STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

August 15, 1988

ATTORNEY GENERAL OPINION NO. 88- 112

The Honorable William Mulich
State Senator, Fifth District
3744 North 67th
Kansas City, Kansas 66104

Re: Elections -- Political Parties -- County Central Committees; Officers; Eligibility

Synopsis: Courts presume the constitutionality of a statute and resolve all doubts in favor of its validity. This presumption, when combined with the lack of prohibitory language in K.S.A. 25-3802, leads us to conclude that, while state law does not require an officer of a county central committee to be a member of a precinct committee, a political party may require such membership. Cited herein: K.S.A. 25-3802.

* * *

Dear Senator Mulich:

As Kansas state senator for the fifth district, you request our opinion regarding the by-laws of the Democratic Party in Wyandotte County. These by-laws require that the county chairman be elected from precinct committee persons.

K.S.A. 25-3802 discusses the county central committees and states in pertinent part:

> "The whole number of precinct committeemen and precinct committeewomen of each

> political party shall constitute the county central committee of such party.
>
> . . . .
>
> It shall not be necessary for any of the officers of a county central committee to be a precinct committeeman or committeewoman. . . ."

Thus, the county central committee is to be made up of precinct committee persons, but the state does not require that officers be precinct persons. The issue thus becomes whether a party may itself require such membership. It is our opinion that it may.

The word "shall" in a statute is frequently read to mean "may." Paul v. City of Manhattan, 212 Kan. 381, 385 (1973). Moreover, K.S.A. 25-3802 does not by its terms prohibit a party placing greater restrictions on who qualifies for central committee chairmanship. It merely establishes that the state does not require such membership. If K.S.A. 25-3802 is read to require that everyone be allowed to run for office in the county committee, a party would be required to vote on persons who are not necessarily members of the party or even residents of the county or state.

Members of a party executive committee are generally not considered public or governmental officers, even when state law provides for their recognition. 25 Am. Jur. 2d, Elections, § 124 (1966). "Party officers . . . are functionaries of a private organization, chosen in accordance with the party's rules. They are in no sense public officers. They are not elective officers, for whom registered voters may cast a ballot." Lynch v. Turquato, 228 F. Supp. 268, 270 (Penn. 1964).

Generally, political parties are subject to reasonable governmental regulation in order to secure stability for the electoral and political system. 29 C.J.S. Elections, § 84 (1965). Thus, some state courts have recognized that the position and activities of party committeemen may be subject to certain statutory regulation. See Hammer v. Curran, 118 N.Y.S. 2d, 268 (1952), Parise v. Board of Canvassers, 170 A.2d 292 (RI 1961), German v. Sauter, 109 A. 571 (Md. 1920), and State ex rel. Latimer v. Leonard, 29 N.E.2d 432 (Ohio 1940). If a statutes does not govern, party rules become applicable. 25 Am. Jur. 2d, Elections § 91

(1965). In Hammer V. Curran a 1952 New York state court held that a political party could not impose limitations on committee membership eligibility more restrictive than the statute. Supra at 273. However, more recent United States Supreme Court decisions raise serious questions as to just how far states may go in regulating the internal workings of a political party.

The United States Supreme Court has long recognized that Constitutional First and Fourteenth Amendment rights are encompassed in the right to freely associate with a chosen political party. See NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). See also, 16A Am. Jur. 2d, Constitutional Law, § 553 (1979). Recent Court case law concerning state control over political parties persuades us that a restrictive interpretation of K.S.A. 25-3802 raises serious constitutional questions.

The Supreme Court did not overturn a Washington law requiring each major political party to have a state committee consisting of two persons from each county. Marchioro v. Chaney, 442 U.S. 191, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979). The Court recognized that the State had an interest in ensuring that the process for electing candidates be conducted in a fair and orderly fashion. Id. at 196. However, the appellant did not claim that the statutory requirements imposed impermissible burdens upon internal party affairs and the court therefore did not consider whether the legislation was constitutionally justified. Id. footnote 12 at 197. Rather, the Court reaffirmed the authority of the Party to determine its own internal party affairs, and it found that the party itself chose the complained of course of action. On that basis, the court recommended that the appellant's complaints be addressed to the party.

The Court recognizes a political party's right to define it's associational rights by limiting those who can participate in the processes leading to the selection of delegates to the National Convention. Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 122, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Court stated that "[a] state, or a court, may not constitutionally substitute its own judgment for that of the party. A political party's choice among the various way of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution." Id. at 124. A persuasive argument exists that if the Court denied state control over a party's methodology for selection of delegates to its National

Convention, the Court would also prohibit state control over party official qualifications. See also Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

In Tashjian v. Republican Party of Connecticut, 479 U.S. ____, 107 S.Ct. 544, 93 L.Ed.2d, 514 (1986), a divided Court affirmed a decision declaring unconstitutional a Connecticut statute. That statute prohibited a political party from permitting independents to vote in certain party primary elections. The Court found that the state improperly limited the party's associational opportunities by placing limits upon the group of registered voters whom the party may invite to participate. The Court did not find a compelling state interest in such a closed primary system and thus allowed the party to use its own judgment as to which eligible voters qualified to vote in its primary. Absent a compelling state interest in allowing anyone to run for the position, a party's choice as to qualifications for committee officers also appears to be a matter in which party judgment may be freely exercised.

Courts presume the constitutionality of a statute and resolve all doubts in favor of its validity. Kansas Malpractice Victim's Coalition v. Bell, 243 Kan. 333, 340 (1988); Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). This presumption, when combined with the lack of prohibitory language in K.S.A. 25-3802, leads us to conclude that, while state law does not require an officer of a county central committee to be a member of a precinct committee, a political party may require such membership.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Theresa Marcel Nuckolls

Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas