TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79–513
of	:	July 27, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Clayton P. Roche Deputy Attorney General	:	

SUBJECT: PRESIDENTIAL PRIMARY ELECTIONS—This opinion deals with who may participate in a presidential primary election and the definition of "open" and "closed" primaries.

The Honorable John G. Schmitz, Senator, 36th Senatorial District, has requested an opinion on the following questions:

1. "Would a minority presidential party be able to field a presidential candidate under Article 2, section 5, of the California Constitution without having to be under the restrictions of Section 6430(a), (b) and (c) of the California Elections Code?"

2. What is meant by "open" and "closed" primaries?

CONCLUSIONS

1. Neither a "minority presidential party" nor any other political party may participate in the presidential primary election in California unless it has qualified as a party under the provisions of section 6430 of the Elections Code.

2. The terms "open" and "closed" primaries have no precise legal definition. As to California's presidential primary, it is "open" in the sense that all "recognized presidential candidates" of a qualified political party may participate therein instead of being "closed" or limited to those who qualify through a petition process, as had been the case under preexisting law.

ANALYSIS

This request for our opinion involves California's "open presidential primary law" found in Article II, section 5 of the California Constitution, which was added by a vote of the people at the June 6, 1972 primary election.

Article H, section 5 provides:

> "The Legislature shall provide for primary elections for partisan offices, *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of the United States*, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy."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.)

Prior to 1972, Article II, section 2.5 had provided for primary elections in California, and had so provided in substance since 1908, as follows:[1]

> "The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary election shall be mandatory and obligatory. . . ."

[1] Article II, section 2.5 prior to 1962 was numbered section 2½. References to section 2.5 are deemed to also mean section 2½ as appropriate.

Article II, section 5 had originally been added in 1972 as section 4. Reference to Article II, section 5 is also to be deemed as meaning section 4 as appropriate.

Article II, section 2.5 was added in 1908 to the Constitution to provide for the direct nomination of candidates by the electorate of political parties in an effort to eliminate existing evils in the party nominating systems. It essentially substituted an election for party nominating conventions. (See generally, *Christian Nationalist Party v. Jordan* (1957) 49 Cal. 2d 448, 452–453; *Communist Party v. Peek* (1942) 20 Cal. 2d 536, 544–545; *Socialist Party v. Uhf* (1909) 155 Cal. 776; *Schostag v. Cator* (1907) 151 Cal. 600.) From this evolved the familiar electoral system in California of a direct primary election in June of each even numbered year to nominate candidates for partisan and nonpartisan offices, and of a presidential primary election in June of each "presidential year" for the selection of delegates to represent the parties at the national conventions. As of 1972, each "qualified party"[2] had its own separate "consolidated primary election ballot" which (in presidential years) consolidated (1) the party's presidential primary election, (2) the party's direct primary election for the particular voting precinct, and (3) the nonpartisan primary election for the particular precinct. A "nonpartisan ballot" was also provided for electors who were not affiliated with any "qualified party."[3]

Thus, in 1972 when the "open presidential primary law" was adopted there was essentially a primary election for each qualified party (the Democrats, Republicans, American Independent Party Members and Peace and Freedom Party Members), and for the nonpartisans (or "declines to state"). As stated in the early case of *Schostag v. Cator*, *supra*, 151 Cal. at pages 603–604, in describing California's primary election system:

> ". . . What we call 'the primary election' is really a number of primary elections equal to the number of parties participating, but conducted at the same time and at the same polling places by one set of public officers."

For the purpose of our analysis herein, two key elements emerge from California's electoral system as it existed in 1972 when Article II, section 5 of the Constitution was adopted by the people. First, only *qualified* political parties participated in the primary election, and a qualified political party was (and still is) defined as one which has met the requirements of section 6430 of the Elections Code.[4] Second, only slates of delegates which had qualified through a petition process within their own party, and their candidates, were entitled to participate in and be on a party's presidential primary election ballot.[5] (See

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[2] See Present Elections Code, section 35 (former section 29) for definition of "party," and prior and present section 6430, set forth at full, *infra*.

[3] 2 See Elections Code 1972, sections 25, 26, 6000–6393; 6400–6661; 9601; 10009; 10200–10264 and 10317.

