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RQ-1061

SCOTT W. ROSEKRANS Opinion Committee
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December 29, 1997

Hon. Dan Morales
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-40000-97
I.D.# 40000

Re: Request for Opinion Concerning the Filling of a Justice of the Peace Vacancy Created by a Removal From Office.

Dear Mr. Morales:

In November of 1997 the Justice of the Peace for Precinct 3 of San Jacinto County was removed from office as a result of his plea of no contest to Official Oppression charges that were filed by this Office.

The position is currently up for election and the primary is in March of this coming year. I had previously advised the Commissioners Court of the two controlling statutes governing the filling of a vacancy in the office of Justice of the Peace. I have since received a request from the County Judge as to whether or not the Commissioners Court was required to fill the position. They would like to leave the position open and appoint the winner of the general election in November of 1998.

I have researched this issue twice this year and have not been able to come up with a definite answer. There is very little, if any, case law on the matter and I was unable to find any Attorney General Opinions that addressed the issue. Section 87.041(a)(10) states that the Commissioners Court "may" (emphasis added) fill a vacancy in the position of justice of the peace. Article 5, §28 of the Texas Constitution states that vacancies in the office of the justice of the peace "shall" (emphasis added) be filled by the Commissioners Court until the next succeeding General Election.

The apparent conflict between the two is what is causing confusion for the Court. The Local Government Code uses discretionary language but the Constitution seems to mandate action. I would appreciate it greatly if you would assign this question to one of your staff and get back to me at your earliest possible convenience with an opinion.

Morales
12/29/97

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Thank you for your time, attention, and cooperation in this matter. If you have any comments or questions please do not hesitate to contact me.

Sincerely,



Scott W. Rosekrans