

## Opinion No. 56-6540

November 9, 1956

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Honorable John F. Simms, Governor of New Mexico, Santa Fe, New Mexico

On November 8, you addressed an inquiry to this office concerning a special election to fill the vacancy created by the unfortunate and untimely death of the Honorable Antonio M. Fernandez, Member of Congress.

Facts indicate that Mr. Fernandez, after having served some seven terms in the Congress of the United States, became ill during the campaign for his eighth term and on the morning after the ballots were cast died. There is clearly no question but that Mr. Fernandez received a very sizeable majority and was elected on November 6, the day prior to his demise. An election is complete upon the depositing of all of the ballots in the ballot boxes or in the voting machines. All authorities agree upon this. Thus the election of an individual occurs at completion of the election day. Furthermore, any person who receives less than the necessary number, regardless of the death of the candidate who receives the majority, still cannot be seated by reason of his failure to become elected by the necessary number of the votes cast for that office. *Saunders v. Haynes*, 13 Cal. 145, also Annotation, 133 A.L.R. 319. The California Court said the following:

"It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject."

You ask three questions specifically in your request for an opinion. They will be answered in the order in which they are asked.

Question No. 1. Is a vacancy automatically created for the 85th Congress?

Answer: Yes. The Federal Statute, Title 2, Section 8, 2 U.S.C.A. 8, states as follows:

"Vacancies. The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively."

In addition to the above quoted section of the Statutes of the Congress of the United States, this office contacted the Parliamentarian of the House of Representatives, and he informed us that a vacancy is created in the succeeding Congress -- in this case the

85th Congress -- as well as a vacancy in the 84th Congress. This seems to be consistent with good sense, as the State of New Mexico is entitled to its representation on the first day that Congress convenes and it would be inconsistent with the theory of representation to require any State to wait until Congress did convene to fill a supposed vacancy. There is no question but that a vacancy exists in the 85th Congress which will convene on the 3rd day of January, 1957. In Re Special Election for Members of Congress, Opinion of the Judges, 9 A. 224.

Question No. 2. In a Governor's call for a special election to fill the vacancy, can the call be designed to fill the remaining days of the 84th Congress as well as the vacancy in the 85th Congress?

Answer. Since we have previously held that a vacancy presently exists for the 85th Congress, and since the death of Congressman Fernandez unquestionably creates a vacancy in the 84th Congress, two vacancies exist, and your call may include an election to fill the remaining vacancy of the 84th Congress as well as the entire term of the 85th Congress. This matter was also discussed with the House Parliamentarian and we were advised that should the same person be elected to fill both vacancies, that person would have seniority rights over persons elected for the first time to serve in the 85th Congress.

In connection with this, it would be necessary that nominations be made separately, one for each vacancy, that is, one for the 84th Congress and one for the 85th Congress, and also that all election machinery be such that the electorate would vote for the nominee to fill each vacancy. Inasmuch as the general election laws control insofar as applicable, straight party voting would be authorized, and ballots should have the usual circle below the party emblem, and party levers should be provided on voting machines, if they are used.

In this connection, your attention is directed to § 3-4-3, N.M.S.A., 1953 Compilation, pocket supplement, which provides that voting machines in those precincts where they have been adopted shall be used in special elections if the authority calling the election, in its discretion, determines the use of such machines to be advisable. Inasmuch as the authority to call the election is vested in the Governor by virtue of § 3-10-20, N.M.S.A., 1953 Compilation, it will be incumbent upon you to determine whether voting machines shall be used in those precincts where they have been adopted.

Question No. 3. By what method and in what manner do the respective political parties select their nominees?

Answer. The nominees are selected in accordance with duly adopted rules and regulations of the respective political parties. Section 3-10-20, N.M.S.A., 1953 Compilation, provides as follows:

"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.**"

This might appear to infer that the nominee should be selected according to the regular method of selecting nominees provided in this State, to-wit, the primary system. However, § 3-11-40, N.M.S.A., 1953 Compilation, pocket supplement, a portion of the primary law, states specifically as follows:

"Officers to which act applies -- Municipal offices and elections to fill vacancies excluded. -- This act (3-11-36 to 3-11-68) shall apply to the offices of United States senator, representative in the Congress of the United States, and to all elective state, district, legislative, county and precinct officers in this state who are elected at the general election now held each biennium upon the first Tuesday after the first Monday in November of each even numbered year. **This act shall not apply to city, town and village offices, nor school board elections, nor to presidential electors, and it shall not apply to special elections to fill vacancies in any office to which this act applies. Nomination of candidates to fill vacancies and nomination of candidates to all offices to which this act does not apply and nomination of candidates for all offices by all political parties not coming under the provisions of this act shall be made as now is or as may hereafter be provided by law.**"

Thus we must find the method of nomination elsewhere, and in this connection § 3-12-1 provides:

"Nominations to accord with rules and regulations. -- From and after the passage of this act, all nominations of candidates for public office which are made by political parties, shall be made in accordance with rules and regulations duly adopted in the manner hereinafter stated. No political party shall be authorized to nominate candidates for public office in this state, unless the same be organized and governed as provided by this act (3-11-1 to 3-11-8)."

Thus it is clear that such nominations are to be made in accordance with the rules and regulations of the respective parties.

The laws of the State of New Mexico do not permit this office to interpret strictly political party matters. The responsibility thus devolves upon each political party to interpret its own rules for the purpose of nominating the candidates for the vacancies created.