BALLOT ACCESS NEWS

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ELEVEN KEY LAWSUITS ARE CLOSE TO A DECISION

BALLOT ACCESS, PARTY RIGHTS, TERM LIMITS DECISIONS IMMINENT

Eleven key court cases are likely to be decided in the next few months. This is an unusually large number, considering that we are not now in an election period.

Political Party Rights

1. A decision is expected this month from a federal court in *Republican Party of Arkansas v Faulkner County*, no. 92-130. Arkansas law requires all political parties to nominate by convention, and also forces political parties to pay for their own primary, unless the county government should volunteer to do so. Only six of Arkansas' 75 counties pay for party primaries. The Republican Party argues that as long as the state mandates primaries, the government must pay for them. This is an issue that has never been in court before.

2. A decision on whether the Federal Election Commission must draw up guidelines to be imposed on the Republican Party, to insure that the party chooses more African-American delegates to its national convention, could be released any day now by the U.S. Court of Appeals, D.C. circuit. *Freedom Republicans v FEC*, no. 92-5214.

3. A decision could come at any time from a federal court in Miami in *Socialist Workers Party v Leahy*, no. 92-1451, a case over whether the government can compel a political party to post a bond in every county in which it wishes to organize, even if that party is not on the ballot.

Ballot Access for New Parties

1. All the briefs have been submitted to federal judge John Copenhaver in *Hess v Hechler*, no. 2:92-0807, a challenge to West Virginia's petition deadline of May (for all office other than president). Under current practice, if voters vote in the primary after they sign, their signatures aren't counted, so a petitioning group can never know if it has enough signatures; and it's too late to get more after the primary. If the deadline can extended past the primary, this difficult problem will be eliminated.

2. All the briefs have been submitted in *McLaughlin v Board of Elections*, no. 2:93cv100, in federal court in Greensboro, North Carolina. Issues in the case:

(1) a 5¢ fee for every petition signature that is submitted to get a new party on the ballot (total $3,000);
(2) a law that parties cannot stay on the ballot unless they get at least 10% of the vote for Governor;
(3) wording on the petition that the signers "intend to organize a new political party" (rather than the language used in other states, that the signers desire that the party be on the ballot);
(4) a law that voters can only register as Independent, Republican or Democrat.

Congressional Term Limits

Federal judge William Dwyer held a hearing in *Colony v Munro*, no. 93-770, on January 11, in Seattle, Washington. This is the only case now pending in any federal court, over the constitutionality of congressional term limits. Speaker Tom Foley is a plaintiff.

Dwyer is expected to rule in a few days on whether the case is ripe for deciding the issue. He will probably rule that the case can go forward. If so, there will probably be a ruling on the merits by April. All the briefs on the merits have been submitted.

Primary Ballot Access

Any day now, there will be a decision in *Duke v Smith*, 92-4093, from the 11th circuit. This involves a challenge to Florida law which provides no means for any candidate to get on the presidential primary ballot, unless the Secretary of State, or the party legislative leader of either house of the legislature, says the candidate should be on.

Ballot Order

All the briefs have been filed in *New Alliance Party v New York State Board of Elections*, no. 90-6226, before federal Judge Robert J. Ward of Manhatten. This case challenges New York law which puts major parties on the ballot in the order of their vote in the last gubernatorial election, but other parties on in random order.

Write-In Voting

1. There will be a hearing on March 16 in *COFOE v McEldeberry*, no. 93-6151, in the 10th circuit. This challenges Oklahoma's ban on write-in votes at the general election for president, since the state requires 41,711 signatures for a third party or independent presidential candidate to get on the ballot. There is a 50-50 chance that one of the three judges on the panel will be former U.S. Supreme Court Justice Byron White, who is participating in that circuit during that week.

2. Any day now, there will be a decision from the Florida State Court of Appeals over the constitutionality of a law which says that write-in candidates' votes cannot be counted, unless the write-in candidate files a declaration of candidacy by mid-July of an election year. *Fulani v Smith*, no. 93-00096.

