



OFFICE OF THE SECRETARY OF STATE

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May 17, 1982

The Honorable Esther Buckley, Chairman
Webb County Republican Party
1308 Santa Maria
Laredo, Texas 78040

Election Law Opinion No. DAD-24
Re: Political party's use of
county facilities on the
primary election day

Dear Ms. Buckley:

This opinion is in response to your inquiry of May 4, 1982.

This official election law opinion is rendered by me as chief election officer of the State in accordance with Tex. Elec. Code Ann. art. 1.03, subd. 1 (Vernon Supp. 1982).

Your basic question is whether any political party is authorized under the Texas Election Code to use the county courthouse or similar county facilities on the primary election day. You further question the appropriateness of both placing a "Democratic Headquarters" banner on the courthouse annex on election day and answering county telephones, also on election day, as "Democratic Party Headquarters".

The Texas Election Code ("the Code") specifically authorizes organized political parties to hold elections "for the purpose of nominating candidates of such party to be voted for at a general or special election. . . ." Id. at arts. 13.01 (Vernon Supp. 1982) See also Id., at art. 13.08. While the Code delegates the responsibility of physically conducting the primary election to organized political parties (excluding the absentee voting in the primary), the Code continues to regulate the mechanics or procedural aspects of conducting the primary election, such as: the primary and runoff dates, the method for nomination, the

voting location, and the primary financing. Id. at art. 13.02 et seq. The legislative act of requiring uniform compliance by all political parties qualified to conduct a primary, as embodied in the Code, sets the precedent for distinguishing between elected party officials' bifurcated duties to both their party and to the State of Texas.

The United States Supreme Court has long ago recognized that, while primary elections conducted by a political party are to some extent the activities of a private association of members, such elections are public in nature because of the intertwining nexus of the parties with state election law. The Court has recognized that private, voluntary associations such as political parties are, for many purposes, transmogrified into creatures of the state through the constitutional concept of "state action."

In Smith v. Allwright, 321 U.S. 649 (1944), an 8:1 decision overruling the decision of the Texas Supreme Court in Bell v. Hill (123 Tex. 531, 74 S.W.2d 113 [1934]) that the Texas Democratic Party could constitutionally exclude blacks from party membership, the Court stated, in referring to the Texas statutes governing primary elections:

"We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. . . ." Id. at 663 (emphasis added).

Almost thirty years later, in another Texas case, the Court reaffirmed this stance:

"[T]he mechanism of [party primary] elections is the creature of state legislative choice and hence is 'state action' within the meaning of the Fourteenth Amendment. Gray v. Sanders, 372 U.S. 368 . . . (1963); Nixon v. Herndon, 273 U.S. 536 . . . (1927)." Bullock v. Carter, 405 U.S. 134, 140 (1972).

Moreover, the Internal Revenue Service has recently ruled that individuals and corporate contributions made to the "secretary of state . . . acting in the capacity as an officer of the state for the express purpose of funding the primary elections . . . may designate that their contributions be used in a particular county but may not

designate that their contributions be used for the primary election of a particular party (emphasis added)" lends support for a clear delineation of the primary as a public versus a private election. T.D. 0170-04.00, ___ Treas. Dec. Int. Rev. ___ (1982).

Thus, it is clear that, except for the narrow confines of specifically authorized primary election statutes found in the Election Code and IRS decisions, political party activity is private in nature.

Additionally, the Code recommends that "all elections--- general, special, or primary---. . . be held in . . . [a] public building within the limits of the election precinct in which such election is being held." Id. at art. 2.03(a).

No Code provision addresses where each respective political party should be headquartered on the primary election day and the exclusive use of the Webb County Courthouse by the local Democratic party improperly connotes an endorsement of that party by county officials.

Courthouses are clearly public buildings and public property that should be used only for public, not private, purposes. As the court stated in Tarrant County v. Rattikin Title Co. 199 S.W.2d 269 (Tex. Civ. App.---Ft. Worth 1947, no writ):

"To allow the Commissioners' Court to lease or rent office space to private enterprise which was originally erected for the use of public office, would be placing the Commissioners' Court and private enterprise in the relationship of landlord and tennant, and in a sense would be applying public property for private use, which is against the laws of our State." Id. at 272 (emphasis added).

The Texas Constitution requires that the commissioners court "shall exercise such powers and jurisdiction over all county business" Tex. Const. art. V; § 18. Texas law provides that courthouses shall be provided and kept in repair by the commissioners court. Tex. Rev. Civ. Stat. Ann. art. 2351 (Vernon 1971). Additionally, sheriffs shall have charge and control of their respective courthouses, subject to such regulations as the commissioners court may prescribe. Id. at art. 6872 (Vernon 1960).

In view of the reasoning stated above, it would appear that no public official is legally empowered, either judicially or administratively, to authorize the private use of county facilities by any political party as a campaign headquarters.

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Under the Penal Code, misapplication of any thing of value belonging to the government is a felony offense:

"(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another, he intentionally or knowingly:

"

"(5) takes or misapplies any thing of value belonging to the government . . . or delivers it to any person knowing that such person is not entitled to receive it.

"

"(c) . . . An offense under Subsection (a) (5) of this section is a felony of the third degree." Tex. Penal Code Ann. § 39.01 (Vernon 1974).

If authority to use the courthouse for private political purposes was authorized by judicial or administrative authorities, it is possible that Section 39.01 supra may have been violated.

Further, state law provides that "[A]ny Judge . . . may be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justices." Tex. Const. art V, § 1-a(6) (emphasis added). Judicial misconduct is referable to the State Commission on Judicial Conduct. Id. at art. V, § 1-a(2).

Moreover, even though the courthouse was not used as a polling place on the primary election day, if such were the case the persons responsible for placing the "Democratic Headquarters" banner on the courthouse annex and answering courthouse telephones could be in violation of the electioneering provisions of the Code. Id. at art. 8.27. Violation of that Article is a misdemeanor punishable by a fine not to exceed \$1,000. Id.

Both situations are not a matter for prosecution by this office. Rather, and again if such were the case, the offenders should be charged with violating Section 39.01 or Article 8.27, both cited supra, and the charges referred to the Webb County District or County Attorney, as appropriate.

In sum, you are advised that the private use for partisan purposes of a county courthouse or other county-owned

facility by a political party in conjunction with conducting the party's primary election, other than bona fide election activities sanctioned by the Election Code, would be an act not authorized by the Election Code.

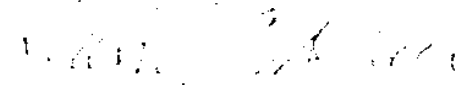
SUMMARY

The use of a county courthouse for a public purpose when sanctioned by the proper authorities is allowed by both statute and caselaw. Conducting primary elections is a public purpose. Except for the narrow exception provided for in the Election Code and IRS decisions on primary finance, political party activity is private in nature.

Thus it is clear the use of a county courthouse for partisan campaign purposes, not related to the holding of an election constitutes private use of county facilities, an act not sanctioned by law. Answering the published courthouse telephone line "Democratic Party Headquarters" and hanging "Democratic Party" banners over the entrances to a county courthouse are indicia of private use of the courthouse and may be a violation of both the Election Code and the Penal Code.

No Code provision addresses where each respective political party should be headquartered on the primary election day; however, the exclusive use of the Webb County Courthouse by the local Democratic party improperly connotes an endorsement of that party by county officials.

Sincerely,


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