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OFFICE OF THE SECRETARY OF STATE
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David A. Dean
SECRETARY OF STATE

December 16, 1981

Election Law Interpretation
No. DAD-2

Re: Designation by place on
ballot and method of filling
certain judicial offices

The Honorable Bob McFarland
Chairman
Committee on Constitutional Amendments
House of Representatives
Box 2910
Austin, Texas 78769

Dear Chairman McFarland:

In your letter of November 30, 1981, you have asked for an official election law interpretation concerning the following questions:

1. For persons appointed by the Governor to seats on the newly-enlarged Courts of Appeals to serve until the next general election (pursuant to Senate Bill 265, Acts of the 67th Legislature, Regular Session), how will these appointees, who become nominees of a political party, be listed on the November 1982 general election ballot--that is, who is responsible for and how is designation by place effectuated?
2. Sections 1, 2, 3, 4, and 5 of House Bill 958, Acts of the 67th Legislature, Regular Session, provide for various effective dates for new district court judgeships. How should nominations be made for these judicial offices?

This official election law interpretation is rendered by me as chief election officer of the State in accordance with TEX. ELEC. CODE ANN. art. 1.03, subd. 1 (Vernon Supp. 1980-1981).

TEX. ELEC. CODE ANN. art. 13.59 (Vernon 1967) provides as follows:

"[W]henver nominations for two (2) or more state offices of the same classification are to be made at the same primary or general election, each such office shall be separately designated on the official ballot used at such primary or general election by numbering the places as 'No. 1,' 'No. 2,' 'No. 3,' etc., and the candidates for each place shall be separately nominated. Such [place] designations shall be made by the State Committee of the political party holding the election. Each candidate for nomination for such offices shall designate in the announcement of his candidacy, and in his request to have his name placed on the official primary ballot, the number of the nomination or place for which he desires to become a candidate, and the names of all candidates so requesting shall have their names printed beneath the title of the office and the number so designated. No person shall be a candidate for more than one of such places." (Emphasis added.)

Senate Bill 265 (1981 Tex. Gen. Laws, ch. 291, § 31, at 776-77) became effective September 1, 1981, and enabled the Governor to make appointments for seats on the newly-enlarged courts of appeals pursuant to TEX. CONST. art. V, § 28. These appointees serve until the next general election in 1982 and, if re-elected, draw lots to determine the length of their terms. In order to be nominated as a candidate in the general election, these persons must file for a place number and will be designated on the primary and, if nominated, on the general election ballot as a candidate for "Associate Justice, Court of Appeals, ___ District, Place ___."

While primary responsibility for place designation is vested in the state executive committee of each political party by Article 13.59, *supra*, it is also apparent that this office, by virtue of other provisions of the Election Code, must of necessity be involved in the place designation process. For example, an independent candidate for an office requiring place designation must file with my office. TEX. ELEC. CODE ANN. art. 13.50, subd. 2(a) (Vernon Supp. 1980-1981). In addition, my office is responsible for certifying the general election ballot, which will include offices having place designation. TEX. ELEC. CODE ANN. art. 1.03, subd. 2 (Vernon Supp. 1980-1981).

There is a possibility that the state executive committees of each party might fail to coordinate with each other, or with this office. Such a situation would result in confusion for both incumbents seeking re-election and persons desiring to file against them.

Therefore, if the state party executive committees should fail to ensure uniformity in place designations, and to timely notify my office of such designations, I shall issue an appropriate directive ensuring uniformity of place designation pursuant to my responsibility as the chief election officer of this state to "obtain and maintain uniformity in the application, operation and interpretation of the election laws." TEX. ELEC. CODE ANN. art. 1.03, subd. 1 (Vernon Supp. 1980-1981).

Your second question asks how nominations should be made for the various district judgeships created by Sections 1-5 of House Bill 958 (1981 Tex. Gen. Laws, ch. 429, §§ 1-5, at 1841), which was passed by the Legislature on June 1, 1981, and signed by the Governor on June 11, 1981.

Persons appointed to these positions also serve until the next general election. TEX. CONST. art. V, § 28, supra, and TEX. REV. CIV. STAT. ANN. art. 199a, § 2.005 (Vernon Supp. 1980-1981).

Section 16 of House Bill 958 sets forth varying effective dates for the judgeships created by the Bill, which can be described as follows:

| <u>Bill Section</u> | <u>Effective Date</u> | <u>Number of Judicial Districts Created</u> |
|---------------------|-----------------------|---|
| 1 | 9-1-81 | 12 |
| 2 | 1-1-82 | 1 |
| 3 | 4-1-82 | 1 |
| 4 | 9-1-82 | 2 |
| 5 | 1-1-83 | 3 |

As the courts created in Sections 1 and 2 are "effective," or, more accurately, "come into existence" prior to the filing deadline in January, no problems concerning the manner of nomination arise. Qualified persons may file pursuant to TEX. ELEC. CODE ANN. art. 13.12(c) (Vernon Supp. 1980-1981), participate in the party primaries in May, and seek election in November 1982 for the four-year term commencing on January 1, 1983.

The courts created by Sections 3 and 4 require a more involved interpretation. The provisions of TEX. ELEC. CODE ANN. art. 13.12a(a) (Vernon Supp. 1980-1981) ("For the purpose of this section, where a new office is created to come into existence at a date subsequent to the effective date of the statute...creating it, the vacancy shall be deemed to occur as of the effective date of the statute....") are inapplicable. These provisions apply only when

there is an occurrence of vacancy by way of an unexpired term or the creation of a new office when the length of the unexpired term extends beyond the first day of January following the election. This is not the case with the House Bill 958 judgeships.

