OFFICE OF THE SECRETARY OF STATE

David A. Dean
Secretary of State

October 27, 1981

Elections Division
Campaign and Ethics Section
Voter Registration Section
P.O. Box 12887
Austin, Texas 78711-2887

Election Law Interpretation No. DAD-1

RE: Ballot status of the Libertarian Party of Texas for the 1982 general election

Mr. Richard A. Yahr
Attorney at Law
2501 North Lamar Boulevard
Austin, Texas 78705

Dear Mr. Yahr:

In your letter of August 6, 1981, you have asked for an official opinion concerning the Texas Election Code as to whether the Libertarian Party of Texas (the "Party") is allowed to place the Party's nominees on the 1982 general election ballot without the necessity of its filing lists of precinct convention participants or supplementary petitions.

This Opinion is rendered by me as chief election officer of the state in accordance with Tex. Elec. Code Ann. art. 1.03, subd. 1 (Vernon Supp. 1980-1981).

The factual basis for your request is that, while not having a candidate in the last preceding general election for governor in 1978, the Party did successfully qualify a candidate by filing lists of precinct convention participants and supplementary petitions for the office of railroad commissioner in the 1980 general election, and that candidate for that office polled 86,654 votes (or 2.2%) of the 4,020,438 votes cast. You further extrapolate that the total vote for railroad commissioner in that election, if compared numerically, would equate to 3.7% of the total votes cast for governor in the 1978 general election.

The statute apposite to your request is Tex. Elec. Code Ann. art. 13.45, subd. 2(a) (Vernon Supp. 1980-1981), which is quoted in pertinent part as follows:

> "Any political party whose nominee for governor received less than two percent of the total votes cast for governor in the last preceding general election for that office . . . may nominate candidates by conventions . . . but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 30 days after the date for holding the party's state convention, the lists of participants in precinct conventions held by the party . . . [in which] qualified voters attending such precinct conventions in any aggregate number of at least one percent of the total votes cast for governor at the last preceding general election for that office; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election for that office. . . ." (Emphasis supplied.)

This statute constitutes the legislatively established state requirements for ballot access by new or minor political parties in Texas. On its face, it clearly sets forth a test of party voter support based upon "the total votes cast for governor in the last preceding general election for that office. . . ." There is contained therein no language from which to identify or infer an alternate test based on other than the votes cast for the office of governor at the last preceding general election for that office.

The United States Supreme Court, in a virtually unanimous decision (Douglas, J., dissenting in part), specifically reviewed this statute in the frequently cited case of American Party of Texas v. White, 415 U.S. 767 (1974). The Court upheld the Texas system of ballot access for minor parties and stated:

"The District Court recognized that any fixed percentage requirement is necessarily arbitrary, but we agree with it that the required measure of support--1% of the vote for governor at the last general election and in this instance 22,000 signatures--falls within the outer boundaries of support the State may require before according political parties ballot position. To demonstrate this degree of support does not appear either impossible or impractical, and we are unwilling to assume that the requirement imposes a substantially greater hardship on minority party access to the ballot . . . . It is not, therefore, immediately obvious that the Article on its face or as it operates in practice, imposes insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support within the time allowed." Id. at 783-84.

The Court then stated:

"In sum, Texas 'in no way freezes the status quo, but implicitly recognizes the potential fludity of American political life.' Jenness v. Fortson, 403 U.S., at 439, 91 S.Ct., at 1975. It affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more." Id. at 787-88.

The Court also noted that the Texas ballot access provisions, including 1% voter support based upon the vote for governor at the last general election, are not invidiously discriminatory, are necessary to further compelling state interests, and, "[W]hether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." Id. at 781.

There is, therefore, no question of the present reasonableness and constitutionality of these particular Texas statutory ballot access requirements and, as you adverted in your letter, a literal reading of the law would require the Party to once again qualify for ballot status in the 1982 general election by filing precinct convention lists or petitions. Inasmuch as 2,369,764 total votes were cast for governor at the last preceding general election for that office in 1978, a minimum of 23,698 (1%) qualified petitioners would be required to obtain ballot access in 1982.

You contend that the state constitution was amended in 1972 to change the general election for the office of governor from a biennial period to a quadrennial period, and that the legislature has not subsequently acted to amend the Election Code to reinstate some type of voter support test consisting of a set percentage of votes cast for a particular office in a particular election.

This specific issue was addressed in Socialist Workers Party v. Davoren, 378 F. Supp. 1245 (D. Mass. 1974). In that case, the party desiring automatic ballot status attacked the pertinent Massachusetts election statutes for vagueness. As did Texas, Massachusetts amended its state constitution to change the term of office for governor from two to four years. In addition, there was no subsequent amendment of the Massachusetts election statutes to delete specific references to "biennial" state election for governor.

The court ultimately decided that there was no vagueness because, although the constitution and statutes were in conflict, the Massachusetts secretary of state had previously interpreted the election statutes and had issued explicit procedural instructions clarifying the discrepancy. More importantly, the court refrained from involving itself in exploring the intentions of the Massachusetts legislature and stated:

> "We confess to puzzlement at what SWP hopes to attain by arguing that the state interpretation is deficient as a matter of state law. The question for resolution is whether the legislature was primarily interested in 'biennial,' thus making sure that figures from the most recent election would be used, or in 'gubernatorial,' thus assuring that figures from the

most representative statewide election would be used. The statutes can be harmonized with the constitution only by reading either 'biennial' or gubernatorial' out of them. Defendant chose to read out 'biennial,' apparently following the constitutional change while preserving assurance that the reference figures would be from a representative statewide election. (Some election years, such as 1980, will have neither gubernatorial nor senatorial elections.) If SWP were to succeed in having 'gubernatorial' eliminated from the statute, the reference to the most recent biennial state election would require use of the figures from the 1972 senatorial contest, which attracted 2,503,494 votes. This is 635,588 more than the 1,867,906 who voted in the 1970 gubernatorial race. The change hardly seems advantageous to SWP, because it would require them to gather even more nomination papers. If the Secretary were instructed to refer to the last 'true' biennial gubernatorial election, that of 1966, he would use a reference base of 2,140,200 votes--again more than the number of votes cast in the 1970 election. SWP gains only if it can effect an unlikely combination: use of the SWP vote in 1972; computed against the vote of 1970, to give SWP a phantom percentage of 2.21% in an election in which it did not participate. This phantom vote would be joined with the declaration SWP seeks that 2% of the vote is sufficient to give it status as a political party entitled to a ballot position. As appears infra we do not go this second mile, so there is no need to traverse the first." Id. at 1248-49, n.2.

Our interpretative analysis must apply the accepted rules of statutory construction concerning legislative intent. In this regard, Tex. Elec. Code Ann. art. 13.45, subd. 2(a) (Vernon Supp. 1980-1981) is a product of the legislature. It seems apparent that that body's failure to amend the statute during its subsequent numerous sessions represents a conscious legislative intent not to provide a different ballot access test than that clearly expressed therein. Allen Sales & Servicenter, Inc. v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975).

The constitutional basis for compelling state interest in regulating the ballot and candidate and party access thereto rests upon the state requirement for ballot integrity, prevention of voter confusion, competent candidates and administrative convenience in elections procedures. The development of these rights of the state are extensively treated in Jardine, Ballot Access Rights: The Constitutional Status of the Right to Run for Office, 1974 Utah L. Rev. 290.

The present legislative standard, which is clearly evident from the face of the statute, applies equitably and constitutionally to all of the new and minor parties similarly situated in regard to ballot access efforts.

SUMMARY

The Libertarian Party of Texas is not entitled to ballot status in the 1982 general election unless it complies with the requirements of Tex. Elec. Code Ann. art. 13.45, subd. 2(a) (Vernon Supp. 1980-1981). In order to qualify for ballot status, the Party must have qualified voters attending its precinct conventions in a number totalling at least 1% of the total votes cast for governor at the last preceding general election for that office, or, in lieu thereof, must present a petition signed by qualified voters who have not participated in the party primary of any other party totalling at least 1% of the total votes cast for governor at the last general election for that office.

The Party's total vote for any office in the presidential general election of 1980 is irrelevant to its meeting the gubernatorial election percentage requirements of Tex. Elec. Code Ann. art. 13.45, subd. 2(a) (Vernon Supp. 1980-1981).

Sincerely,

David A. Dean

DAVID A. DEAN
Secretary of State

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