



OFFICE OF THE SECRETARY OF STATE

DAVID A. DEAN
SECRETARY OF STATE

STATE CAPITOL
P.O. BOX 12897
AUSTIN, TEXAS 78711-2897

January 13, 1983

The Honorable William P. Clements, Jr.
Governor of Texas
State Capitol
Austin, Texas 78701

Election Law Opinion DAD-69
Re: Designation of party
affiliation in Special
Election for U.S. House
of Representatives

Dear Governor Clements:

This official election law opinion is rendered by me as chief election officer of the state in accordance with V.A.T.S. Election Code, art. 1.03, subd. 1.

You have summarized two questions posed to you by State Democratic Chairman Bob Slagle, as follows:

1. May a member of Congress resign from his congressional seat, change political parties and run in the subsequently called special election to fill his vacated congressional seat as a member of his new party?
2. Once a proclamation for a special election to fill a congressional vacancy has been issued by the Governor, can it be withdrawn or amended.

In response to your first question, several sections of the election code must be examined. Article 4.10, Subd. 1 of the Election Code states that:

(a) Any person desiring his name to appear upon the official ballot at any special election held for the purpose of filling a vacancy, when no party primary has been held may do so by presenting his application to the proper authority . . .

(b) In any special election for a statewide or district office which is regularly filled at the general election for state and county officers, the application shall also set forth the candidate's political party affiliation or shall state that the candidate is not affiliated with any political party.

Article 4.10, Subd. 3(c), states:

The party affiliation of the candidate shall be printed on the official ballot following the name of the candidate. If the candidate has stated in his application that he is not affiliated with any political party, the word 'Independent' shall be printed on the ballot following the candidate's name. In other respects, the ballot shall be printed as indicated in Art. 6.05, for a special election in which no party nomination has been made.

Thus under this provision, in special elections called to fill congressional vacancies, the party affiliation, if any, must be placed on the ballot.

The question remains, whether or not a candidate can resign from an elected position as a member of one party and run in the special election as a member of an opposing party. The code simply does not speak to this issue.

Article 13.01a of the Election Code sets forth the criteria for persons wishing to participate in party functions such as conventions and primaries. It is not dispositive of the issue relating to special elections called to fill a vacancy occurring after a general election. It is important to note that a person may be a qualified member of a party "for the duration of the voting year" and would thereunder be covered by the dictates of Article 13.01a. A person who is not a qualified member is disqualified from participating in convention procedures, and may not hold the position of executive committee member, precinct judge or chairman, delegate to any party convention, national committeeman or committeewoman or presidential elector. A qualified member of a political party may not participate in any other party's primary. However, nothing contained in Article 13.01a or elsewhere in the code prohibits a person from changing political parties nor from participating in other functions other than those contained in Article 13.01a.

Thus during an election year, meaning the 12 month period beginning March 1 of each year [Election Code Article 1.01(a)(60)], a qualified member of a party could not participate in another party's primary or convention activities. In fact, special provisions are set out to punish persons who unlawfully participate in another party's convention activities or primaries.

Status as a qualified member of a party under Art. 13.01a does not determine a person's party affiliation required by Art. 4.10. If such were the case, the result would be to deny any affiliation to any candidate in off-year special elections during which time no one could become a qualified party member under the criteria set forth in Art. 13.01a.

Article 13.11a, Election Code, states:

Any person who has participated as a voter or as a candidate in either the first primary election or the runoff primary election of a political party shall be ineligible to have his name printed on the ballot at the succeeding general or special election as an independent candidate for any office for which a nomination was made by such party at either such primary election, and shall be ineligible to have his name printed on the ballot as the nominee of any other party for any office to be voted on at the general or special election. (Emphasis added.)

This article prohibits one party from nominating as its candidate in a special election anyone who was previously a candidate or voter in another party's primaries. Article 4.10 of the Election Code deals with special elections in which candidates are not nominated by any party.

Therefore, Article 4.10 of the Election Code sets forth a self-contained mechanism for holding a special election. It is not governed by Chapter 13 of the Election Code which provides procedures for party primaries, nominations, and conventions. Whether a party wishes an individual to proclaim himself as a member of that party for purposes of a special election is not covered by the election code and is a matter to be addressed by the candidate and the affected party.

If an individual states he is a member of a certain party as required, this office cannot go behind the four corners of

the document, as this does not go to the qualifications of the office.

As to your second question, the executive authority of the State of Texas may exercise no power that is not granted to it by Constitutional or legislative authority. Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405, aff'd on rehearing, 104 Tex. 499, 140 S.W. 1082 (1911).

The Governor is required by law to order a special election to fill a vacancy in the Texas delegation to the U. S. House of Representatives. U.S.C.A., Const. Art. I, §, cl. 4. V.A.T.S. Election Code, arts. 4.09 through 4.11. However, in lieu of a specific constitutional or statutory grant of authority, the Governor has no inherent power to rescind an order calling for a special election or to prevent a special election once the election has been validly called for a date permitted by law.

In Salmon v. Lamb, 616 S.W.2d, 296 (Tex. Civ. App.-Houston [1st Dist.] 1981, no writ), the court recognized the Governor's power to postpone an election date pursuant to V.A.T.S. Art. 6889-7, Sec. 5(g)(1) (The Disaster Act of 1975). This clearly implies that the Governor has no such power without a specific statutory grant such as the Disaster Act.

SUMMARY

The Election Code does not prohibit a member of Congress from resigning, changing parties and running for the resulting vacancy as a member of an opposing party. However, such a member of Congress who has become a qualified member of a political party pursuant to V.A.T.S. Election Code Article 13.01a could not participate in any of his new party's nominating primaries, conventions and other activities contained with Article 13.01a until after the new voting year begins on March 1 of each year.

The Governor, in the absence of a specific statutory grant of authority, may not rescind or amend an order calling a special election.

Sincerely,



David A. Dean
Secretary of State

Willis Whatley
Counsel to the Secretary of State

Charles C. Bailey
Special Assistant for Elections

Prepared by Charles C. Bailey

APPROVED:
OPINION COMMITTEE

Karen C. Gladney
Charles E. Evans
Horace Jennings III
Felix R. Sanchez
Adela P. Santos
John Steiner
Sharon Talley