Presidential Debates

There will be a hearing in the 2nd circuit on January 13 in *Fulani v Brady*, no. 93-6205, over whether the League of Women Voters Fund should lose tax-exempt status. It sponsored a presidential debate in January 1992 and used arbitrary standards for deciding which candidates to invite.

LOUISIANA DISTRICTS INVALIDATED

On December 28, 1993, a 3-judge U.S. District Court invalidated Louisiana's congressional districts on the grounds that they are a "racial gerrymander". The decision was written by Judge Jacques L. Wiener, a Bush appointee, and co-signed by Judge John M. Shaw, a Carter appointee. Judge Donald E. Walter, a Reagan appointee, concurred but wrote a separate opinion.

Louisiana apportioned its seven districts in 1992 to ensure that Black voters were the majority in two districts. One of those districts has orderly boundaries, but the other one, the 4th, represented by Congressman Cleo Fields, is extremely irregular. It takes in Black neighborhoods in the northwest, northeast, and center of the state and is 600 miles long but only 60 feet wide in certain places.

30% of Louisiana's population is Black, so the state defended the plan on the basis that two Black districts out of seven is proportional to population. However, Wiener rejected that idea. He said a major share of the state's Black voters don't live in either of the two "Black" districts, and if the goal is proportional representation, the solution is faulty, since the Blacks voters living outside those two districts have no voice in choosing the state's Black members of Congress.

Wiener also scolded the Justice Department's Voting Rights Section for making the legislature feel it had no choice but to draw two "Black" districts. And he mentioned the state's expert witnesses by name and stated why he disagrees with their testimony.

The state plans a quick appeal to the U.S. Supreme Court. This was the first time any state's reapportionment was held unconstitutional on the grounds that it paid too much attention to race, although the Supreme Court put the North Carolina districting in jeopardy last year for a similar reason. In that case, *Shaw v Reno,* the Supreme Court told the lower court to re-do the case.

U.S. SUPREME COURT NEWS

1. The U.S. Supreme Court will probably decide in March whether to hear *Recall '92 v Edwards,* no. 93-1062. It concerns a Louisiana law which makes it illegal to petition (or do anything political) within 600 feet of any polling place on election day.

2. The court will hold a hearing in March in *Ladue v Gilleo,* no. 92-1856, a case about municipal ordinances which ban political signs on private property.

NES CHANGES ITS NAME

Last year, the News Election Service changed its name to Voter News Service. The News Election Service is the organization which collected election returns on election night, and delivered them to television networks and major newspapers. NES was criticized in the past for omitting most third party candidates from its election night tallies, but in 1992 it included all third party presidential candidates, and in 1993 it included all third party candidates who were on the ballot in all races.

WASHINGTON STATE HEARING

On January 6, the 9th circuit held a hearing in *Libertarian Party of Washington v Munro,* no. 92-36620. The case is over (1) a law which forces new or minor parties to choose their candidates by the first Saturday in July, whereas Republicans and Democrats don't even need to file for the primary that early; and (2) law which lets major parties fill vacancies in nominations, but which denies other parties the same opportunity (although if a minor party candidate dies, the party can replace the candidate).

The lower court had upheld both of these laws. Hearing the party's appeal were Judges William Canby (a Carter appointee), Thomas G. Nelson and William Shubb (Bush appointees). The panel seemed to agree with the state that the Libertarian Party hadn't showed that it was harmed by the laws under attack. None of the candidate-plaintiffs in the case had been kept off the ballot or shown concretely that their campaigns were harmed by the disparity in deadlines.

Just before the hearing, the Libertarian Party submitted new evidence to show that the party is harmed by the early deadline, since it won't be choosing a presidential candidate until July 6, 1996, and that happens to be the last day permitted by Washington law for a party to say who its candidates are. The judges asked no questions about this, and granted permission for the state to submit a post-hearing brief on this issue. The state plans to argue that this issue does not belong in the case, since no reference to the presidential problem was made when the case was originally filed in 1992.

It seems likely that the panel will conclude that there is no basis to make a ruling on the constitutionality of the laws, because of insufficient evidence and the lack of a specific controversy when the case was first filed.

