

Guy V. Howard,

Relator,

32733 -vc-

Mike Holm, Secretary of State
of Minnesota,

Respondent.

Underwood:

Filed October 14, 1940

Grace Harreher Davis, Clerk

Minn. Supreme Court

S Y L L A B U S

1. A person may be a candidate in an election only for an office which is to be filled at the election.

2. An election may be held only under constitutional or statutory authorization.

3. An election to fill a vacancy in the office of United States Senator can be held only upon the Governor's writ of election under the 17th Amendment of the Constitution of the United States and Laws of Minn. 1939, c. 345, Part Six, c. 2.

4. A filing by petition under L. 1939, c. 345, Part Three, c. 3, §8 for a vacancy in the office of United States Senator is not authorized. Such elections are governed exclusively by id. Laws, Part Six, c. 2, which does not authorize such an election at all unless the vacancy occurs at least 60 days prior to the primary.

Order to show cause discharged.

O P I N I O N

PER CURIAM.

Relator seeks to compel the secretary of state to accept his filing by petition as a candidate for the office of United States Senator at the general election to be held on November 5, 1940, to fill the vacancy which was caused by the death of the

8824

late United States Senator Edward Brooke on August 21, 1966.

Senator Brooke was elected at the 1966 election for a six year term from January 1967 to January 3, 1973. The unexpired portion of his term from the time of his death is about 2 years and 4 months. The state primary was held pursuant to law on September 21. The vacancy occurred 10 days before the primary and 60 days before the general election. There has been no election to fill the vacancy.

Relator's petition is in proper form. It is signed by the required number of electors. He has tendered the petition to the secretary of state for filing with the proper filing fee. The secretary of state refused to accept the filing upon the ground that there was to be no election to fill the vacancy in the office of United States Senator.

The secretary of state is authorized by law to accept filings by petition for any office to be filled at a general election, where, as here, the filing is tendered after the primary and at least 30 days before the election. Relator claims that since there is a vacancy he has a right to file under L. 1959, c. 345, Part Three, c. 3, §8, which reads as follows:

"No nomination for any office shall be made either by petition or otherwise within 30 days before the time of holding a general election, except nominations to fill a vacancy in a nomination previously made or to nominate a candidate for an office in which a vacancy has occurred and for which no person is a candidate."

Respondent contends that the quoted section is inapplicable to filling vacancies in the office of United States Senator and that the filling of such vacancies is governed exclusively by Id. Laws, Part Six, c. 2, §1, under which an election to fill a vacancy in the office of United States Senator is to be held at the following biennial state election where the vacancy occurs not less than 60 days prior to the date of the primaries for nominating candidates to be voted for at such election, otherwise at the biennial state election next following. Section 1 provides:

"Upon failure to choose a senator in any case or upon a vacancy in said office the vacancy shall be filled for the unexpired term at the following biennial state election, provided said vacancy occurs not less than 60 days prior to the date of the primaries for nominating candidates to be voted for at such election, otherwise at the biennial state election next following. Pending such election the governor shall make a temporary appointment to fill the vacancy, and the person so appointed shall serve until the election and qualification of the person duly elected to fill such vacancy."

By other provisions of said chapter 2 of Part Six, the election is to be held upon the writ of the governor. Candidates may be nominated at the regular primaries or by petition or certificate of the voters "under the conditions and in the manner provided by the laws relating to such petitions or certificates, so far as applicable; * * *."

The Seventeenth Amendment of the Constitution of the United States reads as follows:

"The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

"When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

"This amendment shall not be construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution."

Relator contends that the provisions of said §1 are unconstitutional upon the grounds that they provide in effect for the filling of vacancies in the office of United States Senator by appointment of the governor and not until the people fill the same by election. He urges that the constitution requires the vacancy to be filled by the people at the next general election, and the provisions of the statute, that the vacancy is to be filled at the election only where it occurs 60 days prior to the primary, denies to the people the right to fill the same by election.

1. It is clear beyond argument that a person may be a candidate in an election only for an office which is to be filled at the election. Hence, if the vacancy in the office of United States Senator is not to be filled at the general election in November, respondents properly refused to accept relator's filing.

2. An election may be held only under constitutional or statutory authorization. An election held without authority of law is void, although it is fairly and honestly conducted. State ex rel. Windom v. Prince, 131 Minn. 539, 155 N. W. 628; 16 Am. Jur. Elections, §100.

