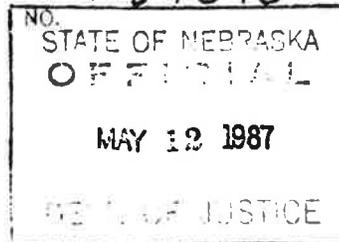


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: May 12, 1987

SUBJECT: The Legality of Closed Primary Elections in Light of Recent Decisions by the United States Supreme Court

REQUESTED BY: Senator Lee Rupp
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General

SUMMARY OF OPINION

Must independent voters in Nebraska, who are qualified and allowed to vote in our nonpartisan legislative primaries, also be allowed to vote in our partisan congressional and senatorial primaries? Yes. Qualified independent voters in Nebraska must be allowed to vote in partisan congressional primary elections. This conclusion is based primarily upon the 1986 United States Supreme Court Tashjian v. Republican Party of Connecticut decision, which holds:

(a) The United States Constitution Qualifications Clause requires that all of those allowed to vote for the more numerous branch of the state legislature (in Nebraska, our unique nonpartisan unicameral) must also be allowed to vote in congressional elections.

(b) This requirement applies to primary as well as general elections. Therefore, it requires that qualified independent voters who vote in the Nebraska primary nonpartisan unicameral elections must also be allowed to vote in the Nebraska primary partisan congressional elections.

DETAILED OPINION

You have asked whether a recent United States Supreme Court decision [Tashjian v. Republican Party of Connecticut, 93 L.Ed.2d 514, 107 S.Ct. 544 (1986)] requires that independent voters in Nebraska, who are qualified and permitted to vote in our

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nonpartisan legislative primaries, must be allowed to vote in our partisan congressional and senatorial primaries.

We have reviewed the Tashjian decision together with other applicable law, and have concluded that the answer to your question must be yes. Tashjian does require that independent voters allowed to cast ballots in our nonpartisan legislative primaries also must be allowed to vote in our partisan congressional primaries.

I. Our legal reasoning.

(1) The Tashjian case involved a Connecticut statute which allowed only party members to vote in a primary election for a nomination to public office by a major political party. Contrary to that statute, the state's Republican Party adopted a rule which attempted to permit independent voters to vote in the party's primaries for federal and statewide public offices but which remained silent as to the party's primaries for nominations for the state legislature.

(a) The Republican Party then challenged the state statute in federal district court, and the district court granted summary judgment in favor of the Party.

(b) On appeal, the United States Supreme Court affirmed the judgment of the district court which struck down the state statute.

(c) Among other things, the Supreme Court held that the Qualifications Clause contained in Article I, § 2 and the Seventeenth Amendment of the United States Constitution are applicable to primary elections in precisely the same fashion that they apply to general congressional elections.

(d) The court also held that those constitutional provisions require that all those qualified to participate in the selection of members of the more numerous branch of the state Legislature must also be qualified to participate in the election of Senators and Members of the House of Representatives.

(2) Under our unique nonpartisan, unicameral legislative system, our state statutes provide that independent voters may participate in primaries for the selection of state senators. However, those same statutes do not allow independent voters to cast ballots in the partisan primary elections for the Senate and for the House of Representatives. Therefore, our current primary system conflicts with the holding of the Tashjian case.

(3) In Tashjian, the Supreme Court began its analysis of the qualifications issue by discussing the purpose in enacting the first Qualifications Clause. The court determined that the purpose of the Qualifications Clause was actually increased federal suffrage, and the Court stated, "Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections." 93 L.Ed.2d at 532. The Court went on to state,

The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives.

Our conclusion that these provisions do not require a perfect symmetry of voter qualifications in state and federal legislative elections takes additional support from the fact that we have not previously required such absolute symmetry when the federal franchise has been expanded. . . .

We hold that the implementation of the Party rule does not violate the Qualifications Clause or the Seventeenth Amendment because it does not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature.

93 L.Ed.2d at 532, 533 (Emphasis added).

(4) It therefore appears clear that the Qualification Clause and the Seventeenth Amendment of the United States Constitution do not require that voter qualifications for the state Legislature and for the United States Congress be identical if voter qualifications for the congressional elections are expanded. However, it appears clear that a statute which would reduce the persons qualified to vote in the congressional elections in comparison to those qualified to vote in the elections for the state Legislature would be questionable under the Tashjian analysis. The latter situation is exactly that which we face under our current Nebraska statutes. Independent voters in Nebraska can participate in the primary elections for our state Legislature. They cannot, however, participate in the partisan primaries for selection of candidates for the House of Representatives and for the United States Senate.