NEW LAWSUITS PLANNED

1. The New Alliance Party of Texas plans to bring a lawsuit in state court against the Texas ballot access law for new parties, under a provision of the State Constitution which outlaws monopolies. The Texas ballot access law for parties is so difficult, no new parties qualified for the ballot in either 1990 or 1992.

2. The Libertarian Party of Georgia plans to bring a lawsuit against law which forces it submit petitions signed by 5% of the registered voters, in order to place a candidate for Congress on the ballot. A typical Georgia district requires 14,500 valid signatures, the toughest requirement for new parties in the nation to get on the ballot for U.S. House. No third parties for the U.S. House have ever qualified in Georgia under the 5% law, which has existed since 1943.

3. The Libertarian Party may bring a lawsuit against Colorado ballot access laws which require a petition signed by 20% of the last vote cast, for a new party to place candidates for County office on the ballot, in small counties; and against another law which requires a separate petition for each such candidate.

SENATE CAMPAIGN REFORM BILL

S.3, the Campaign Reform Bill passed by the U.S. Senate on June 17, has these provisions, some of which appear to violate the First Amendment:

1. Senate candidates who volunteer to limit their spending, and who receive small contributions of at least 5% of that volunteer spending ceiling, are entitled to public benefits. Since each state's population differs, the spending ceiling is different for each state. The formula is $400,000 plus 30¢ for each resident of voting age in the state (up to the first 4,000,000 residents) and 25¢ for each resident beyond that. However, the ceiling will never be below $1,200,000 and will never be greater than $5,500,000. The amounts are indexed for inflation.

2. Public campaign subsidies will be paid for by taxing campaign contributions, and by removing the tax exemption for lobbying and applying the extra revenue.

3. Eligible "volunteers" who are on the ballot and who have raised enough money (5% of the ceiling), will be entitled to cheaper postage rates and cheaper TV rates. Direct subsidies will only go to these candidates if they have opponents who do not "volunteer" to limit their spending.

4. Not all eligible candidates are treated equally. Democratic and Republican candidates receive more subsidies than other candidates. See page 6.

5. Contributions from political action committees based on employment are banned.

6. Candidates who don't "volunteer" to limit their spending, must say in all their advertising, "This candidate has not agreed to voluntary campaign spending limits."

7. Out-of-state contributions made more than two years before the election are banned.

8. Primary season presidential matching funds become more difficult to obtain; instead of raising at least $5,000 in each of 20 states, the candidate must raise at least $15,000 in each of 26 states.

9. Any presidential candidate convicted of breaking a campaign spending law may never again receive primary season matching funds.

10. "Persons other than candidates who mail any commnication to the general public that advocates the election of a particular candidate and directly or indirectly refers to an opponent of the candidate, with or without identifying any opponent in particular, shall file an exact copy of the communication with the FEC and with the Secretary of State of the candidate's State by no later than 12:00 pm on the day on which the communication is first placed in the mail to the general public." (sec. 714)

11. If independent expenditures are spent for a broadcast, the broadcaster must notify the opposition candidate; if the opposition candidate has qualified to be eligible for public funding, the broadcaster must provide an opportunity for that candidate to respond, and may not demand to be paid in advance.

12. For the first time, political parties will be forced to disclose to the FEC information about their contributors, and their expenditures, even when the money does not relate to campaigns for federal office. Individuals who contribute as much as $2,000 to a political party also would be required to file disclosure statements.

HOUSE CAMPAIGN REFORM BILL

HR 3, the bill passed by the House November 21, 1993, contains these provisions:

1. Title I, "Control of Congressional Campaign Spending", provides that a voluntary spending limit for candidates of the U.S. House shall be set. Basically, the ceiling is $600,000, indexed for inflation.

If a candidate is nominated by primary and wins the primary by less than 20%, that candidate's general election ceiling is $800,000.

A "volunteer" who stick to this spending limit, must also promise not to spend more than $50,000 of his or her own money on the campaign.

In exchange, such "volunteers" shall be entitled to matching public funds, up to $200,000, if they have received at least $60,000 in private contributions of $200 or less. Such candidates are released from the spending limits if they have an opponent who does not abide by the spending limit and spends at least $750,000. "Volunteer" candidates are entitled to extra amounts of public funding if they were nominated by primary and won the primary by less than 20% of the vote. They are also entitled to extra amounts of public funding if at least $10,000 of independent expenditures are made against them.

2. Title II prevents all candidates for Congress from accepting more than $200,000 from PAC's, and also prevents all candidates from accepting more than $200,000 from individuals who give in chunks greater than $200. However, the candidates who volunteered to abide by the voluntary spending limits mentioned above may receive as much as $266,600 from these sources if they won a primary with a margin of less than 20% of the vote.

Also, these limits are totally eliminated for any "volunteer" who has a "non-volunteer" opponent who spends more than $50,000 of his or her own money.

3. Title III expands the definition of "Independent Expenditures" in campaigns, and imposes tougher disclosure rules for such expenditures ("independent expenditures" are funds spent to influence voters in an election, made by people or groups other than candidates and made independent of any coordination with any candidates).

Title III also requires a TV or radio station which airs any independent expenditure-financed ad which advocates the defeat of any "volunteer" candidate, or the election of his or her opponent, to send a copy of that tape to the "volunteer" candidate, within a week of the broadcast. If the broadcast is made in the last week before an election, the station must send it within 24 hours. The law applies to TV stations even if they only operate via cable.

HOUSE CAMPAIGN BILL *(continued from page 3)*

4. Titles IV and V make revisions on existing laws which already regulate the amount of money political parties can receive and spend on their candidates for federal office.

Some of the changes seem to further restrict parties; for instance, local, state and national committees of political parties can no longer be treated as separate organizations, for purposes of contribution limits to their own candidates.

5. Title VI makes changes in reporting procedures, and VII revises certain FEC procedures, and instructs the FEC to spend money on persuading the public to donate to the fund to support public funding.

6. Title VIII requires any group which spends at least $1,000 in support of, or in opposition to, certain state initiative campaigns, to report to the FEC with information about its finances.

The law applies to these types of state initiatives: "Any referendum or other ballot initiative which involves (A) the election of candidates for Federal office and the permissible terms of those so elected; or (B) the regulation of speech or press, or any other right guaranteed by the U.S. Constitution." (emphasis added).

7. Title IX makes miscellaneous changes; Title X sets up public funding for candidates for Congress, which is called the "Make Democracy Work Election Fund".

HR 3 has been widely mocked, because it doesn't say how to finance the public funding for congressional candidates. The conference committee will wrestle with that question.

Politea, the newsletter of the American Association of Political Consultants, predicts that no campaign finance reform bill will pass this session of Congress. Republicans are likely to filibuster any bill that emerges from the Conference Committee. Nevertheless, it might be a good idea for anyone who opposes either version of the reform to write his or her members of Congress.

STATE LEGISLATIVE NEWS

1. California: AB 817, which would have permitted small qualified parties to nominate by convention instead of primary, was defeated on January 10 in the Assembly Elections Committee.

2. New Hampshire: The bills to make it easier for a party to remain on the ballot now have numbers: HB 1352 and HB 1246.

COFOE SEEKS STATE COORDINATORS

COFOE, the Coalition for Free & Open Elections, is a coalition of half of the nation's nationally-organized third parties. COFOE is asking for volunteers to be state coordinators. A state coordinator would serve as a center of communications, during attempts to persuade state legislators to improve that state's ballot access laws. Write COFOE at Box 20263, New York NY 10001, or telephone chair Ann Rosenhaft during the day at (212) 691-0776.

B.A.N. SALUTES CHERYL LAU

Ballot Access News hereby names Cheryl Lau, Secretary of State of Nevada, as the election official who did the most during 1993 to improve ballot access laws.

Lau suggested a package of election reforms to the 1993 legislature, including a proposal to reduce the number of signatures needed for a new party to get on the ballot, from 3% of the last vote cast, to 1%. Also included was a proposal to lower the number of votes needed for a party to remain on, from 3%, to 1%, of the statewide vote.

