Law Offices of
OLSON, CONNELLY, HAGEL, FONG & LEIDIGH

July 24, 1991

Lawrence M. Noble
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion 1991-6

Dear Mr. Noble:

The California Democratic Party (CDP) requests clarification of an issue raised in Advisory Opinion 1991-6.

One of the three issues considered in AO 1991-6 was whether CDP may include one point in its ballot composition ratio for local candidates. The Commission concluded that CDP may include one point for local candidates. That conclusion was based to some extent on Geary v. Renne, 911 F.2d 280 (1990), which affirmed a judgment enjoining enforcement of Article II, section 6(b) of the California Constitution.[1]

As you may know, the United States Supreme Court recently vacated the Geary opinion and remanded the case to the trial court with instructions to dismiss the relevant cause of action without prejudice. Renne v. Geary, ___ U.S. ___, 1991 US Lexis 451 (1991) (copy attached). The Supreme Court's opinion was based solely on its conclusion that, on the record before it, the case was not justiciable. The Supreme Court did not address the merits.

Our question is this: Does Renne v. Geary, ___ U.S. ___, 1991 US Lexis 451 (1991), affect the

LANCE H OLSON
BRUCE J HAGEL
LEROY Y FONG
ROBERT E LEIDIGH
GEORGE M WATERS
DIANE M FISHBURN
CHRISTIAN A SPECK

OF COUNSEL
LLOYD G CONNELLY *Member*
California State Legislature

[1] Article II, section 6(b) states: "No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office."

300 Capitol Mall Suite 350
Sacramento, California 95814
TELEPHONE (916) 442-2952
FAX (916) 442-1280

Commission's conclusion that CDP may include one point in the ballot composition ratio for local candidates?

Very truly yours,

OLSON, CONNELLY, HAGEL, FONG & LEIDIGH

LANCE H. OLSON

LHO:deh
Enclosures

cc: Phil Angelides (without enclosures)
Susan Kennedy (without enclosures)
Bob Mulholland (without enclosures)

1ST CASE of Level 1 printed in FULL format.

LOUISE RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL., PETITIONERS v. BOB GEARY, ET AL.

RENNE v. GEARY

No. 90-769

SUPREME COURT OF THE UNITED STATES

1991 U.S. LEXIS 3489; 59 U.S.L.W. 4675

April 23, 1991, Argued
June 17, 1991, Decided

NOTICE: The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY:
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: 911 F. 2d 280, vacated and remanded.

SYLLABUS: Article II, @ 6(b) of the California Constitution prohibits political parties and party central committees from endorsing, supporting, or opposing candidates for nonpartisan offices such as county and city offices. Based on @ 6(b), it is the policy of petitioners -- the City and County of San Francisco, its Board of Supervisors, and certain local officials -- to delete any reference to party endorsements from candidates' statements included in the voter pamphlets that petitioners print and distribute. Respondents -- among whom are 10 registered voters in the city and county, including members of the local Republican and Democratic Central Committees -- filed suit seeking, inter alia, a declaration that @ 6(b) violates the First and Fourteenth Amendments and an injunction preventing petitioners from editing candidate statements to delete references to party endorsements. The District Court entered summary judgment for respondents, declaring @ 6(b) unconstitutional [*2] and enjoining its enforcement, and the Court of Appeals affirmed.

Held: The question whether @ 6(b) violates the First Amendment is not justiciable in this case, since respondents have not demonstrated a live controversy ripe for resolution by the federal courts. Pp. 2-11.

(a) Although respondents have standing to claim that @ 6(b) has been applied in an unconstitutional manner to bar their own speech, the allegations in their complaint and affidavits raise serious questions about their standing to assert other claims. In their capacity as voters, they only allege injury flowing from @ 6(b)'s application to prevent speech by candidates in the voter pamphlets. There is reason to doubt that that injury can be redressed by a declaration of @ 6(b)'s invalidity or an injunction against its enforcement, since a separate California statute, the constitutionality of which was not litigated in this case, might well be construed to prevent candidates from mentioning party endorsements in voter pamphlets, even in the absence of @ 6(b). Moreover, apart from the possibility of an overbreadth claim, discussed infra, the standing of respondent committee members to litigate based on injuries [*3] to their

respective committees' rights is unsettled. See Bender v. Williamsport Area School Dist., 475 U.S. 534, 543-545. Nor is it clear, putting aside redressability concerns, that the committee members have third party standing to assert the rights of candidates, since no obvious barrier exists preventing candidates from asserting their own rights. See Powers v. Ohio, 499 U.S. , . Pp. 5-7.

