

Opinion No. 80-31

August 22, 1980

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: The Honorable Shirley Hooper, Secretary of State, 400 State Capitol, Santa Fe, New Mexico 87503

ELECTIONS

The republican party state central committee may not nominate a candidate to run in the 1980 general election for the office of United States representative for the Second congressional district.

FACTS

In the June 3, 1980 primary election, the New Mexico democratic party nominated Representative Harold Runnels as its candidate in the 1980 general election for the office of United States representative for the second congressional district. The death of Representative Runnels thus creates a vacancy in the list of democratic nominees.

There is no republican nominee for the office of United States representative for the second congressional district because the republican party offered no candidates for that office in the primary election.

QUESTIONS

May the republican party state central committee nominate a candidate to run in the 1980 general election for the office of United States representative for the second congressional district?

CONCLUSIONS

No.

ANALYSIS

Section 1-8-17 NMSA 1978 provides that major party nominations for all offices to be filled at the general election are made pursuant to the Primary Election Law. That Law, Sections 1-8-10 to 1-8-52 NMSA 1978, essentially requires that a major party candidate for the office of United States representative be nominated by the voters of his party in a primary election.

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If, however, after the primary election, a vacancy occurs, for any cause, in the list of nominees of a qualified political party for the office of United States representative, Section 1-8-8 NMSA 1978 provides that such a vacancy may be filled by "the state committee of the state political party filing the name of its nominee for the office with the proper filing officer." The authority of a state central committee of a political party to select a nominee for an office to be voted upon at the general election exists only in the event that there is a vacancy in the list of the party's nominees for that office.

Representative Runnels was not the nominee of the republican party and his death creates no vacancy on the list of that party's nominees. It is virtually undisputed that statutory language such as found in Section 1-8-8 does not allow a political party to make an original nomination through its central committee when it has failed, for whatever reason, to nominate a candidate in the primary process. See, *{*177} Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 143 A.L.R. 987 (1942). See, also, cases cited at Annotation, 143 A.L.R. 996.

In New Mexico, the Supreme Court held in ***State ex rel. Van Schoyck v. Board of County Commissioners of Lincoln County***, 46 N.M. 472, 483, 131 P.2d 278 (1942), that "the vacancy contemplated by the legislature in authorizing a party committee to fill it is one occurring after the primary in a nomination made at the primary." The Court explained:

"We may judicially notice that one of the chief reasons for adopting the primary system of making nominations was to take the matter out of the hands of party conventions and committees and give it directly into the hands of the qualified electors of the parties participating therein. . . . A political party whose leaders were so disposed might easily discourage the filing of candidacies in the primary as to all or the more important offices. Having thus occasioned a "vacancy", the appropriate party committee, following the primary, could meet and select candidates to oppose those already selected by the other party or parties in the primary. Knowing who the opposing candidates were, the committee selection could be made after taking into consideration every factor, geographical and otherwise, calculated to pool the largest vote for such candidate in the general election." 46 N.M. at 483.

See, also, ***Granito v. Grace***, 56 N.M. 652, 248 P.2d 210 (1952).

The case law of other jurisdictions overwhelmingly supports the position of the New Mexico Supreme Court. It has been well-settled that a "vacancy in the list of nominees" or a "vacancy in a nomination" is distinguishable from a failure or omission of a party to nominate in a primary election. In ***State ex rel. Chamberlain v. Tyler***, 100 Fla. 1112, 130 So. 721, 724 (1930), the Court said:

"There can be no 'vacancy in a nomination' until there has first been a nomination. When no nomination has been made, there may be a vacancy on the party ticket for the general election, but there is no vacancy 'in any nomination,' for there has been no

nomination. The statute does not provide that, 'if for any cause there is a failure or omission by any political party to designate a nominee in the primary,' then the executive committee may designate a nominee. If such had been the legislative intent, it would have been very easy to so provide."

The authority vested in a party committee to select a nominee for the general election by Section 1-8-8 NMSA 1978 is limited solely to the filling of vacancies in the party's list of nominees. When there has been no party nominee for an office, there can be no vacancy in the list of nominees to be filed by the committee. **Dyte v. Lawley**, 220 N.Y.S. 2d 165, 31 Misc.2d 182 (1961).

It is, therefore, abundantly clear that the death of Representative Runnels does not afford the republican party state central committee the opportunity to exercise the authority granted pursuant to Section 1-8-8 NMSA 1978 to nominate a candidate for the second congressional district. Nor is there any other statutory authority which would entitle the committee to nominate such a candidate for the term to be voted upon at the 1980 general election. Although the death of Representative Runnels also creates {*178} a vacancy in the office of United States representative for the second congressional district for the remainder of the term which expires on January 3, 1981, see Amendment XX, Section 1, United States Constitution, those statutes which apply to filling the vacancy for the remainder of the term, i.e., Sections 1-15-18 to 1-15-22 NMSA 1978, do not operate to authorize a party committee to nominate a candidate for the general election to fill an office for the next succeeding term.

The vacancy for the remainder of the term is filled by special election called by the governor, pursuant to Article I, Section 2, Clause 4, United States Constitution and Section 1-15-18 NMSA 1978, unless no special election is called because the period to be served on the remaining term would be truly **de minimus**, **Jackson v. Ogilvie**, 426 F.2d 1333 (7th Cir. 1970), **cert. denied**, 400 U.S. 833.

Section 1-15-20 NMSA 1978 provides that in the event a special election for an expiring term is called with the general election in which a representative is to be chosen for the next succeeding term, the party **may** select the same individual as a candidate for both terms to a primary election, nominating convention or general election. It does not authorize the republican party state central committee to make an original nomination of a candidate for the general election if the party has failed to do so in the primary election.

Section 1-15-21 NMSA 1978 provides that if a special election were held within three months of January 3, 1981, then a candidate nominated by a party at its convention or in its primary election to run in the general election for the next succeeding term shall also be the party's candidate in the special election for the remaining term. Even if a special election were called by the governor to fill the remainder of Runnels' term, Section 1-15-21 NMSA 1978 applies **only** when a party is otherwise nominating a candidate for the general election by convention or primary, conditions which the republican party cannot meet.

In summary, original nominations by major political parties for the office of United States representative are made in accordance with the Primary Election Law or not at all. A political party committee is authorized to select a nominee for that office only in the event there is a vacancy in the party's list of nominees. Where there has been no nominee chosen in the primary, there can be no vacancy. The fact that in the event of a special election, the republican party would be entitled to nominate a candidate to fill the remaining term does not, in any way, entitle the republican party state central committee to nominate a candidate for the general election to fill Representative Runnels' office for the next succeeding term.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General