

**OPINION**  
**74-226**

December 11, 1974           (OPINION)

Mr. Ben Meier  
Secretary of State  
State Capitol Building  
Bismarck, ND 58505

Dear Mr. Meier:

This is in response to your request for an opinion as to whether or not you must call a meeting of the state board of canvassers to certify the results of the recount in the U.S. Senate election race.

Section 16-13-47.1 is silent as to any activities pertaining to the state canvassing board which should or should not be performed after the recount has been accomplished. This section, however, does state "the results of such recount shall be certified by the district judge to the secretary of state, or to the county auditor in the case of county offices, no later than 15 days after the application for a recount has been filed."

In finding the answer to your question is is also necessary to take into account the manner in which the recount is being conducted. Based upon general information made public, we are aware that the recount is being conducted by the presiding judge of each of the six judicial districts. This means that six district judges individually will be certifying the results of the recount in their respective judicial districts. The certification by each judge in itself does not determine the total number of votes cast for the candidates for U.S. Senate. It will still be necessary for an official or official body to add the votes certified by the district judges of the six judicial districts. In this respect the statutes are silent.

Case law generally suggests that once a canvassing board has performed its function and adjourns sine die, it is deemed functus officio.

We are also cognizant that the functions of the state canvassing board are purely ministerial except for the purposes of determining the genuineness of election returns and to take necessary steps to cause the correction of obvious mistakes at which instances it would be acting in a quasi judicial capacity. Under the recount procedures we at the moment cannot envision the performance of any duty by the state canvassing board except the ministerial function. We do not believe that the state canvassing board would be in a position to act as a quasi judicial body for purposes of determining the genuineness of the certification made by the district judges.

We are strongly impressed with the necessity of determining the total results of the recount certified by the district judges. Under the present law from the portion quoted from section 16-13-47.1, it may be implied that the secretary of state would perform the function of adding the votes certified by the district judges. However we are reluctant to conclude that this responsibility should be born solely

by the secretary of state. The purposes and object of the state canvassing board includes, amongst other things, the built in assurances that the mechanical aspects of adding figures are carried out properly without bias or prejudice to one candidate or the other.

After examining the various provisions of the state canvassing board, as found in chapter 16-13 we cannot with any assurance, point to one provision or the other for the answer to the questions submitted. However taking into account the totality of the statutory provisions and the purpose and necessity of the functions of the state canvassing board on implication is discernable permitting the convening of the state canvassing board, even though some of the statutory provisions may be strained. We believe it is better reasoning to conclude that the statutes will permit or require the reconvening of the state canvassing board for purposes of adding the votes certified by the district from each of the six judicial districts to determine the total votes cast for each candidate, than to conclude otherwise and leave matters in a state of uncertainty. In this instance we recognize the equitable rule of necessity.

It is therefore, our opinion that you as secretary of state should reconvene the state canvassing board for purposes of "canvassing" the results of the recount certified to you by the district judge of each of the six judicial districts.

It is further our opinion that the state canvassing board in its reconvened session should perform the duties normally assigned to the state canvassing board as pertaining to the results of the recount in the U.S. Senatorial race.

As stated in the opinion, the results reached here required straining current statutory provisions. For this reason we urge and recommend that appropriate legislation be introduced to correct the shortcomings and to provide for a definite procedure to be followed in instances of recounts, as authorized under the current provisions of section 16-13-47.1.

Sincerely yours,

Allen I. Olson

Attorney General