(b) Respondents' allegations fail to demonstrate a live dispute involving the actual or threatened application of @ 6(b) to bar particular speech. Their generalized claim that petitioners deleted party endorsements from candidate statements in past elections does not do so, since, so far as can be discerned from the record, those disputes had become moot by the time respondents filed suit. Similarly, an allegation that the Democratic Committee has not endorsed candidates "in elections since 1986" for fear of the consequences of violating @ 6(b) will not support a federal court action absent a contention that @ 6(b) prevented a particular endorsement, and that the controversy had not become moot prior to the litigation. Nor can a ripe controversy be found in the fact [*4] that the Republican Committee endorsed candidates for nonpartisan elections in 1987, the year this suit was filed, since nothing in the record suggests that petitioners took any action to enforce @ 6(b) as a result of those endorsements, or that there was any desire or attempt to include the endorsements in the candidates' statements. Allegations that respondents desire to endorse candidates in future elections also present no ripe controversy, absent a factual record of an actual or imminent application of @ 6(b) sufficient to present the constitutional issues in clean-cut and concrete form. Indeed, the record contains no evidence of a credible threat that @ 6(b) will be enforced, other than against candidates in the context of voter pamphlets. In these circumstances, postponing adjudication until a more concrete controversy arises will not impose a substantial hardship on respondents and will permit the state courts further opportunity to construe @ 6(b), perhaps in the process materially altering the questions to be decided. Pp. 7-10.

(c) Even if respondents' complaint maybe read to assert a facial overbreadth challenge, the better course might have been to address in the first [*5] instance the constitutionality of @ 6(b) as applied in the context of voter pamphlets. See, e. g., Board of Trustees, State Univ. of N. Y. v. Fox, 492 U.S. 469, 484-485. If the as-applied challenge had been resolved first, the justiciability problems determining the disposition of this case might well have concluded the litigation at an earlier stage. Pp. 10-11.

911 F. 2d 280, vacated and remanded.

JUDGES: KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SOUTER, JJ., joined, and in all but Part II-B of which SCALIA, J., joined. STEVENS, J., filed a concurring opinion. WHITE, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined.

OPINIONBY: KENNEDY

OPINION: JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners seek review of a decision of the United States Court of Appeals for the Ninth Circuit holding that Article II, @ 6(b) of the California Constitution violates the First and Fourteenth Amendments to the Constitution

of the United States. Section 6(b) reads: "No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office." Its companion [*6] provision, @ 6(a), provides that "all judicial, school, county, and city offices shall be nonpartisan."

I

In view of our determination that the case is nonjusticiable, the identity of the parties has crucial relevance. Petitioners are the City and County of San Francisco, its Board of Supervisors, and certain local officials. The individual respondents are 10 registered voters residing in the City and County of San Francisco. They include the chairman and three members of the San Francisco Republican County Central Committee and one member of the San Francisco Democratic County Central Committee. Election Action, an association of voters, is also a respondent, but it asserts no interest in relation to the issues before us different from that of the individual voters. Hence, we need not consider it further.

Respondents filed this suit in the United States District Court for the Northern District of California. Their third cause of action challenged @ 6(b) and petitioners' acknowledged policy, based on that provision, of deleting any references to a party endorsement from the candidate statements included in voter pamphlets. As we understand it, petitioners print the pamphlets and pay [*7] the postage required to mail them to voters. The voter pamphlets contain statements prepared by candidates for office and arguments submitted by interested persons concerning other measures on the ballot. The complaint sought a declaration that Article II, @ 6 was unconstitutional and an injunction preventing petitioners from editing candidate statements to delete references to party endorsements.

The District Court granted summary judgment for respondents on their third cause of action, declaring @ 6(b) unconstitutional and enjoining petitioners from enforcing it. 708 F. Supp. 278 (ND Cal. 1988). The court entered judgment on this claim pursuant to Federal Rule of Civil Procedure 54(b), and petitioners appealed. A Ninth Circuit panel reversed, 880 F. 2d 1062 (1989), but the en banc Court of Appeals affirmed the District Court's decision, 911 F. 2d 280 (CA9 1990) (en banc).

