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Rolando B. Pablos
Secretary of State

OPINION COMMITTEE

August 29, 2018

Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Sent via Electronic Mail to opinion.committee@oag.texas.gov

Dear General Paxton:

On behalf of Secretary of State Rolando B. Pablos, the Office of the Texas Secretary of State seeks an attorney general opinion under Section 402.042 of the Texas Government Code on the following question:

If a legislative vacancy were to exist in a single-county legislative district, would the Secretary of State be the "returning officer" under Article III, Section 13(a) of the Texas Constitution, or, if the Secretary of State is not the "returning officer", who would be the "returning officer" in a single-county legislative district?

Specifically, Article III, Section 13(a) of the Texas Constitution provides:

When vacancies occur in either House, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened, shall be authorized to order an election for that purpose.

Neither the Texas Constitution nor the Texas Election Code define "returning officer." Prior to the 1985 codification of the current Texas Election Code, Article 4.12 of the Texas Election Code dealt with legislative vacancies. Specifically, Subdivision 2 of Article 4.12 of the pre-1985 Texas Election Code provided:

Whenever there is a special election in any representative or senatorial district in this state for the election of any member of the Legislature, the commissioners court of each county in the district shall meet within three days after the election is held and canvass the returns. The county judge of each county in which the

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election was held shall, within twenty-four hours after the commissioners court canvasses the result, make out duplicate returns of the election, one of which he shall immediately transmit to the seat of government of the state, sealed in an envelope, directed to the Secretary of State, and endorsed "Election Returns for _____ County, for " (filling the first blank with the name of the county and the other blank with the name of the office for which the election was held); and the other of the returns shall be deposited in the office of the county clerk where the election was held.

Acts 1965, 59th Leg., p. 777, ch. 368, § 1. Amended by Acts 1967, 60th Leg., p. 1868, ch. 723, § 14a, eff. Aug. 28, 1967.

In 1985, Article 4.12, Section 2 of the Texas Election Code was re-codified into Sections 67.007 and 203.012 of the current Texas Election Code. While Section 203.012 of the current Texas Election Code is specific to legislative vacancies, Section 67.007 of the current Texas Election Code is not. Sections 67.007 and 203.012 of the current Texas Election Code provide:

Sec. 67.007. COUNTY ELECTION RETURNS. (a) For each election for a statewide or district office, a statewide measure, or president and vice-president of the United States, the county clerk of each county in the territory covered by the election shall prepare county election returns. (b) The county election returns shall state, for each candidate and for and against each measure, the total number of votes received in the county as stated by the local canvassing authority's tabulation of votes. (c) The county clerk shall sign the county returns to certify their accuracy. (d) Not later than 24 hours after completion of the local canvass, the county clerk shall deliver to the secretary of state, in the manner directed by the secretary, the county returns in a sealed envelope. The envelope shall be labeled: "Election Returns for _____ (name) County, for _____ (election)." (e) The county clerk shall retain a copy of the county returns for the period for preserving the precinct election records.

Sec. 203.012. TIME OF CANVASS. (a) The commissioners court shall convene to conduct the local canvass not later than the 10th day after election day. (b) The governor shall conduct the state canvass not later than the 14th day after election day. (c) The secretary of state shall post, on the bulletin board used for posting notice of meetings of state governmental bodies, a notice of the date, hour, and place of the canvass at least 24 hours before the canvass is conducted. (d) Section 1.006 does not apply to this section.

Over 110 counties in Texas have county elections administrators fulfilling the duties of the county clerk under the Texas Election Code, pursuant to Section 31.043 of the current Texas Election Code. A county elections administrator is not an "officer" because, among other reasons, a county elections administrator needs "the approval of Commissioners Court for...issuing orders calling for elections...". *Krier v. Navarro*, 952 S.W.2d 25, 30 (Tex. App.—San Antonio 1997) (finding generally that a county elections administrator did not "hold a public office within the meaning of article XVI, section 30(a) of the Texas Constitution..."). In

addition, under both Article 4.02 of the pre-1985 version of the Texas Election Code and Section 3.004 of the current Texas Election Code, the county judge, and not the county clerk or county elections administrator, has the general authority to order an election. *See, e.g.*, Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 25 (“The county judge...shall order an election for the county and precinct officers, and all other elections which under the law the county judge may be authorized to order...”); TEX. ELEC. CODE § 3.004(a)(10)(“The following authority shall order an election: (1) the county judge, for the general election for officers of the county government.”) Moreover, neither the pre-1985 Texas Election Code nor the current Texas Election Code appear to contemplate the Secretary of State delivering any election returns.

Accordingly, the Office of the Texas Secretary of State seeks an opinion as to identity of the “returning officer” under Article III, Section 13(a) of the Texas Constitution in a single-county legislative district were a vacancy to exist under Article III, Section 13(a) of the Texas Constitution; i.e., whether the legislature in re-codifying the Texas Election Code in 1985 intended to designate (1) the county clerk, or the county elections administrator fulfilling the duties of the county clerk under the Texas Election Code; (2) the Secretary of State; or (3) some other individual(s) as the “returning officer” in a single-county legislative district, were a vacancy to exist under Article III, Section 13(a) of the Texas Constitution.

The Office of the Texas Secretary of State respectfully requests that the Office of the Attorney General expedite the briefing deadline in this matter and issues its opinion as soon as reasonably possible.

Sincerely,



Lindsey Aston
General Counsel