[4] All further section references are to the Elections Code unless otherwise noted. See note 2, *supra*.

[5] This opinion involves only the placement of names of presidential candidates on the ballot.

former §§ 6080, 6082, 6345, 6347, 10317.)

This background places in focus the questions presented for our resolution herein.

1. May A "Minority Presidential Parry" Field A Presidential Candidate In California?

The first question presented is whether a "minority presidential party" may field a presidential candidate in California without complying with the provisions of section 6430 of the Elections Code.

The request for our opinion does not define what is meant by a "minority presidential party." It could mean a party which intends to "field" only a presidential candidate, or it could mean any unqualified political party, such as the Socialist Workers Party, La Raza Unida, the Libertarian Party, or any other of a number of minor parties presently found in California. However, whether it means the former or the latter is immaterial for our consideration herein as will be evident from the following analysis.

For purposes of the Elections Code, party is defined in section 35. It states that "'[p]arty' means a political party or organization which has qualified for participation in any primary election." Pursuant to section 6430 a party may attain that status if: (1) it polled at least two percent of the vote cast at the last gubernatorial election as to any statewide candidate, subdivision (a); or (2) if on the 135th day before the primary election it had registered with its party voters equal to one percent of the vote cast at the last gubernatorial election, subdivision (b), or (3) if on the 135th day before the primary election, it has filed a petition signed by voters equal in number to ten percent of the vote cast at the last gubernatorial election, subdivision (c).[6] It is thus evident that unless there has been a basic

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It does not involve, nor do we discuss, the manner in which delegates are presently selected for party nominating conventions.

[6] Section 6430 provides in full:

"A party is qualified to participate in any primary election:

'(a) If at the last preceding gubernatorial election there was polled for any one of its candidates for any office voted on throughout the state, at least 2 percent of the entire vote of the state; or

'(b) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, char voters equal in number to at least 1 percent of the entire vote of the state at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

'(c) If on or before the 135th day before any primary election, there is filed with

change in California's electoral system to be found elsewhere in the Elections Code with respect to the participation of parties in the consolidated primary election held in a presidential year, neither a "minority presidential party" nor any other unqualified party could field a candidate at the presidential primary election.

It is to be recalled that Article II, section 5 of the California Constitution, adopted by the voters in 1972, states that the Legislature "shall provide for primary elections for partisan offices" which shall include "an open presidential primary whereby the candidates on the ballot are [to be (1)] those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President" and (2) those who qualify for the ballot by petition.

An examination of the current Elections Code demonstrates a number of things the Legislature has provided since the adoption of the "open presidential primary law." To carry out the mandate of this new law,[7] the Legislature has revised the presidential primary laws for all qualified parties. Thus, there are now basically four separate laws applicable to qualified parties. Sections 6000–6071 apply to the Republican Patty and to qualified parties for which no other provisions are applicable; sections 6100–6198 apply to the American Independent Party; sections 6200–6294 apply to the Peace and Freedom Party; and sections 6300–6376 apply to the Democratic Party. Each of the separate party "laws" has a similar basic provision as its main implementing provision for the "open presidential

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> the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the state at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18–point blackface type, which caption shall be the name of the proposed party followed by the words 'Petition to participate in the primary election.' No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.'"

Section 6430 and its predecessor, section 2540, have been held to be constitutional by both the California Supreme Court and the United States Supreme Court. (*Peace and Freedom Party, etc, et al. v. Jordan, as Secretary of State*, *et al.*, Cal. S. Ct. (1968), Sac. No. 7821; *Christian Nationalist Party v. Jordan* (1957) 49 Cal. 2d 448; *Socialist Workers Party v. Eu* (ND. Cal. June 7, 1976, Dock No. C-73–1 165 ACW), affd, 433 U.S. 901 (1977).)

[7] It is clear that section 5 of Article II is the type of constitutional provision which requires legislative implementation, and consequently would not be self-executing. Compare *Taylor v. Madigan* (1975) 53 Cal. App. 3d 943, 950–961, with *Flood v. Riggs* (1978) 80 Cal. App. 3d 138, 154–155.

primary" portion of Article II, section 5. For example, section 6010, applicable to the Republican Party, states:

> "The Secretary of State shall place the name of a candidate upon the Republican presidential primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or California as a candidate for the nomination of the Republican Party for President of the United States.
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> "On or before February 1 immediately preceding a presidential primary election the Secretary of State shall publicly announce and distribute to the news media for publication a list of the candidates he intends to place on the ballot at the following presidential primary election. Following this announcement he may add candidates to his selection, but he may not delete any candidate whose name appears on the announced list."