We granted certiorari, 498 U.S. (1991), to determine whether @ 6(b) violates the First Amendment. At oral argument, doubts arose concerning the justiciability of that issue in the case before us. Having examined the complaint and the record, we hold that respondents have not demonstrated a live controversy [*8] ripe for resolution by the federal courts. As a consequence of our finding of nonjusticiability, we vacate the Ninth Circuit's judgment and remand with instructions to dismiss respondents' third cause of action.

II

Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. We presume that federal courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" Bender v. Williamsport Area School Dist., 475 U.S. 534, 546 (1986), quoting King Bridge Co. v. Otoe County, 120 U.S. 225, 226 (1887). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

July 31, 1991

Lance Olson
Olson, Connelly, Hagel,
Fong & Leidigh
300 Capitol Mall, Suite 350
Sacramento, CA 95814

Dear Mr. Olson:

This refers to your letter dated July 24, 1991, in which you request clarification of one issue addressed in Advisory Opinion 1991-6 as a result of the United States Supreme Court decision in Renne v. Geary, No. 90-769, decided June 17, 1991.

The issue you cite from Advisory Opinion 1991-6 is whether the California Democratic Party may include one point for local candidates in its ballot composition allocation ratio pursuant to Commission regulations at 11 CFR 106.5(d). The conclusion of the Commission's opinion was based on the appellate court's decision in Geary v. Renne, 911 F. 2d 280 (9th Cir. 1990) (en banc). Because of the Supreme Court's reversal of the lower court, you ask whether the cited decision affects the Commission's conclusion on the ballot ratio point for local candidates.

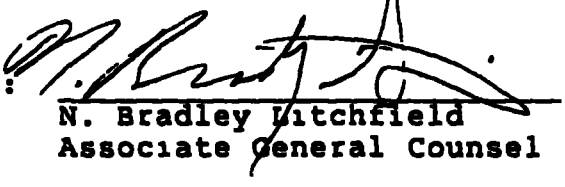
The preliminary informal answer I would offer in response to your question is, yes--the local candidate conclusion of Advisory Opinion 1991-6 seems to be affected by the Supreme Court's decision. The Commission's opinion states, in pertinent part, "that the outcome of that appeal may remove the premise on which the Commission's conclusion is based if the holding of the Ninth Circuit is reversed. Thus, the Commission's conclusion is limited to the circumstances as they now exist..."

This office may not, however, render any opinion of an advisory nature on the issue. 2 U.S.C. §437f(b), 11 CFR 112.4(f). In view of these restrictions, and because your inquiry in essence reiterates one of the same questions answered in Advisory Opinion 1991-6, the Commission would have to consider that question again in the context of a new advisory opinion request.

If you wish your letter of July 24, 1991, to be considered as a new advisory opinion request, please advise us in writing, and we will proceed accordingly. If you have any questions about this letter, please contact the undersigned.

Sincerely,

Lawrence M. Noble
General Counsel

BY: 
N. Bradley Litchfield
Associate General Counsel

Law Offices of
OLSON, CONNELLY, HAGEL, FONG & LEIDIGH

August 9, 1991

Lawrence M. Noble
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion 1991-6

AOR
1991-27

Dear Mr. Noble:

Lance Olson has asked that I reply to your letter of July 31, 1991.

We request that Mr. Olson's July 24, 1991, letter to you be considered as a new advisory opinion request.

Please contact me if you have any questions.

Very truly yours,

OLSON, CONNELLY, HAGEL, FONG & LEIDIGH

GEORGE WATERS

GW:deh

cc: Phil Angelides
Susan Kennedy
Bob Mulholland

LANCE H OLSON
BRUCE J HAGEL
LEROY Y FONG
ROBERT E LEIDIGH
GEORGE M WATERS
DIANE M FISHBURN
CHRISTIAN A SPECK

OF COUNSEL
LLOYD G CONNELLY *Member*
California State Legislature

300 Capitol Mall, Suite 350
Sacramento, California 95814
TELEPHONE (916) 442-2952
FAX (916) 442-1280