Lau's ideas were immediately criticized in a column in the *Las Vegas Sun*, written by the editor, former Governor Mike O'Callaghan. O'Callaghan said, "Won't this encourage even more splinter parties? Open debate on this issue may show there are several reasons to leave it as it is (3%) or even increase it to 4%."

Notwithstanding this attack, Lau's proposal was enacted. Five other states also improved their ballot access laws in 1993, but only in Nevada was the improvement a direct consequence of support from an elections official.

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BALLOT SPOT AFFECTS VOTE

The New Jersey gubernatorial election of November 2, 1993, provides overwhelming evidence that a candidate's position on the ballot, affects his or her vote.

In New Jersey, every county decides for itself which order to list the third party and independent candidates (but by state law, Republicans and Democrats always get the best spot on the ballot). Since New Jersey only requires 800 signatures for a statewide third party or independent candidate to get on the ballot, there are always many such candidates. This year, there were 17, in addition to the Democrat and Republican.

With only three exceptions, every third party and independent candidate for Governor did best, in the county in which he or she was listed next to the Democrat and Republican, above all the other candidates. No independent gubernatorial candidate had the third line in more than two counties. The details for each third party and independent candidate follow:

1. Marilyn Arons, whose label was "Maximum Citizen Involvement" got the third line in Passaic and Hunterdon Counties, where she polled .75% and .34%. In no other county did she poll more than .15%.

2. Pete DiLauro, label "Common Sense Government" got the third line in Warren and Gloucester Counties, where he polled .69% and .31%. In no other county did he poll more than .23%.

3. Tim Feeney, label "The Independent Choice" got the third line in Salem County, where he polled .92%. In no other county did he poll more than .34%.

4. Tom Fuscaldo, label "Zero Sales Tax" got the third line in Hudson County, where he polled .33%. Hudson County was his second-best county, but he did poll a higher percentage (.36%) in one other county.

5. Andrea Lippi, label "People Purpose Progress" got the third line in Somerset and Morris Counties, which were her best and third best counties.

6. Joseph Marion, label "Independent", got the third line in Union and Camden Counties, where he polled .92% and .52%. In no other county did he poll more than .28%.

7. Michael R. Scully, "Fresh Start", got the third line in Middlesex and Cumberland Counties, where he polled .58% and .47%. In no other county did he poll more than .21%.

8. Andrew J. Zemel, "Integrity-Common Sense", got the third line in Bergen County, where he polled .21%. In no other county did he poll more than .07%.

9. Michael Ziruolo, "Better Affordable Government", got the third line in Essex County, where he polled .47%. In no other county did he poll more than .12%.

10. Tom Blomquist, Conservative Party candidate, got the third line in Monmouth County, which was his second best county (his best county was his home county, Ocean).

11. Mark Rahn, Socialist Workers Party candidate, got the third line in Cape May County, where he polled .17%. In no other county did he poll more than .07%.

12. John Kucek, Populist Party candidate, got the third line in Burlington and Mercer Counties, which were his best two counties.

13. Kenneth Kaplan, Libertarian Party candidate, got the third line in Atlantic and Ocean Counties, which were his seventh and eighth best counties. His results do not fit the pattern, probably because the Libertarian Party has been organizing for twenty years in New Jersey and has a stable constituency of supporters who vote for it regularly, regardless of its spot on the ballot. Nevertheless, Kaplan did better in Atlantic and Ocean Counties than he did in the state as a whole.

Independents Alene Ammond, Pat Daly, Jerry Grant, and Richard Lynch did not get the third line in any county.

1994 PETITIONING

The 1994 petitioning chart does not appear in this issue, but will reappear in the next one. The only significant changes in the last two months are: (1) the Green Party has launched a petition to get on the ballot for Governor of Maine; (2) The Wyoming Libertarian petition now has 4,000 signatures; (3) the Michigan Libertarian petition has been approved, so the party is on the ballot there; (4) the New Alliance Party petition in Indiana now has 38,000 signatures; (5) the U.S. Taxpayers Party has begun petitioning to place its candidate on the ballot for U.S. Senate in Ohio.

