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March 16, 1972

FILE NO. S-429

ELECTIONS:
Primaries
Change of Party Affiliation

Honorable Frank Bonan
State's Attorney
Hamilton County
McLeansboro, Illinois 62859

Dear Mr. Bonan:

I have your recent letter wherein you state:

"At a primary election held February 8, 1972 for nomination of County Board Districts the voters made a choice of political party.

The questions are:

(1) Do the provisions of Chapter 46, Sec. 7-43(d) apply? If so, are the 23 months to be determined from the primary held in 1970 or does the 23-month restriction commence with the date of February 8th?

(2) Secondly, do not provisions of Sec. 10-6, Chapter 46 relating to time for filing of nominations of independent candidates as defined in Section 10-3 of Chapter 46 apply? If so, is there any other option for an independent candidate?"

As I understand your first question, you want to know whether persons who voted in the county board primary on February 8, 1972 are precluded from changing their party affiliation when they vote in the primary on Tuesday, March 21, 1972. These facts do fall within the terms of Section 7-43 of The Election Code (Ill. Rev. Stats. 1971, ch. 46, par. 7-43). That section reads in part as follows:

"§7-43. Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

* * * * * * * * * * * * * * * *

(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the

calendar month in which such primary is held:"
(Here follows certain exceptions not herein
applicable.)

In my opinion the statutory provisions above quoted would preclude such a change in party affiliation. However, it is my further opinion that the twenty-three month provision is in violation of Sections 2 and 4 of Article I of the Illinois Constitution of 1970, as well as the Fourteenth Amendment to the Constitution of the United States.

The twenty-three month rule affects the right of freedom of association which is guaranteed on the Federal level by the First Amendment to the Constitution and is applicable to the states through the Fourteenth Amendment. (N.A.A.C.P. v. Alabama, 357 U.S. 449, 460) The right to vote without undue restriction is guaranteed under the equal protection clause of the Fourteenth Amendment. (Affeldt v. Whitcomb, 319 F. Supp. 69, 73 (N.D. Ind. 1970.)) We must then consider whether the subject restriction is justifiable and therefore constitutional. In testing the justification for this restriction, it is pertinent to evaluate the rights guaranteed.

"The very foundation and bulwark of our democracy is the right of our citizens to participate in the selection of our governing officials." (Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 986 (S.D. Ohio 1968.)) "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." (Wesberry v. Sanders, 376 U.S. 1, 17.) "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (Reynolds v. Sims, 377 U.S. 533, 562 (1964.)) "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." (Kramer v. Union School District, 395 U.S. 621, 626 (1969.)) Although classifications by States of the objectives of legislation are usually and traditionally approved by the courts if any rational basis therefore can be conceived under a general presumption of constitutionality, such

presumption is not indulged in reviewing statutes which deny some residents the right to vote. (Kramer v. Union School District, supra P.627-628; Shapiro v. Thompson, 394 U.S. 618, 658 dissenting opinion.) Thus, there has arisen a tradition of exacting judicial scrutiny of statutes which grant the franchise, at any level, to only a portion of the electorate. In order to justify any restriction upon the elective process by a State legislature, the court must find a compelling State interest in enforcing such restriction. (Williams v. Rhodes, supra P. 31.)

The constitutionality of the twenty-three month limitation turns upon whether that restriction preserves or enforces any compelling interest of the State of Illinois. The Federal District Court for the Northern District of Illinois has decided that the State of Illinois has no such interest. (Pontikes v. Kusper, et al, 71 C 2362 and Klaetsch, et al v. Stern, 71 C 2415 N.D. Ill. 1972.) I agree with that holding of the District Court.

I am not unfamiliar with the various arguments proferred in favor of the twenty-three month limitation. The primary argument is based upon the fear of "raiding"

where members of the one political party cross over and vote in the primary of an opposing party for the weakest or most vulnerable candidates of the party being "raided". That fear has impelled successive Illinois legislatures through the last 45 years or more to preserve the twenty-three month limitation with only minor exceptions. But the apparent logic of that thesis has not been supported by subsequent events. Forty-four states in the Union do not impose post-election restraints on changing party affiliation, (Pontikes v. Kusper, supra, P. 8) and those states have not suffered any substantial impairment of the two party system.

Illinois has a compelling State interest in the two party system but the twenty-three month limitation is not a necessary component. Not only is the twenty-three month rule not essential to preservation of the two party system, it has, in many areas throughout the State, resulted in impairment of that system. I refer to the many political sub-divisions in which there is a long standing tradition of one party politics and one party government. Who is to say that if the voters were allowed to change affiliation more freely, the two party system would not be strengthened in such areas? Is it not as logical to say that the opportunity to change affiliation, with the concurrent threat of more effective expression of voter disillusionment, would diminish the power of single party politics and strengthen the effectiveness of the two party system?

Can it be said that forty-five years of protection from the threat of "raiding" has produced better government here than is extant in the forty-four states which have not seen fit to thus so zealously enshrine this appendage to the two party system?

Since the State of Illinois has no compelling interest to protect by means of the twenty-three month limitation, that restriction constitutes a violation of rights guaranteed by the Federal Constitution.

As heretofore stated, the primary election process involves a political association or affiliation which on the Federal level is protected by the First Amendment and is made applicable to the States by the Fourteenth Amendment. I interpret Section 4 of Article I of the Illinois Constitution of 1970 as containing the same guarantees of freedom of voter association and affiliation as are found in the First Amendment to the Federal Constitution. The statute under consideration is therefore violative of said Section 4. As also heretofore discussed, unjustified infringement on the right to vote is protected by the equal protection clause

of the Fourteenth Amendment. Interpretation of that clause is equally applicable to the equal protection clause found in Section 2 of Article I of the Illinois Constitution of 1970. The twenty-three month restriction is contrary to the Constitutions of the United States and the State of Illinois.

In your second question you have asked whether the provisions of Section 10-6 of "An Act concerning elections", (Ill. Rev. Stat., 1971, ch. 46, par. 10-6), relating to time for filing of nomination papers for an independent candidate apply to the nomination of members of the county board. The pertinent portion of this section provides:

> " * * *
>
> Except as otherwise provided in this section, all other certificates for the nomination of candidates shall be filed with the county clerk of the respective counties at least 92 days previous to the day of such election.
>
> * * *"

Nothing in this section excludes county board candidates from its application. All statutes are presumed to be

enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. Statutes are, therefore, to be construed in connection with and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence. (See Vol. 82 C.J.S. 794 [Stat. Sec. 362].) I am of the opinion that the provisions of Section 10-6 of "An Act concerning elections", (Ill. Rev. Stat., 1971, ch. 46, par. 10-6), relating to the time for filing nomination papers of independent candidates do apply to nominations for county board members.

Very truly yours,

ATTORNEY GENERAL