Rev. Stats. 1971, ch. 46, pars. 2-7.1, 2-9) cannot be construed as operating in a vacuum without reference to the overall intent of the legislature in enacting The Election Code. It is apparent that both of the said sections were intended to be a part of the entire election process as embodied in the statutes and the Constitution in existence at the time those sections were enacted.

The next problem is whether there are any provisions in the Illinois Constitution which, standing alone, would authorize voters to write in the names of judicial candidates at the November, 1972 election, to require such vote to be counted, and to fill the office based upon such write-in votes. It is my opinion that

no such constitutional provision exists. Section 12 of Article VI of the Illinois Constitution of 1970 provides in part:

> "(a) * * * Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. * * *"
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> * * * *
>
> "(c) * * * A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate judges shall serve until the vacancy is filled for a term at the next general or judicial election * * *."

Section 6 of Article III of the Illinois Constitution of 1970 provides:

> "As used in all articles of this constitution except Article VII, 'general election' means the biennial election at which members of the General Assembly are elected. Such election shall be held on the Tuesday following the first Monday of November in even-numbered years or on such other day as provided by law."

It is pertinent, in view of the foregoing constitutional provisions, to determine whether the references therein to "general . . . election" are self-executing provisions. If those provisions are self-

executing, it could be argued that write-in votes at the November, 1972 election would be effective to elect persons to existing judicial vacancies.

It is my opinion, however, that these constitutional provisions are not self-executing. A constitutional provision which contemplates and requires implementing legislation is not self-executing and does not become effective until legislation is enacted. (Tuttle v. National Bank, 161 Ill. 497.) Furthermore, the fact that a constitutional provision is mandatory does not necessarily mean that it is self-executing. Washingtonian Home v. Chicago, 157 Ill. 414.

The need for implementing legislation here is obvious. Election laws establish precincts, voting places, clerks, judges, ballot forms, voting machines and all of the accruements and paraphernalia which help turn the word "election" into a viable process.

Therefore, for all of the reasons listed above,

a voter cannot write in the name of a candidate for judicial office on the November, 1972 ballot.

In conclusion, there now exists no statutory or constitutional provisions under which any judicial office can be filled at the November, 1972 general election. Legislative action will be required in order to make such election possible. In the absence of any adequate legislation enacted before the November election, the only method of filling vacancies in judicial office before 1974 is by appointment by the Illinois Supreme Court. (Ill. Const. 1970, art. VI, sec. 12[c]. See Cohn, Judicial Changes - 1970 Constitution, 1971 Ill. L.F., 403-4, Note 138.) In 1974, the current statutory provisions herein discussed will become operative, excepting, of course, the provisions for the filling of vacancies in nominations by party committee.

Very truly yours,

ATTORNEY GENERAL