



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

April 3, 1957

Honorable Zollie Steakley
Secretary of State
Austin, Texas

Opinion No. WW-88

Re: Time within which the returns of the Special Election for United States Senator can be officially canvassed and the winning candidate certified.

Dear Mr. Steakley:

Your request for an opinion of this office reads as follows:

"Your opinion is respectfully requested concerning the time within which the returns of the Special Election for United States Senator to be held on Tuesday, April 2, 1957, can be officially canvassed and the winning candidate certified; together with the date on which the successful candidate can assume the office of United States Senator of Texas (unexpired term).

"Articles 8.37, 8.38 and 8.39 of the Election Code would appear to control. Under these statutes the County Judge canvasses the results within 48 hours and certifies to the Secretary of State; on the 17th day after the election, exclusive of the day of election, and not before, the Secretary of State in the presence of the Governor and Attorney General is directed to open and count the returns of the election, whereupon the Governor executes a certificate of election.

"Article 8.44 of the Election Code would appear to apply only to Special Elections for members of the Texas Legislature and to elections to fill vacancies in Congressional Districts."

We agree with your conclusion that the election returns in a special election for United States Senator cannot be canvassed by the Secretary of State until the 17th day after

the election. Article 8.30 of the Code provides that the presiding judges of the election precincts shall forward the returns in general and special elections to the county judge within 36 hours after the votes have been counted, and that the county judge shall forward a copy of the returns to the Secretary of State within 48 hours after the returns have been canvassed by the commissioners court. Article 8.34 provides that the commissioners court shall canvass the returns on the Monday following the election or sooner. Article 8.37 again provides that "in all elections for State or district officers, including presidential electors, except members of the Legislature," the county judge shall forward a copy of the returns to the Secretary of State within 48 hours after the canvass by the commissioners court. Article 8.38 provides that the Secretary of State shall open and count the returns on the 17th day after the election, "and not before." Article 8.39 provides that the Governor shall immediately make out, sign and deliver a certificate of election to the person receiving the highest number of votes for the office. Although the office of United States Senator is not, strictly speaking, a "state office," we have no hesitancy in holding that these general rules also apply to that office.

An exception to these general rules is found in Article 8.44 of the Code, which provides for an acceleration of the procedures in special elections for State Representative or State Senator during a legislative session or within 30 days prior to the convening of a session. An amendment to this statute, added in 1951, further provides that "this same procedure shall be followed whenever a vacancy occurs in Congress in any congressional district of this State if Congress is in session or is to convene within 30 days from the date of the vacancy."¹ Reference to a vacancy "in any congressional district" limits its application to special elections for United States Representative in the various congressional districts, and it has no applicability to a special election for United States Senator. While this language is sufficiently definite that it would not permit an extension by construction to include special elections for United States Senator, it may

¹ The historical comment under Article 8.44 of Vernon's Annotated Election Code, prepared by the Counsel for the Election Code Commission which added this provision when it wrote the 1951 Election Code, describes the change as the addition of a provision "adopting the same procedure in the case of a special election for representatives in Congress."

be pointed out that there is a reason for the Legislature's having provided for accelerating the election procedures for the offices of State Senator, State Representative, and United States Representative without also providing for an acceleration in the case of United States Senator. In case of a vacancy in the first three offices, the people are without representation in the legislative body until the vacancy is filled by election, but they are represented in the United States Senate by a Senator appointed in accordance with Article 12.02 of the Code until the office is filled by election.

The person elected in the special election held on April 2 will be entitled to receive a certificate of election from the Governor as soon as the results are canvassed on April 19. Arts. 8.38 and 8.39, Vernon's Election Code. He will be entitled to qualify for the office immediately thereafter and to assume office as soon as he has qualified. Art. 12.02, Vernon's Election Code; U.S. Const., Amend. XVII; 2 U.S.C.A. §§ 1a, 1b, and 36.

SUMMARY

The Secretary of State should canvass the results of a special election for United States Senator on the 17th day after the election, in accordance with Article 8.38 of Vernon's Texas Election Code. The person elected is entitled to receive a certificate of election as soon as the results are canvassed, and he is entitled to qualify and assume the office immediately thereafter.

Yours very truly,

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By

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APPROVED
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