Sections 6011 and 6012 then provide for notice to the candidate and withdrawal of his name at the candidate's request. (See similar provisions in §§ 6110–6112, American Independent Party; §§ 6210–6213, Peace and Freedom Party; §§ 6311–6313, Democratic Party.) Suffice it to say that a further examination of these laws applicable to qualified parties demonstrates that they then set forth the manner in which "unselected candidates" and unpledged delegations may qualify for a place on the presidential ballot *of the party,* and the manner in which delegates are actually selected for the presidential conventions. Each law is different, and a complete exposition is not necessary for our purposes herein.

Significant for our purposes is that nowhere in the Elections Code has the Legislature provided any machinery for an unqualified party to field a party presidential candidate at the primary election. In fact, declarations found in the law disclose an opposite intent. This is graphically demonstrated in sections 9950–9956, a new part which was added to Division 7 of the Elections Code, *effective July 10, 1976.* These sections set forth a procedure for new parties which wish to qualify pursuant to the provisions of section 6430, *supra*, to do so. Section 9954 of these new provisions states:

> "If by the 135th day before any primary election, a political body filing notice pursuant to Section 9951 [of its intent to qualify] has not qualified as a political party pursuant to Section 6430, the political body shall he considered to have abandoned its attempt to qualify as a political party *and shall be ineligible to participate in the following primary*." (Emphasis added.)

Thus a formally organized minor party which files a formal notice with the Secretary of

State of its intent to meet the requirements of section 6430 (see § 9951), but which fails to do so by a certain date, may not participate in and field a candidate in the following presidential primary election. *A fortiori*, a minor party less organized, or which has decided not to make such an attempt, would also nor be eligible to participate in the succeeding presidential primary election. In fact section 9956 of this new part to Division 7 anticipates the possibility that the unqualified group may qualify, and thus participate ultimately in a succeeding presidential primary election. It provides that the new party "shall conduct its presidential primary election in accordance with procedures applicable to such other political party which has detailed statutory provisions applicable to its presidential primary as shall be designated by the newly qualified party." The necessary implication therefrom is that a party which fails to qualify will have no need to make such a selection.

In short, sections 9950–9956 demonstrate clearly that only the four presently qualified political parties, and any new party which may qualify pursuant to section 6430, may participate in the presidential primary election.

This conclusion is further graphically demonstrated in the Elections Code provisions applicable to preparation of the ballots for the direct primary election and the presidential primary election. Thus section 10200.5 provides as to the form of ballots at elections:

> "All voting shall be by ballot. There shall be provided at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, except that for partisan primary elections one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot. At such partisan primary elections each voter nor registered as intending to affiliate with any one of the political parties participating in the election shall be furnished only a nonpartisan ballot. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices and measures to be voted for at the primary election. Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he is registered and the nonpartisan ballot both of which shall be printed together as one ballot in the form prescribed by Section 10207."

These provisions are applicable to the consolidated primary, *including the presidential primary*. (See following sections on contents of ballot, § 10201, *et seq*. clearly demonstrating this fact.)

Thus the law contemplates that there will be at the polls only a partisan ballot for each qualified party and their members, and a nonpartisan ballot for the remaining voters which shall contain only *nonpartisan offices*. Clearly, the Legislature has again essentially declared in these ballot provisions that a minor unqualified party may not participate in nor field a candidate in the presidential primary.

In sum, the Legislature, by providing no machinery for presidential candidates other than those of *qualified* political parties, has interpreted section 5 of Article H of the California Constitution as meaning that the Secretary of State is to select "recognized candidates" of only qualified political parties; that this new article was not intended to change or modify the *party system* as it was known and had existed for decades in California. Stated otherwise, Article II, section 5 was intended to provide an open presidential primary as to candidates, nor as to parties, whether qualified or not.

