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FEDERAL ELECTION COMMISSION
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**DISSENTING OPINION
OF
COMMISSIONER SCOTT E. THOMAS**

ADVISORY OPINION 1991-6

In Advisory Opinion 1991-6, the majority concluded that the California Democratic Party must include a point for each United States Senate race on the November 1992 general election ballot in the Party's calculation of the federal portion of its ballot composition ratio. Because I believe that the Commission's regulations require the ballot composition ratio to be based on the categories of federal and non-federal races on the ballot, rather than the actual number of federal and non-federal races within such categories, I dissent.

The Commission's new allocation regulations provide for the allocation of expenses for activities that benefit both federal and non-federal candidates. Among other things, the regulations require state and local party committees to allocate their administrative expenses and the costs of generic voter drives. This allocation is to be calculated using what is called the "ballot composition method." Under the ballot composition method:

expenses shall be allocated based on the ratio of federal offices expected on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in the committee's state or geographic area.

11 C.F.R. §106.5(d)(1)(i). The regulation goes on to explain that:

This ratio shall be determined by the number of categories of federal offices on the ballot and the number of categories of non-federal offices on the ballot, as described in paragraph (d)(1)(ii) of this section.

Id. (emphasis added).¹

In determining the ballot composition ratio for California, the majority assigns two points to the United States Senate races on the November 1992 California ballot by counting the actual number of Senate races. In my opinion, the Commission should strictly follow the language of the regulation and assign only one point to the 1992 elections for the United States Senate in California. Section 106.5(d)(1)(i) speaks in terms of

1. In pertinent part, paragraph (d)(1)(ii) provides:

In calculating a ballot composition ratio, a state or local party committee shall count the federal offices of President, United States Senator and United States Representative, if expected on the ballot in the next general election, as one federal office each.

11 C.F.R. §106.5(d)(1)(ii).

the "number of categories of federal offices on the ballot" and the "number of categories of non-federal offices on the ballot." 11 C.F.R. §106.5(d)(1)(1) (emphasis added).

The category method does not mean that the Commission should count and assign one point for each of the races actually on the ballot; rather, the category method assigns a certain number of points for each category or type of office on the ballot whether it be federal or non-federal. Under the category method of calculation, the Commission should assign only one point to the category of United States Senate and not assign two points based upon the actual number of races for United States Senate.

→ Not only does the language of the regulation require a category approach, but the Commission's Explanation and Justification for the Regulation as well as the Commission's reporting form and instructions also suggest this approach. In approving section 106.5(d)(1)(1), the Commission said:

The [ballot composition] method has been further simplified to produce a ratio by counting the categories of offices on the ballot rather than counting each individual office. Paragraph 106.5(d)(1)(1) specifies the categories to be included in the ratio and the number of federal or non-federal offices to be counted for each such category.

Explanation and Justification of 11 C.F.R. §106.5(d), 55 Fed.

Reg. 26058 (June 6, 1990), at 26064 (emphasis added).² In addition, the Commission's form for the reporting of allocations indicates that only one point may be taken for the United States Senate category. See Attachment. Similarly, the Commission's reporting instructions state:

In calculating this [ballot composition] ratio, committees may count only one federal or non-federal office for each candidate category listed in lines 1 through 9 of the Schedule, [except for "Other Statewide Offices" and "Local Candidates" for which an additional non-federal office may be counted in certain instances].

FEC Instructions for Preparing the Method of Allocation Schedule (emphasis added).

Under the category approach, the ballot composition method does not contemplate a strict accounting of each and every office on the ballot. Indeed, there are some offices on the ballot which are not even included in the ballot composition calculations. The non-federal side of the ratio for state

2. In adopting §106.5(d), the Commission specifically declined to adopt any ratio calculation based on the actual number of federal or non-federal races on the ballot:

Under [the ballot composition] approach, committees are to calculate a ballot composition ratio according to the ballot which an average voter would face in that committee's state or geographic area, rather than basing the ratio on the aggregates of all federal and all non-federal races on the ballot.

Explanation and Justification of 11 C.F.R. §106.5(d), Id. (emphasis added).

parties, for example, allows for a maximum of two slots for the category of "Other Statewide Office" and only one slot for the category of "Local Candidates." Thus, even if a ballot features statewide races for the offices of Lieutenant Governor, State Treasurer, State Auditor, Secretary of State, and Attorney General, the non-federal ratio may only include two points for the category of "Other Statewide Office." Likewise, a ballot may feature races for 10 or 20 local offices, but the state party may only count one point for the category of local office. If the majority were to apply the ballot composition method on the federal side in the same manner as it is applied on the non-federal side -- each category or office counts at most for a set number of points -- it would conclude that only one point should be assigned to the Office of United States Senate for the 1992 California ballot.

Because the majority's decision in Advisory Opinion 1991-6 runs counter to the language of the regulation as well as the Commission's prior interpretation of the regulation as reflected in the Commission's Explanation and Justification and publications, I dissent.

29 May 1991
Date



Scott E. Thomas
Commissioner