In a well-reasoned opinion, former Attorney General Carr held that an act effective on August 23, 1963, gave notice of a district court's creation on June 1, 1964, a date after the filing period and primary election. In TEX. ATT'Y GEN. OP. NO. C-198 (1963), it was held that candidates at the 1964 general election for the judgeship of that court should be nominated by normal primary nominating procedures.

In Popham v. Patterson, 121 Tex. 615, 51 S.W.2d 680 (1932), an act of the Legislature, approved March 20, 1930, increased the term of county school superintendents from two to four years, effective January 1, 1931. The question before the court was whether county school superintendents elected at the general election in 1930 received two- or four-year terms. The court held they received four-year terms, saying:

"When we apply the above rules to the 1930 act, supra, it becomes evident that the clause therein, 'This Act shall take effect January 1, 1931,' does not mean that the act did not become a law until January 1, 1931, but merely means that it did not have effect to lengthen terms of office until such date. . . .

"Appellee contends that the 1930 act could not be effective as notice until it became a law, citing Missouri, K. & T. Ry. Co. v. State, 100 Tex. 420, 100 S.W. 766. We agree with this contention. No act of the Legislature is operative as notice until it becomes a law, but it is so operative as soon as it does become a law. Since this act became a law, about June 20, 1930, it operated as notice from that date forward. . . ." Id. at ____, 51 S.W.2d at 683 (emphasis added).

In Anderson v. Penix, 138 Tex. 596, 161 S.W.2d 455 (1942), an act approved on July 23, 1941, reorganized the 30th Judicial District by removing two counties and leaving only Wichita County therein. Section 6 of the act provided that "This Act shall take effect and be in operation on and after January 1, 1943." The question before the court was whether the voters of the two removed counties could participate in the nomination of the district attorney for the 30th district in the 1942 primary and general elections. The

court held that the office should be filled only by the voters of Wichita County:

"The Act became a law ninety days after the adjournment of the Legislature which enacted it. . . . At that time it became effective, except as to certain matters which were postponed until a later date. The law gives notice as soon as it becomes a law [citing Popham, supra]. . . ." Id. at ____, 161 S.W.2d at 459 (emphasis added).

Cf. Williams v. Huntress, 153 Tex. 443, 272 S.W.2d 87 (1954) (act did not become law until after primary filing deadline and therefore was not effective as notice that the office was to be filled at the general election). Contra, Brown v. Meeks, 96 S.W.2d 839, 843 (Tex. Civ. App.--San Antonio 1936, writ dis'm'd) ("[P]ersons cannot become candidates for an office that does not exist. . . ."). (It should be noted that the Anderson case was decided by a higher court and also six years after Meeks.)

The Supreme Court of Texas has thus held in Anderson that an act with a prospective effective date puts all persons on notice of the contents and effect of the legislation even before the act's actual effective date. Accordingly, all interested persons have notice that the courts in Sections 3 and 4 of House Bill 958 will come into existence prior to the 1982 general election. It is my opinion that persons may file for the Sections 3 and 4 courts during the filing period even though those offices are not extant at that time, but will exist at the time of the general election.

The Section 5 courts have an effective date of January 1, 1983. These courts, unlike all the others in House Bill 958, will not come into existence until after the general election. TEX. ATT'Y GEN. OP. NO. H-134 (1973) directly addressed the question of whether a vacancy on a district court scheduled to come into existence on January 1, 1975, should be filled by appointment of the Governor. In holding this to be the case, the Attorney General appeared to be saying that the key date to be considered in filing for an office that will be created in futuro is that of the general election: "No vacancy could possibly occur in these offices until they become effective; and thus, they cannot be filled by the general election in 1974." (Emphasis added.)

TEX. ATT'Y GEN. OP. NO. H-134 (1973) has not been overruled, modified, or rescinded. You are, therefore, advised that the judgeships created by Section 5 of House Bill 958 are not ones for which a person may file for the May 1982 primary elections; rather, these judgeships are to be filled

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by appointment of the Governor, such appointees to serve until their successors are elected and qualified in the general election of November 1984.

SUMMARY

While primary responsibility for designating place positions on the ballot rests with the respective state party executive committees, the office of the Secretary of State, by virtue of the Texas Election Code, is also involved in this process. Should the party executive committees fail to ensure uniformity of place designation, the Secretary of State, in his capacity as chief election officer of the state, will issue an appropriate directive to accomplish this uniformity.

House Bill 958, 67th Legislature, creates several new district judgeships. The five sections of the Bill creating the judgeships have five different effective dates. Persons may file for nomination in the 1982 party primary procedure for judgeships created by Sections 1-4 of the Bill, even though some of these judgeships will not be created until after the filing deadline and primary election date. Those judgeships created by Section 5 of the Bill (effective January 1, 1983) are not subject to the 1982 party primary nominating procedure, but are to be filled by appointment of the Governor, and the appointees to those judgeships will serve until their successors are elected and qualified in the 1984 general election.

Sincerely,


David A. Dean
Secretary of State

DAD:ACB:mr

APPROVED:
OPINION COMMITTEE

M. E. Kosa, Chairman
Austin C. Bray, Jr.
Charles Evans
Eddie Shell