

## Opinion No. 46-4969

December 6, 1946

**BY:** C. C. McCULLOH, Attorney General

**TO:** State Canvassing Board Santa Fe, New Mexico

{\*289} You have advised this office that certificates of canvass from Santa Fe County disclose that 11 persons wrote in the name of Will Harrison for the unexpired Clinton P. Anderson term in the United States House of Representatives, and that the only other candidate shown to have received votes by the certificates of canvass was Edward A. Lopez, who received four votes. In view of this situation, you ask our opinion as to whether a certificate of election should be awarded to Will Harrison to fill the unexpired term caused by the resignation of Clinton P. Anderson from the House of Representatives.

We have delayed writing this opinion for several days as we were advised by counsel for Mr. Harrison that a memoranda of authorities would be submitted. No such memoranda has been received.

The Constitution of the United States provides as follows: Article 1, Section 2, Clause 4:

"When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancy."

Article 1, Section 4, Clause 1 provides:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators."

You will observe that while Article 1, Section 2, Clause 4 uses the language "the executive authority thereof shall issue writs of election", it does not specify the time at which the executive authority shall issue such writs of election. You will further observe that Article 1, Section 4, Clause 1 of the Constitution of the United States specifically reserves to the state legislature the right to select the time, place and manner of holding elections for representatives unless otherwise provided by Act of Congress. There is no Act of Congress prescribing the {\*290} time, place or manner of filling vacancies in the House of Representatives.

The applicable provision established by the legislature of New Mexico is as follows:

"56-718. Representatives in Congress -- Vacancy. -- Whenever a vacancy shall occur in the office of representative in Congress the governor may by his writ of election provide

for the election of a person to fill such vacancy at a special election. The time for holding such special election shall be fixed by the governor. The provisions of this act in so far as applicable shall govern the nomination and election of candidates to fill such vacancies."

You will observe that by this section the Governor is authorized to issue writs of election to fill the vacancy in the House of Representatives at a **special election**. You will further observe that the time for holding such special election shall be fixed by the Governor. While the word "may" in the above quoted section might be construed to be mandatory in view of the above quoted provision of the Federal Constitution, or the clause "may by his writ of election provide for the election etc." might be superseded by Article 1, Section 2, Clause 4, so that the absolute duty is imposed upon the Governor to issue writs of election, yet neither the above quoted statute nor the provisions of the Federal Constitution fix the time for the holding of such election or the issuance of such writ. By the Federal Constitution, the time of holding the election is left to the discretion of the legislature. The legislature vested in the Governor the absolute discretion to fix the time of issuing the writs and holding such special election. Nowhere in the Federal Constitution or the statute does it provide that the vacancy shall be filled at the next general election or that writs of election shall be issued calling for a special election at such time.

In this connection, had the Legislature so intended, language similar to that found in Section 56-717, relating to vacancies in the Senate, would have been used. There the Legislature provided:

"Said vacancy shall be filled for the unexpired term by the vote of the electors of the state in the next general election \* \* \*."

The Governor could have issued writs of election for a special election prior to the general election, at the time of the general election, or subsequent thereto.

No writs of election were issued, nor was a special election called to be held at the time of the general election or any other time. It thus appears that votes cast for a candidate to fill such vacancy on the day of the general election would have no greater force than votes cast at any other time.

In the case of *People ex rel Levenson v. Thompson*, 9 Calif. 833, the court held that in cases of special elections to fill a vacancy, a proclamation is necessary, even though the special election be held at the same time as a general election. In that case, which involved representatives in Congress, the court held that when a vacancy in office has occurred by reason of death or resignation, the voters are not bound to take notice of such vacancy, and where no notice of an election has been given, the casting of votes for a candidate to fill such vacancy will not constitute an election.

For other cases along this line, see Key 40 under Elections in the American Digest.

Further, the courts have held that some notice is essential. A candidate is not considered elected where the fact of his candidacy was kept secret and where it appeared that had statutory notice been given a different result would be possible, even though he received a majority of the votes cast for such office. Thus, in the case of *Washington State v. Superior Court of Kings County* 148 P. 1054, 71 Wash. 484, where a candidate kept the fact of his candidacy secret and less than {\*291} one voter in 2000 cast ballots for that office, the candidate was not elected.

See also, *State v. Hay*, 128 P. 1058, 71 Wash. 699.

In view of the foregoing, since neither the statutes of the State of New Mexico nor the Constitution of the United States provide for the election at the time of the general election to fill a vacancy in the House of Representatives, and since no special election was called for that time by the Governor, and since Mr. Harrison received less than one vote for each 10,000 votes cast, it is our opinion that Mr. Harrison was not elected to fill the vacancy created by the resignation of Clinton P. Anderson, and that a certificate of election to fill such unexpired term should not be issued to Mr. Harrison.

By ROBERT W. WARD, ROBERT V. WOLLARD,

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