Jack Gargan, Independence Party candidate for Governor of Florida, has received 300,000 blank petition cards from the Secretary of State, and starts his petition drive on January 15. He has decided to qualify as an independent candidate, even though the number of signatures for a new party and for an independent candidate are the same, 196,255. No independent candidate in any state has ever overcome a signature hurdle greater than 134,781 signatures.

HATCH ACT EXPANDED

On November 23, 1993, the U.S. Office of Special Counsel issued a ruling which expands the Hatch Act to non-partisan elections, if a candidate in a non-partisan election campaigns by saying he or she is endorsed by a political party which ran a presidential candidate in the last election. Although Congress relaxed many Hatch Act restrictions lately, it still bars federal employees from running for office in partisan elections. The ruling was issued against a Socialist Workers Party member who ran for city office in San Francisco.

The ruling gives any party which ran a presidential candidate great power; any such party can now enter a candidate in a non-partisan election and instantly transform that election into a "partisan" election for purposes of Hatch Act enforcement. That, in turn, would prevent <u>any</u> federal employee from running in such an election!

S.3 VIOLATES COPENHAGEN ACCORD

S. 3, the "Congressional Spending Limit and Election Reform Act of 1993", as passed by the Senate, clearly violates the Copenhagen Document, which the United States signed in 1990. The Document pledges nations not to discriminate for or against any political party or candidate. S. 3 mandates higher public campaign subsidies to Republicans and Democrats running for the U.S. Senate, even when another candidate has raised more money and otherwise shown more public support than the major party candidates!

Suppose Vermont's Independent member of Congress, Bernie Sanders, were to run for the U.S. Senate. Also suppose that Sanders had raised $800,000 in small contributions from individuals. Also suppose that his hypothetical Republican opponent, the incumbent, had raised $1,620,000, and that the hypothetical Democratic candidate had raised $60,000 (this is not an unrealistic scenario; in the U.S. House race in Vermont in 1992, Sanders raised $575,791; his Republican opponent raised less; and the Democratic candidate raised less than $5,000 and only polled 8% of the vote).

The amount raised by the Republican Senator exceeds the $1,200,000 voluntary cap for Vermont in this particular year in our hypothetical example, so S.3's public campaign subsidy program would go into operation.

Sec. 503(b)(2)(B) of the bill contains the formula for determining Sanders' subsidy. His amount would be the least of these three calculations: (1) small contributions to Sanders minus 5% of the legal spending cap, or $740,000; (2) 50% of the legal spending cap, or $600,000; (3) the excess over the spending cap spent by the candidate who didn't adhere to that cap, in this case $420,000. Sanders would receive the least of these three amounts, *i.e.*, $420,000.

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Sanders' Democratic opponent would receive an amount determined by Sec. 503(b)(2)(A) of the bill. In this example, since the excess spending by the non-capped Republican is more than 1.33% of the spending cap, but less than 1.67% of the cap, the Democrat would receive two-thirds of the spending cap, or $800,000.

To summarize: the state's independent member of the U.S. House, who won with 58% of the vote in 1992, would receive $420,000 in public campaign subsidies, only half the amount of money he had raised. Yet his Democratic opponent would receive $800,000, an amount 13 times greater than the amount of money he or she had raised!

NEW RESOURCES AVAILABLE

1. The Center for Voting and Democracy is about to publish its first annual report. It will be approximately 75 pages, with articles on how proportional representation fared around the world during 1993. Authors include former Congressman John B. Anderson, Professor Douglas Amy, journalist Hendrik Herzberg, and Professor Lani Guinier. The report is available to members for $5. Non-members may join and receive the report for $25. Center for Voting & Democracy, 6905 Fifth St. NW, #200, Washington DC 20012, tel. (202) 882-7378.

2. The transcript of hearings on how the U.S. violates the Copenhagen Meeting Document is now available for $35 from the Democracy Project, Bx 526175, Salt Lake City Ut 84152, (801) 582-3318. The book weighs 3 pounds and is 577 pages long. It contains all the testimony submitted last year to the Salt Lake City hearings.

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