(5) Our research has disclosed very little additional law about this issue. Our own Nebraska Supreme Court has not dealt with this specific question, although it has indicated that in the exercise of the right of suffrage, statutes are to be construed liberally in favor of the voter. Shaw v. Stewart, 115 Neb. 315, 212 N.W. 760 (1927). This holding would support the notion that statutes which unduly restrict those who shall be allowed to vote are suspect.

(6) In addition, there are a number of cases which deal with the legitimacy of state regulation of the voting process. For example, in Rosario v. Rockefeller, 410 U.S. 752 (1973), the United States Supreme Court upheld primary election registration requirements designed to prevent party fragmentation and interparty raiding. In these various cases, it is clear that the right of suffrage is a fundamental right, and that the state must demonstrate a compelling interest which is addressed by the regulatory statute in question in order for that statute to have legitimacy. Libertarian Party of Nebraska v. Beermann, 598 F.Supp. 57 (D.Neb. 1984).

(7) In any event, the real question in the present instance is not whether the state has unduly burdened the primary election process in Nebraska, but rather whether our statutory framework complies with the Qualifications Clauses of the United States Constitution as they are explained in the Tashjian decision. As the Supreme Court has said on at least one earlier occasion,

The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. . . . They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

In the matter of Jasper Yarbrough, 110 U.S. 651, 663 (1884) (Emphasis added).

(8) On the basis of the Tashjian decision and on the general law supporting expanded suffrage, it is therefore our view that our current statutory framework which does not allow independent voters to vote in the partisan primary elections for Congress conflicts with the Qualifications Clauses of the United States Constitution. It is further our view that those portions of the federal Constitution require that independent voters who vote in the nonpartisan primary for the Legislature should be

given whichever partisan ballot they desire for the partisan congressional elections.

II. Where does this leave us?

You have asked whether or not current Nebraska election laws conflict with the recent United States Supreme Court Tashjian ruling. We have answered you by stating and explaining our conclusion that our laws do conflict with this ruling. Perhaps we should stop there. However, because of the significance and urgency of this issue, it may be helpful if we comment upon related legal concerns and share with you our thoughts about precisely what legal options the Legislature, political parties and people of Nebraska have as a result of this significant United States Supreme Court decision:

(1) Humility and experience both teach us that our legal opinion here may be wrong. Others may reach different conclusions. However, we do not consider this a close case. In our judgment the Tashjian Case is clear in what it says and thus it is clear how it affects our unique Nebraska situation.

(2) Tashjian was a 5-4 Supreme Court decision. And so it is always possible that a future Court (with different members) might rule otherwise. But, irrespective of this possibility, we must respect and adhere to the law as it now is, not as it might be at some future undefined time. To proceed in any other fashion would result in legal anarchy.

(3) Timing is important here. We have primary elections next year and so compliance in some form with the requirements of this decision should be addressed promptly. A failure to comply could cast some legal shadows on the 1988 Nebraska primary congressional elections.

(4) What are the actual legal options for the Legislature, the political parties and the people of Nebraska?

(a) The Legislature could amend our state election laws so as to allow independents to vote in partisan congressional primaries. Legislation which merely gives the parties the option to let independents so vote would not meet the Tashjian case requirements. The case requires that the independents must be allowed to so vote. It is important to remember that the Tashjian Case relates to federal congressional elections only. It does not affect the partisan elections of state officeholders, such as the Governor and Secretary of State.

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(b) Nebraska could change to a partisan legislature. Doing this would require a state constitutional amendment.

(c) Nebraska could do away with direct partisan primary Congressional elections. The parties themselves, through procedures they would establish, would then designate nominees for the general election. This would replace the present direct vote of the people nomination system. Doing this would require statutory changes.

III. Concluding thoughts.

(1) This Tashjian Case decision raises truly significant public policy and political science issues. For example, its effect upon an established and effective two-party governmental system is of concern to many. It also raises questions about nonpartisanship in the legislature, the policies and procedures of the major political parties, and other related concerns. On all of these questions we quite properly express no opinion. Our task here has been to interpret the meaning and effects of the law and nothing else. How to react to the requirements of the law is the province of the people and their elected representatives.

(2) Special recognition should be given to Ms. Cynthia Johnson, Legal Counsel for the Legislature's Government, Military and Veterans Affairs Committee. Ms. Johnson, a wise and constructive attorney, studied, analyzed and effectively brought this important issue to the attention of all of us.

(3) As a personal matter, I particularly appreciate the substantial assistance on this issue provided by Dale A. Comer, Assistant Attorney General and Chief of our Department of Justice General Legal Services Section, and Chief Deputy Attorney General A. Eugene Crump.

Perhaps because of the difficult policy decisions the law confronts us with here, we find ourselves a fronte praecipitium a tergo lupi (literally "a precipice in front, wolves behind;" i.e. between a rock and a hard place).

Sincerely,



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Attorney General

RMS/bae

cc: Patrick J. O'Donnell
Clerk of the Legislature