FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 25, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-27

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

Dear Mr. Olson:

This is in response to your letters of July 24 and August 9, 1991, requesting an advisory opinion on behalf of the California Democratic Party ("CDP") regarding the application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, and Commission regulations to the allocation of CDP expenditures that influence both Federal and non-federal elections. Specifically, as a result of the United States Supreme Court decision in Renne v. Geary, ___ U.S. ___, 111 S.Ct. 2331, decided June 17, 1991, you seek clarification of one issue addressed in Advisory Opinion 1991-6.

In Advisory Opinion 1991-6, the Commission considered, inter alia, whether CDP could include one point in its ballot composition ratio for local candidates. The Commission's allocation regulations, at 11 CFR 106.5(d)(1)(ii), allow state party committees to "include in the ratio one additional non-federal office if any partisan local candidates are expected on the ballot in that election". As noted in that advisory opinion, California law provides that local elections are nonpartisan pursuant to Article II, section 6(a) of the California Constitution. Prior to 1986, this provision was interpreted to permit political parties to endorse, support or oppose local candidates; only party nominations were prohibited by that section. See Unger v. Superior Court, 37 Cal. 3d 612 (1984). In 1986, however, the state constitution was amended through Proposition 49, by adding Article II, section 6(b): "No political party ... may endorse, support or oppose a candidate for nonpartisan office".

At the time of your earlier request, the United States Court of Appeals for the Ninth Circuit had held that section 6(b) violates the first and fourteenth amendments of the United States Constitution. Geary v. Renne, 911 F.2d 280 (9th Cir. 1990)(en banc). Thus, the Commission

found that although section 6(b) would normally operate to "preclude CDP from claiming a non-federal point in its ballot composition calculation for its support of `partisan local candidates'", that section was rendered inoperative by the holding in Geary. Advisory Opinion 1991-6. The Commission therefore concluded that CDP was not then under any constraints regarding its activity in local races and could claim a point for local candidates in its ballot composition calculation for the 1992 election cycle. As the opinion explains, however, this conclusion was limited to the circumstances then existing:

> The Commission also notes that the Supreme Court has granted certiorari in the Geary case, and 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, in which California law provides no impediment to the participation of parties in local races, other than their ability to nominate candidates for such offices.

On June 17, 1991, the Supreme Court vacated the Ninth Circuit decision in Geary and remanded the case to the lower courts with instructions to dismiss the relevant cause of action without prejudice. Renne v. Geary, 111 S.Ct. at 2336. At the present time, then, Article II, section 6(b) of the California Constitution is reinstated.[1] You ask whether, under these circumstances, Renne v. Geary affects the Commission's conclusion in Advisory Opinion 1991-6 that CDP may include one point in the ballot composition ratio for local candidates.

The Commission concludes that, since its earlier decision was expressly conditioned on the status of California law, CDP may no longer include a point for local offices in its ballot composition calculation. Although the effective date of this change is July 12, the date on which the Court's decision became final,[2] for administrative convenience CDP may recalculate its ballot composition ratio as of August 1, 1991. CDP should file a new Schedule H-1 with its next report reflecting the change in its ratio as of August 1 with a notation indicating that the change is being made pursuant to this advisory opinion. The recalculated ratio must be applied to all allocable expenditures for goods and services received by CDP after July 31, 1991.

It is possible, on remand, that section 6(b) will again be invalidated by the courts. However, your request does not indicate that any stay or injunction has been obtained to bar enforcement of that provision pending the outcome of further litigation. If either of these events occurs in the future, i.e. section 6(b) is held invalid or is otherwise rendered inoperative through a stay or injunction, CDP may once again include a point for local candidates in its ballot composition ratio. The effective date of this recalculation would be January 1, 1991, since section 6(b) would be considered invalid or inoperative as of that date.[3]

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Joan D. Aikens
Vice-Chairman for the Federal Election Commission

Enclosure (AO 1991-6)

ENDNOTES

1/The Court concluded in Renne, on the basis of the record before it, that the case was not ripe for resolution. Consequently, it did not reach the merits. 111 S.Ct. at 2336.

2/A petition for rehearing of any Supreme Court decision must be filed within 25 days after entry of judgment; if no petition is filed, the Court's decision becomes final at the end of that period. See Supreme Court Rule 44.1.

3/The Ninth Circuit decision finding Section 6(b) unconstitutional was issued in 1990, predating the effective date of the allocation regulations. Geary v. Renne, 911 F.2d 280 (9th Cir. 1990) (en banc).