That this interpretation by the Legislature is reasonable is also supported by an examination of the ballot pamphlet for the June 6, 1972 primary election. Nowhere in the Arguments with respect to Proposition 4, the "Open Presidential Primary" proposition which became Article II, section 5, was there any indication that the provision would open the presidential primary to all minor parties. In fact, the "Argument in Favor of Proposition 4" appears to presuppose the existing party system. It points our such matters as the fact "[t]he present system of selecting presidential candidates often leaves the voter without a direct voice in the decision" because of the use of "favorite son" candidates, and the consequent inability of a voter to vote for either the candidate of his choice or the person who eventually becomes the presidential nominee. It also points out that persons nor chosen by the Secretary of State "may qualify for the ballot by circulating petitions as required by existing law," which would apply only to qualified parties. Additionally, the Legislative Counsel's Digest appears to presuppose the existing party system when it summarized the effect of the proposition as follows:

> "This measure would add Section 8, Article II of the California Constitution to direct the Legislature to provide for an open presidential primary. It would require the Secretary of State to place upon the presidential primary ballot of the appropriate political party as its candidates for the office of President of the United States, the names of those persons who he determined to be either (a) recognized as candidates throughout the nation or (b) recognized as candidates throughout California. This measure would also require the placement on the ballot of the names of presidential candidates who qualified by virtue of nominating petitions. However, the name of any candidate would be excluded from the ballot if he withdrew himself from consideration by the filing of an affidavit that he was not a candidate."

The clear implication from this summary, as well as from the arguments in favor of the proposition, is that candidacy would be opened up within the existing party system in California; nor that the existing system would be changed to open up the presidential primary to unqualified parties and their presidential candidates.[8]

Finally, insofar as the legislature has "interpreted" section 5 of Article II through its implementation thereof, that interpretation, being reasonable is virtually conclusive and will in all probability be followed by the courts. (See *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal. 3d 685, 692–693.)

Accordingly, it is concluded that neither a "minority presidential party" nor any other political party may participate in the presidential primary election in California unless it has qualified pursuant to section 6430 of the Elections Code.

2. What Is Meant By "Open" And "Closed" Primaries?

The second question presented is what is meant by "open" and "closed" primaries.

To our knowledge, these terms have no precise legal definition. Nor has our research disclosed that they have. In fact, the only case we discovered discussing these terms indicated that an "open" primary was something to be eschewed and that "closed" primaries were to be preferred. In *Roberts v. Cleveland*, 149 P.2d 120 (N.M. 1944), the Supreme Court of New Mexico stated:

> "After having had the convention system for a long time with its supposed evils of 'fusions' and 'boss control', which impaired the idea of party responsibility and integrity, supposed by many to be detrimental to our government, the legislature, being doubtless familiar with various methods including both open and closed primaries, adopted what is commonly called the closed primary. This contemplates that each political party shall have the right to select its own candidates, and shall have such protection as the law can afford in exercising that right. . . ." (*Id*. at pp. 121–122.)

Obviously, this is not what is meant by an "open primary" in the context of California's open presidential primary. Therefore, it would seem that reference must be

[8] (See Ballot Pamp. Proposed Amends, to Cal. Const. with Arguments to Voters, Primary Election (June 6, 1972) arguments in favor of proposition 4 and General Analysis by Legislative Counsel, pp. 9–11.) These ballot arguments may be used in ascertaining the intent of the voters, *or the absence of a particular intent.* (*People v. Privitera* (1979) 23 Cal. 3d 697, 709–710; *White v. Davis* (1975) 13 Cal. 3d 757, 775, n. 11.)

made to that law itself and its implementation by the Legislature. It is abundantly clear from the analysis as to question one, above, that the term "open" primary in the context of the presidential primary means that all recognized presidential candidates of *qualified parties* are to be placed on the appropriate qualified party's primary election ballot by the Secretary of State unless the candidate requests otherwise. (See also Legislative Counsel's Digest to Sen. Bill No. 1184 (1974 Reg. Sess.) which added the original version of the "Alquist Open Presidential Primary Act" to the Elections Code.) In California, in the context of the presidential primary, a "closed" primary would be exemplified by the system which existed before the adoption of Article II, section 5, and its implementation by the Legislature, that is, the ballot was "closed" to all but those who qualified through the petition system, with the strict legal controls attendant thereto. (*Cf. Roberts v. Cleveland, supra*, 142 P.2d 120.)

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