



STATE OF KANSAS

## Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

**Curt T. Schneider**  
Attorney General

January 25, 1977

ATTORNEY GENERAL OPINION NO. 77- 27

Mr. Phillip L. Harris  
City Attorney  
8500 Santa Fe Drive  
Overland Park, Kansas 66212

Re: Elections--Cities--Independent Candidates

Synopsis: The independent nomination procedure prescribed under K.S.A. 25-303 is constitutionally required to be available to independent candidates for municipal office in partisan city elections.

\* \* \*

Dear Mr. Harris:

You advise that the question has been raised whether a potential candidate may file as an independent candidate for the coming municipal election in the City of Overland Park, Kansas.

Pursuant to K.S.A. 25-2113, the municipal elections of that city are partisan elections. The question arises whether a prospective candidate may be required to file as a party candidate, or whether a person professing no party affiliation may qualify for ballot position. In Storer v. Brown, 415 U.S. 714, 39 L.Ed.2d 714, 94 S. Ct. 1274 (1974), the Court held that the state may not condition ballot position for an independent candidate upon his or her forming a new political party so long as the state is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory measure of support. The Court reiterated the "proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe . . ." 415 U.S. at 738. If the obstacles to ballot position for independent candidates are unconstitutionally formidable, it is no defense to argue that a valid procedure exists for an independent candidate to organize a new political party:

Mr. Phillip L. Harris  
Page Two  
January 25, 1977

"It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. . . . But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a state-wide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. . . . But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not." 415 U.S. at 745-746, 39 L.Ed.2d at 732.

Clearly, any statutory scheme which prohibits ballot access to independent candidates entirely, or places unduly onerous conditions on that access, will not withstand constitutional scrutiny. The principles of Storer v. Brown, supra, although announced in a case involving state elections, apply in my judgment equally to municipal elections.

As you point out, there appears to be no provision for independent candidates in partisan city elections. The primary nomination device in these circumstances is open only to the candidates who seek party nominations. K.S.A. 25-303 does provide a procedure for independent nominations, in pertinent part as follows:

"All nominations other than party nominations shall be known and designated as 'independent nominations,' and the nomination

Mr. Phillip L. Harris  
Page Three  
January 25, 1977

papers whereby such nominations are made shall be known and designated as 'independent certificates of nomination.'

\* \* \*

Independent nominations of candidates for offices to be filled by the voters of a county, district or other division less than a state may be made by nomination papers signed by not less than five percent (5%) of the qualified voters of such county, district or other division voting for secretary of state at the last preceding general election for each candidate, and in no case to be signed by less than twenty-five (25) voters of such county, district or division, for each candidate."

This section further provides, however, that it "shall not apply to city and school elections, nor to the election of other officers provided by law to be elected in April."

This section prescribes a procedure which is valid, in and of itself, as a device for the nomination of independent candidates. In Jenness v. Fortson, 403 U.S. 431, 29 L.Ed.2d 554, 91 S. Ct. 1970 (1971), the Court upheld a requirement that independent candidates demonstrate substantial support in the community by securing signatures equal to 5% of the total registered voters in the last election for filling the office sought by the candidate. The 5% requirement in this provision thus appears sound. However, the provision which makes this procedure inapplicable to partisan city elections is not, in my judgment, for it operates to deny entirely independent candidates ballot access whatever.

Thus, in my judgment, the independent nomination procedure available under K.S.A. 25-303 is constitutionally required to be available to independent candidates for municipal office in partisan city elections. Thus, any person who is otherwise eligible who presents for filing sufficient nomination papers pursuant to K.S.A. 25-303 is entitled to ballot position on the general ballot in the city election held on the first Tuesday in April.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General