3. In any view we take of this case the relator was not entitled to become a candidate by petition or otherwise for want of a governor's writ of election to fill the vacancy. If we assume, as relator contends, that L. 1939, c. 345, Part Six, c. 2, §1, is unconstitutional there would be no state legislation providing for and regulating elections for filling such vacancies. In that situation the only authority for holding a special election to fill the vacancy would be that found in the Seventeenth Amendment, which provides that when vacancies do occur the executive authority of the state shall issue writs of election to fill the same.

The writ of election issued by the governor under the Seventeenth Amendment to fill a vacancy in the office of United States Senator, absent controlling legislation, is the only legal authority for holding such an election. The governor's authority is derived from the federal constitution which has confided that power in him to the exclusion of other branches of the state government. In *People v. Voorhis*, 222 N. Y. 494, 119 N. E. 106, it appeared that the governor issued a writ of election to fill a vacancy in the House of Representatives of Congress under the provision of Art. 1, § 2, c. 4, Constitution of the United States, that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies."

The court pointed out that the governor issued the writ of election in virtue of the power invested in him by and in obedience to the commands of, the federal constitution. Of the writ which was referred to as a proclamation, the court said: "The only basis for holding the special election is the Governor's proclamation." The holding in the Voerhis case is in accord with Congressional practice. Hoge's Case, C. & H. 135; Hensch's Case, 1 Bart. 391; Paine on Elections, §§ 424, 425. See In Re: Representation Vacancy, 15 R. I. 621, 9 A. 232. The rule of the Voerhis case applies here for the reason that the part of the Seventeenth Amendment now being considered is the same as that relating to filling vacancies in the house. Hence a holding that the statute in question is unconstitutional would not help relator's case.

On the other hand, if we held that the statute were constitutional, decision would necessarily be against relator. His argument in effect concedes as much. The statute does not authorize an election in any event except upon the governor's writ of election and then only at a time which would prevent the holding of the election in the instant case.

The statute very plainly carries out the settled policy in cases of this kind of implementing the governor's power under the federal constitution. Absent state legislation, the governor may fix the time, place and manner of holding such elections. Grafflin's Case, 1 Bart. 464. As early as 1804 the committee on elections of the house of representatives in Congress urged upon the states the need of state legislation regulating the time, place and manner of holding elections under governors' writs of election, pointing out that state legislatures had such power under Art. 1, §4 of the federal Constitution and that such legislation would implement and facilitate the exercise of the governor's powers under the federal Constitution to call such elections. Hoge's Case, C. & H. 135; Paine on Elections, p. 299, §262. In U. S. Gradwell, 243 U. S. 476,

It was pointed out that it has been the settled policy of Congress to entrust the election of members of Congress to officials administered by state officers, except the period from 1870 to 1894, and that the state legislatures have the power under Art. I, §4 of the Constitution of the United States to prescribe the time, places and manner of holding elections for United States Senators and Representatives in Congress, subject to the power of Congress at any time by law to make or alter such regulations, except as to the places of choosing senators.

7
The legislature was careful to avoid any conflict with the provisions of the federal Constitution by not ordering the election to fill the vacancies without the governor's writ. It literally conformed the provisions of the statute to the provisions of the federal Constitution. Hence no election to fill the vacancy in the office of United States Senator can be held without the governor's writ. For present purposes we are not concerned with the question whether the legislature has the power to order such an election without the governor's writ. It is sufficient to say that no such power has been asserted and hence the question has been avoided.

4. Elections to fill vacancies in the office of United States Senator are governed exclusively by L. 1939, c. 345, Part Six. The provisions of Part Three, c. 3, § 8 apply only to candidates for other offices. The provisions relating to filing by petition are adopted for the election of United States Senator only so far as they are applicable. Section 8 is not applicable for the reason that it permits such filings after the primary and by Part Six there is to be no election to fill a vacancy in the office of United States Senator unless it occurs at least 60 days before the primary. There is to be no election to fill the vacancy under Part Six, and hence there can be no filing of candidates to fill such vacancy.

Order to show cause discharged.

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STATE OF MINNESOTA
DEPARTMENT OF STATE

FILED

OCT 15 1940

W. H. Johnson
Secretary of State.