



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable M. O. Flowers  
Secretary of State  
Austin, Texas

Dear Sir:

Opinion No. 0-2188  
Re: Is the Secretary of State  
authorized to deny a place  
on the ballot in the general  
election to candidates  
of the Communist Party?

We have your request for an opinion on the above question.

Being well aware of the profound significance of the question you have presented, we have endeavored to give it the deliberate study it deserves. In times like the present, when cataclysmic world events shake the very foundations of the institutions of men, we will do well to approach with humility questions which affect those institutions. Under stress of the universal conflict of ideologies the very word "communist" has come to have a connotation of peril. The word has become linked in our emotions with anarchy and revolution. It is inevitable that we should look with suspicion upon those who profess communism as their political faith. It is only human that we should wish to expel them from any participation in the functions of our democracy. However, being called on, as we now are, to determine whether our constitution and laws give to the Secretary of State of Texas the authority to deny a place on the ballot in a general election to the nominees of the Communist, or any other political party, we must be guided, not by our emotions, desires or prejudices, but by the words and spirit of the constitution and laws which it is our solemn duty to uphold. Let us not forget the admonition of Mr. Justice Pound (People vs. Gitlow, 136 N.E. 317, at p. 327) that "the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected".

The first amendment of the Constitution of the United States provides:

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"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances."

Section III of the Bill of Rights of the Texas Constitution declares:

"All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The principles announced and rights guaranteed by these constitutional provisions apply to all citizens regardless of political faith. These principles were forcefully illustrated in Jefferson's preamble to the Virginia Act for establishing Religious Freedom. His words apply as well to political as to religious freedom.

"To suffer the civil magistrate to intrude his power into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy; which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own."

Speaking over one hundred years later, Mr. Justice Holmes reaffirmed the same philosophy when he said: (Dissenting in *Abrams vs. U.S.*, 250 U.S. 616)

" . . . We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

These same principles have been repeatedly announced by the courts of Texas, but never more succinctly than by Mr. Justice Gaines, speaking for the Supreme Court of Texas in *Steuseff vs. State*, 80 Tex. 428:

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"When a constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammelled will of the electors. Experience teaches us that in popular elections only those are chosen who are in sympathy with the people both in thought and aspiration . . . "

With these general principles in mind let us turn to a consideration of the specific question before us, i.e., the powers, duties and discretion relating to elections vested by the Constitution and laws of the State in the Secretary of State.

Section 3 of Article IV of the Constitution provides that:

"The returns of every election for said executive officers, until otherwise provided by law, shall be made out, sealed up, and transmitted by the returning officers prescribed by law, to the seat of government, directed to the Secretary of State, who shall deliver the same to the Speaker of the House of Representatives . . . "

Section 21 of Article IV directs the Secretary of State to "perform such other duties as may be required of him by law". Insofar as these duties relate to elections, these duties are enumerated in the statutes comprising Title 50 of the Revised Civil Statutes, and Title 6 of the Penal Code. Article 2925, Revised Civil Statutes; directs him to "prescribe forms of all blanks" for ballots, etc., "and furnish same to each county judge". Articles 2926 and 2979 provide that the death of any state or district officer or nominee shall be certified to the Secretary of State. Article 2928 prohibits the Secretary of State from issuing certificates of election or appointment to anyone "who is not eligible to hold such office under the Constitution . . . " Article 2982 requires the Secretary of State to hold a drawing to determine the order in which proposed constitutional amendments shall appear on the ballot. Article 2997a directs the Secretary of State to examine and approve voting machines. Articles 3026a and 3033 direct county judges to mail election returns to the Secretary of State, and Article 3034 provides that he shall open and count the returns of elections. Article 3155 requires state committees of political parties whose nominee for governor polled between 10,000

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and 100,000 votes at the last election to certify to the Secretary of State whether they will nominate their candidate by convention or primary election. Article 3157 requires such nominations to be certified to the Secretary of State. By Article 3159, non partisan or independent candidates are directed to make application to the Secretary of State to have their names placed on the ballots, and Article 3161 directs the Secretary of State to relay the names to the county clerks. Articles 3168-3173 provide for reports of campaign expenditures to be made to the Secretary of State.

This enumeration of the statutory duties of the Secretary of State relating to elections indicates that all of his said duties are ministerial in character. Nowhere do we find any discretionary power lodged in the Secretary of State to authorize him to refuse a place on the ballot to the duly designated nominees of any political party.

This precise question was before the Austin Court of Civil Appeals in *Morris vs. Mims*, 224 S.W. 587. Suit was brought to restrain the Secretary of State from certifying the nominees of the American party, to the election officers. In denying the relief sought, the court in a per curiam opinion declared:

"The Legislature may make reasonable regulations as to how nominations may be made, but it cannot prohibit such nominations, whether by a new party or an old one (*Gilmore vs. Waples*, 108 Tex. 167, 188 S.W. 1039); and it cannot nullify the effect of such nominations, when legally made, by prohibiting the printing of the names of such nominees upon the official ballot, the same being the only ballot that can be legally voted.

"The statute prescribes no method by which a new party may make nominations. Such being the case, a new party has the right to pursue any reasonable method in making its nominations, not prohibited by law. As the American party pursued one of the methods prescribed by statute for making nominations by pre-existing parties, we hold that such method was reasonable, and, as there is no law forbidding it to pursue such method, we hold that its nominations of the candidates named in the petition herein were legally made. The same having been properly certified to the Secretary of state, it is his duty to certify the names of such candidates to the proper election officers, whose duty it will be to print or cause to be

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printed the names of such candidates on the official ballots as the nominees of the American Party." (Emphasis ours)

That it is not within the discretion of the Secretary of State to refuse to place upon the ballot at a general election the duly certified candidates of a political party was likewise held by the Supreme Court of Texas in *Sterling vs. Ferguson*, 122 Tex. 122, 53 S.W. (2d) 753. The opinion which was signed by all three justices (Cureton, Greenwood and Pierson) quoted with emphasis the following statement from 9 Ruling Case Law, p. 1090, Sec. 100:

" . . . where provision is made for the issuance of a nomination certificate, and one is issued, the holder is entitled to have his name printed on the official ballot, at least until it is set aside in proper proceedings."

The opinion quotes Article 230 of the Penal Code:

"Any judge, clerk, chairman or member of an executive committee, collector of taxes, county clerk, sheriff, county judge or judge of an election, president or member of a State Convention or Secretary of State, who willfully fails or refuses to discharge any duty imposed on him under the law, shall be fined not to exceed five hundred dollars unless the particular act under some other law is made a felony."

and declares significantly:

"Moreover, for a willful failure to certify the names of the nominees of a party as filed with the Secretary of State, that officer is punishable by a fine not exceeding \$500 as specified in the Article of the Penal Code just quoted . . .

"It is clear, we think, that these statutes (relating to ballots at general elections) are mandatory, in the sense that the candidate and the citizens have rights to be subserved thereby, which may be enforced, and the statutes should be obeyed."

It is our considered opinion, that under the foregoing authorities the Secretary of State of Texas is but a

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ministerial officer with respect to the conduct of elections, and he may not in his discretion refuse a place on the ballot at a general election to the nominees of any political party who have been duly nominated and certified to him according to law.

It follows, therefore, that the Secretary of State is not authorized to deny a place on the ballot in the general election to candidates of the Communist Party.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Glenn R. Lewis*  
Glenn R. Lewis  
Assistant

By *Walter R. Koch*  
Walter R. Koch  
Assistant

APPROVED JUN 28, 1940

*George B. Mann*  
ATTORNEY GENERAL OF TEXAS

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