

Opinion No. 69-57

June 13, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Honorable David F. Cargo, Governor, State of New Mexico, Legislative Executive Building, Santa Fe, New Mexico

QUESTIONS

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A vacancy has occurred in Senatorial District 5, a district comprised of all of Los Alamos County and part of Santa Fe County. How is the vacancy to be filled?

CONCLUSION

By appointment of the governor in accordance with § 2-9-20, N.M.S.A., 1953 Compilation (1967 P.S.).

OPINION

{*86} ANALYSIS

The filling of multi-county legislative vacancies was once clearly established by New Mexico Constitution Article IV, Section 4, subsequent to the amendment of 1953. That provision provided that if a vacancy occurred in a legislative district (either house or senate) comprised of more than one county, {*87} then the county commissioners of each county would submit one name to the governor who would appoint the replacement from the names submitted.

In 1960 Article IV, Section 4 was again amended and the provision for filling multi-county district vacancies was eliminated. But in 1966 the legislature passed a law providing for the filling of multi-county **senatorial districts**. That law provides that

If a vacancy occurs in the office of senator for any reason, the vacancy shall be filled as follows: . . .

in any senatorial district within any multicounty combination, the board of county commissioners of each county in the senatorial district shall each submit one name to the governor who shall appoint the senator to fill the vacancy from the list of names so submitted. . . .

§ 2-9-20(D) (2), N.M.S.A., 1953 Compilation (1967 Supp.).

The United States District Court for the District of New Mexico in **Beauchamp v. Campbell**, Civil No. 5778 (D. N.M. filed March 17, 1966) declared the senatorial apportionment provisions of New Mexico Constitution, Article IV, § 4 unconstitutional. The decision specifically ruled that § 2-9-20, N.M.S.A., 1953 Compilation (Laws 1966, ch. 27, § 8) was still valid. Hence that statute controls this question and provides that the governor must appoint the senator from District 5 from the names submitted by the Santa Fe and Los Alamos county commissioners.

We have not overlooked the provisions of Section 2-1-2, N.M.S.A., 1953 Compilation. That statute, enacted in 1919, provides for an election to fill legislative vacancies. Although the 1953 amendment to Article IV, Section 4 of the New Mexico Constitution provided for the filling of vacancies by appointment, § 2-1-2 has never been repealed. Obviously, the statute cannot control the constitutional provision on the same subject and the statute is of no force or effect.

The 1960 amendment to Article IV, Section 4 maintains the appointment provision but it does not cover multi-county districts. We believe that Article IV, Section 4 is valid insofar as it relates to the filling of vacancies in single county legislative districts because the question of vacancies was not an issue in **Beauchamp v. Campbell**, and insofar as it may imply otherwise, Opinion of Attorney General No. 67-8, dated January 19, 1967 is expressly rejected. Section 2-9-20(D) (2) fills the gap by providing a method of appointment for **multi-county senatorial** districts and is valid as carrying out the intent of the Constitution. In any event, Section 2-9-20(D) is completely repugnant to Section 2-1-2 insofar as both relate to vacancies in the Senate. Therefore, Section 2-9-20(D) repeals Section 2-1-2 by implication to the extent of the repugnancy. **State v. Valdez**, 59 N.M. 112, 279 P.2d 868 (1955).