



OFFICE OF THE SECRETARY OF STATE

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July 6, 1982

The Honorable Bob McFarland  
House of Representatives  
State Capitol Building, Room 151C  
Austin, Texas 78701

Election Law Opinion DAD-34  
Re: Impact of Fashing decision

Dear Representative McFarland:

In your letter of July 1, 1982, you requested my opinion on the impact of the recent Supreme Court's decision in Clements v. Fashing, 50 U.S.L.W. 4869 (U.S. June 25, 1982) (hereinafter referred to as Fashing) on those candidates who ran in campaigns conducted during the pendency of the Fashing litigation.

This official election law opinion is rendered by me as chief election officer of the state in accordance with V.A.T.S. Election Code, art. 1.03, subd. 1.

Specifically, you posed three questions:

1. What is the overall impact of Fashing on Article III, Section 19, and Article XVI, Section 65, of the Texas Constitution?
2. How does the opinion affect candidates who are the nominees of their respective parties or who were defeated in the primary election?
3. What are the responsibilities of the affected political parties as a result of the Fashing opinion?

On Friday, June 25, 1982, the United States Supreme Court in Fashing upheld the constitutionality of two provisions of the Texas Constitution that relate to the ineligibility of certain officeholders to become candidates for legislative offices during their terms of office and to the automatic

forfeiture of office by certain officeholders who become candidates for offices not then held.

I

Vernon's Ann. Tex. Const. Art. III, § 19 provides:

No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

The Fashing court upheld the validity of the waiting period imposed by Article III, Section 19 on certain officeholders who desire to run for legislative office. The gist of the challenge to Section 19 was that it rendered a Justice of the Peace ineligible to become a candidate for the Legislature because his term as Justice of the Peace overlapped the legislative term to which he would have sought election. Therefore, it is my opinion that any affected officeholder whose current term overlaps the legislative term sought is an ineligible candidate.

In its discussion, the court talked in terms of becoming a candidate as triggering the prohibitions of Article III, Section 19. The opinion is replete with suggestions that the affected officeholders may not be candidates for the legislature during their terms of office. The Court did not discuss what effect overlapping terms would have on the ineligibility of such officeholders under Article III, Section 19, although the issue was discussed at the district court level. See Fashing v. Moore, 489 F.Supp. 471 (W.D. Tex, 1980).

It must be noted that Texas case law (Lee v. Daniels, 377 S.W.2d 618; Kirk v. Gordon, 376 S.W.2d 560; Willis v. Potts, 377 S.W.2d 622) has held that the test of Article III, Section 19 is whether or not the term of office of the current officeholder overlaps with the term of the legislative office being sought. These cases held that if the terms do not overlap then the dictates of Article III, Section 19 are not applicable. However, if the current officeholder's term of office does overlap with that of the legislative term, he is prohibited from being a candidate for the state house of representatives or senate.

Because the Supreme Court in Fashing speaks to becoming a candidate as the triggering device of the prohibitions of Article III, Section 19, a question now arises as to the applicability of the decisions of the above-cited Texas cases. Consequently, I have asked the Attorney General to provide me with an official opinion to resolve the apparent conflict between Fashing and the Texas cases interpreting Article III, Section 19. As chief election officer of the State of Texas pursuant to V.A.T.S. Election Code, arts. 1.03, subd. 2, and 1.05, subd. 4, I have a duty and responsibility to certify only eligible candidates to appear on the November 2, 1982 General Election ballot.

The State Executive Committee of each party that conducted a primary election must certify to the Secretary of State within 20 days of its canvass the names of that party's nominees for state and district office. The deadlines for certifying candidates to the Secretary of State that were nominated in the 1982 general primary and runoff primary elections are June 2, 1982 and July 9, 1982, respectively. Id. at arts. 13.27(b) and (c). After the July 9th reporting date, the State Executive Committees have a continuing responsibility to ensure that only eligible candidates are certified to me for inclusion on the November general election ballot. This continuing responsibility takes into account occurrences such as death, resignation or other disqualifications.

Accordingly, I advised both major parties of my affirmative duty to certify only eligible candidates and further informed them to ensure that candidates clearly affected by Fashing are not certified to me. In this regard, I will upon request issue advisory opinions on a case-by-case basis to help the parties determine the eligibility of candidates appearing on the November general election ballot. Such advisory opinions will take into account the requested Attorney General's opinion as to the apparent conflict between Fashing and the Texas cases interpreting Article III, Section 19 and any subsequent U.S. Supreme Court order reforming Fashing.

