

OPINION
63-123

July 24, 1963 (OPINION)

ELECTIONS

RE: Special Election - Congressional District

This is in reply to your letter dated July 19, 1963, wherein you request an official opinion on the procedure and requirements relative to filling the vacancy in the United States House of Representatives due to the death of Congressman Hjalmer Nygaard. You specifically ask for an opinion on the following questions:

- 1.) whether this vacancy can only be filled by a special election or whether it may be accomplished by appointment;
- 2.) in the event a special election is called, the procedure and means of nominating candidates;
- 3.) the timetable and sequence to be followed, including the filing of certificates of nomination;
- 4.) the manner of calling a special election;
- 5.) the manner of giving notice of the holding of a convention, and the steps to be followed by the respective political parties to select nominees;
- 6.) since this vacancy is in the Eastern Congressional District, it is necessary to know the basis of representation in the respective conventions;
- 7.) in the event a special election is not called, please outline the steps and procedure to be followed to fill the vacancy at the next state primary election, assuming there could be no interim appointment;
- 8.) please advise, also, the advantages or disadvantages of calling a special election as against calling an election at the time of the next primary election."

As to question 1.): Article I, Section 2, Paragraph 4 of the United States Constitution provides, "When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies."

It is to be noted that no provisions are made for any appointment. This becomes more significant in comparing the language found in Article XVII, Paragraph 2 of the United States Constitution pertaining to vacancies in the United States Senate, which provides as follows:

When vacancies happen in the representation of any state in the

senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct."

The legislature has provided the manner in which a vacancy may be filled in the senate as set forth in Section 16-07-07 of the North Dakota Century Code. Said provision, however, applies only to the senate and has no application to the house of representatives. It is, therefore, our opinion that the only manner in which a vacancy in the house of representatives may be filled is by a special or regular election. We also wish to advise that the term "shall", as used in Paragraph 4 of Article I, is not construed to mean that a special election must be held but rather that if the vacancy is to be filled it must be filled by a special election.

The Court of Appeals of New York expressed itself on this constitutional provision in the case of *People vs. Voorhis*, 119 N.E., 196, wherein the Court said:

The only basis for holding the special election is the governor's proclamation. Whether a special election of the character of the one under consideration shall be held, and if so when involves a matter of executive discretion with which the Courts have no right or power to interfere."

As to Question 2.): Section 16-07-02 of the North Dakota Century Code specifically provides:

SPECIAL ELECTION TO FILL VACANCY IN PARTY NOMINATION - PARTY COMMITTEE TO CALL CONVENTION TO NOMINATE. If a special election is called to fill a vacancy in any office for which a party nomination may be made, the proper party committee shall call a convention to make a party nomination for such office. The precinct comitteemen of the county or district shall be duly convened and shall elect the required number of delegates to such convention."

From this provision we conclude, and it is our opinion, that the office of congressman or member of the United States House of Representatives is one which may be filled by party nomination.

In addition to this, under Chapter 16-03 of the North Dakota Century Code, individual nominations may be made as provided for in Section 16-03-02, Subsection 2, of the North Dakota Century Code. Individual nominations may be made by securing signatures of at least ten per cent of the number of votes cast in such district for member of congress at the last preceding general election, but in no case shall more than three hundred signatures be required on such petition.

As to Question 3.): A minimum of forty-six days should be allowed to intervene between the date of calling or issuing the writ of election and the date on which the election is held. This is necessary to permit the various political machineries to be put into operation and carry out the appropriate functions. The state committee would have to take notice of the writ of election which would be required to

convene and determine the basis of representation of delegates to the convention, and would also fix the date and place for the convention to be held. The counties would also be required to meet and elect delegates after due notice. Time must be allowed to permit the results of the various meetings to be made known and conveyed to the proper officials. In addition to this, time must also be allowed to convey the results of the convention to the secretary of state.

One of the factors which must be considered is that the nominations for a special election must be filed with the secretary of state not less than twenty-five days before the day of election and not later than five o'clock P.M. on the twenty-fifth day.

Another factor which must be considered is the by-laws of the political organization. If the by-laws provide for a minimum length of time a notice must be given before holding certain meetings or conventions, which time would exceed those set out by statute, additional time should be allowed for such provisions.

As to Question 4.): A special election is called by issuing a writ of election. A sample form is enclosed.

As to Question 5.): The steps to be followed by the respective political parties to select nominees is to a great degree governed by the by-laws of the political party. The statutory requirements are that the notice of holding the convention must be printed or posted at least six days before the convention. In addition to this, the county precinct committeemen as defined by law shall be duly convened and elect the required number of delegates to such convention. The basis of representation of delegates shall be fixed by the state committee of each political party. Other than that, the by-laws of the political party would be controlling.

As to Question 6.): Inasmuch as the state is divided into two congressional districts and the representative from each district is chosen by electors within each district, it would necessarily follow that the nomination be made by delegates from the district in which the vacancy exists. The basis of representation in the respective political conventions would be determined by each political party. It does not necessarily follow that each political party must use the same basis of representation. So long as the basis for representation as determined by each party applies equally throughout the entire district, it will be adequate.

As to Question 7.): If a special election were to be called at the next state primary election, the same procedure as discussed above would apply for such special election. The mere fact that the special election is held in conjunction with the primary election would not change the procedure involved, except in some instances the same meetings and and conventions may be used for both purposes.

As to Question 8.): We are assuming that the advantages you refer to are legal advantages rather than political. If the special election were held in conjunction with the primary election and the state convention were held on or before April 15th, as contemplated by Section 16-17-17 of the North Dakota Century Code, absentee ballots could be used.

Where a special election is called not in conjunction with a primary or general election, the time factor invariably does not permit the use of absentee ballots. However, this may be true also where the special election is held in conjunction with a primary or general election if the nominating convention is not held in sufficient time to permit the use of absentee ballots. Where the special election is held in conjunction with the primary election, a person would be entitled to vote twice for the same office - once to fill the vacancy for the unexpired term and the other time to elect a nominee for the regular two-year term to be voted on once by the general election. It is conceivable that this might lead to some confusion. The mere fact that the special election is held in conjunction with the primary election would not eliminate the necessary steps for a special election. They would, in fact, be two elections in one. In this respect, there would be two ballots - one for the nomination in the primary election and one to fill the interim vacancy. A special election held in conjunction with a primary election would save on costs. The same officials could act on both.

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