If, as a result of the Fashing opinion, a candidate for the state legislature is ". . . ineligible to be elected to or to hold the office for which he is a candidate. . ." on or before the 45th day before the general election date, then the party's appropriate district executive committee may nominate a candidate to the vacancy. Id. at art. 13.56(b).

The expeditious rendering of an official Attorney General's opinion on the unresolved issue is imperative. A timely opinion will allow me to properly fulfill my duties as chief

election officer of the State in issuing advisory opinions to the political parties, candidates, and appointing officers who are impacted by the Fashing decision.

II

Vernon's Ann. Tex. Const. Art. XVI, § 65, provides in pertinent part:

The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution. . . .

. . . Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. (Emphasis added.)

In holding that Article XVI, Section 65 is constitutional, the court approved the "automatic resignation" provision of that section. Therefore, it would appear from the Court's holding that any officeholder listed in Article XVI, Section 65 resigned his office by operation of law when with more than one year remaining in his term, he became a candidate for an office he did not then hold.

However, the determination of whether or not a vacancy did occur due to the Fashing court interpretation of Article XVI, Section 65 is a determination that must be made by the Attorney General. This is clearly a question of removal from office, not election to office, thus the issue does not lie within my jurisdiction as chief election officer.

The Attorney General was the attorney for the state in the Fashing case and successfully defended Article XVI, Section 65 from attack. He should be intimately knowledgeable and immediately able to rule on the impact of the resign-to-run provision of Section 65.

Importantly, the Texas Legislature long ago realized that the Attorney General was the proper statewide official to go into court to remove unlawful officeholders under the extraordinary writ of quo warranto pursuant to Vernon's Ann. Civ. St. art. 6253. Therefore, not only is the Attorney General familiar with the current problem of vacancies occurring by operation of law, but he is also a proper official to act to remove unlawful officeholders.

The question of how to fill vacancies, on the other hand, is one which I may properly rule on as chief election officer. Should, as a result of Fashing, vacancies occur, they are to be filled in accordance with law.

Vacancies in the offices included within Section 65 are filled by appointment until the next general election. The governor appoints district attorneys and criminal district attorneys; district judges appoint district clerks; the commissioner of agriculture appoints public weighers; the other offices listed in the section are filled at the county level by the commissioners court or the county judge as prescribed by statute. See, for example, Vernon's Ann. Tex. Const. Arts. IV, § 12, and V, §§ 9, 21, 23 and 28.

Appointees shall hold office until their successors are elected and qualified. Vernon's Ann. Civ. St. art. 18. ". . . Persons elected to unexpired terms in the various state, district, county, and precinct offices shall be entitled to qualify and assume the duties of their respective offices immediately upon receiving a certificate of election, which certificate shall be issued immediately following the official canvass of the results of the election at which they were elected, and they shall take office as soon thereafter as possible." Id. at art. 17.

The Election Code prescribes the nomination procedure to be used by the political parties to select nominees to appear on the general election ballot as candidates to fill unex-

pired terms. The appropriate state, district, or county executive committees of each party may nominate a candidate to be placed on the November ballot pursuant to V.A.T.S. Election Code, art. 13.12a.

I have noted that the Harris County District Attorney and Harris County County Attorney have requested an opinion as to specific officeholders in Harris County. I have also noted that one county commissioner in Bexar County has already resigned because of his race for U.S. Congress. This only serves to highlight the urgency of this issue.

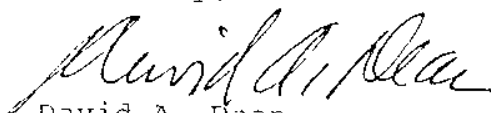
I, therefore, have asked the Attorney General for an official opinion as to the impact of Fashing on officeholders who have run for other offices in violation of Article XVI, Section 65. This opinion needs to be rendered at once so that all the affected political parties and appointing officials can perform their statutory duties in filling vacancies in offices while at the same time allowing the nominees to be viable candidates for the various offices in the November general election.

SUMMARY

As chief election officer I will certify only eligible candidates for the November ballot and any candidate found to have violated Article III, Section 19 as interpreted by Clements v. Fashing cannot be certified by my office. My decision on certification will be guided by any reformation of Fashing by the U.S. Supreme Court and official Attorney General opinion interpreting any conflict between Fashing and Texas case law.

The question of automatic resignation under Article XVI, Section 65 is a question of removal from office and must be ruled upon by the Attorney General. As Secretary of State, I do not have jurisdiction over such an issue. The vacancies, if any, occurring as a result of Fashing must be filled pursuant to the Election Code.

Sincerely,



David A. Dean  
Secretary of State

Willis Whatley  
Counsel for the Secretary of State

The Honorable Bob McFarland  
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Prepared by Charles C. Bailey

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