

456

1. ELECTIONS — SPECIAL — HELD TO FILL VACANCY IN OFFICE OF MEMBER OF 82 CONGRESS—AMENDED SUBSTITUTE HOUSE BILL 16, 99 GENERAL ASSEMBLY HAS NO APPLICATION—CAN BE APPLICABLE ONLY AS TO ELECTIONS TO 83 AND SUCCEEDING CONGRESSES.
2. SPECIAL ELECTION TO FILL VACANCY—MEMBER OF 82 CONGRESS—THIRD DISTRICT OF OHIO—MUST BE CONDUCTED WITHIN DISTRICT AS IT EXISTED AT TIME OF REGULAR ELECTION, NOVEMBER, 1950—BUTLER, MONTGOMERY, PREBLE COUNTIES—BOUNDARY CHANGES.

SYLLABUS:

1. Amended Substitute House Bill No. 16, enacted by the 99th General Assembly, has no application to special elections held to fill a vacancy in the office of member of the 82nd Congress, but was intended to and can be applicable only as to elections to the 83rd and succeeding Congresses.

2. Any special election to fill a vacancy in the office of member of the 82nd Congress from the "Third District" of Ohio must be conducted within such district as it existed at the time of the regular election of the congressman of such district in November, 1950, namely, within the counties of Montgomery, Butler and Preble, regardless of the enactment of any legislation changing the boundaries of the "Third District."

Columbus, Ohio, July 3, 1951

Hon. Ted W. Brown, Secretary of State,
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Amended Substitute House Bill No. 16, known as the Congressional Redistricting Bill, was filed in this office on June 18, 1951. Said act provides: ‘The countries of Montgomery and Butler constitute the third district.’ Said third district at the present time consists of Montgomery, Butler and Preble counties.

“Mr. Edward Breen was elected to Congress from the third district in the general election of November, 1950 to serve a term of two years commencing at noon on January 3, 1951. It is our understanding that Congressman Breen has tendered his resignation and that the same will become effective in October, 1951.

“In your opinion, should an election be held after September 17, 1951 (the effective date of House Bill No. 16) for the unexpired term of a representative to Congress would said election be held for the territory constituting said district as it existed in November, 1950 or for the district as set out in House Bill No. 16?”

At the present time the State of Ohio is divided into twenty-two Congressional Districts by Section 4828-1, General Code, enacted by the General Assembly of Ohio in 1913. At the election of members of the 82nd Congress in November, 1950, Ohio, being entitled to twenty-three representatives, elected one congressman for each of the twenty-two districts described by existing Section 4828-1, General Code, and elected the twenty-third congressman from the state at large pursuant to the provisions of the Federal statutes. (2 U. S. C., Section 4.)

Under the Seventeenth Decennial Census of 1950, Ohio will continue to be entitled to twenty-three representatives to Congress for the next five sessions of that body. (Message from the President of the United States, to 82nd Congress January 9, 1951, pursuant to 2 U. S. C., Sections 2a, 2b.)

Amended Substitute House Bill No. 16 repeals existing Section 4828-1, General Code, and divides the state into twenty-three Congressional Districts. Some of the old districts are left unchanged and others are radically changed. Under existing Section 4828-1, General Code

Montgomery, Butler and Preble counties comprise what is designated as the "Third District." Under Amended Substitute House Bill No. 16, Montgomery and Butler counties will constitute the "Third District" and Preble County, together with the counties of Allen, Auglaize, Darke, Mercer, Miami and Shelby will constitute the "Fourth District." This act, not being an emergency measure, will go into effect ninety days after having been filed in your office, or, as stated in your letter, will become effective on September 17, 1951.

The question presented is whether a special election to fill a vacancy in the office of congressman of the Third Congressional District of Ohio of the 82nd Congress, arising after the effective date of Amended Substitute House Bill No. 16, should be held in the territory constituting such Third Congressional District at the time of the election of the present incumbent to the 82nd Congress, or whether such election should be held in the "Third District" as established by Amended Substitute House Bill No. 16.

A brief reference should be made to the constitutional and statutory provisions relating to the election of representatives to Congress.

Article I, Section 4, clause 1 of the Federal Constitution provides that the Legislature of each state shall prescribe the times, places and manner of holding such elections, subject to the power of Congress to make or alter such regulations at any time.

Article I, Section 2, clause 4 of the Federal Constitution provides:

"When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies."

Pursuant to its constitutional authority, Congress has provided that:

"The time for holding elections in any State * * * for a Representative * * * to fill a vacancy * * * may be prescribed by the laws of the several States * * *." (2 U. S. C., Section 8.)

Section 4829, General Code, reads as follows:

"When a vacancy in the office of representative to congress of senator or representative to the general assembly occurs, the governor, upon satisfactory information thereof, shall issue a writ of election, directing that a special election be held to fill such vacancy in the territory entitled to fill it on a day specified in the writ. Such writ shall be directed to the sheriff or sheriffs within

such territory who shall give notice of the time and places of holding such election as in other cases. Such election shall be held and conducted and returns thereof made as in case of a regular election."

Article I, Section 5, clause 1 of the Federal Constitution makes each house the judge of the elections, returns and qualifications of its own members. In the last analysis, therefore, the Federal House of Representatives has the final and complete power to determine the qualifications of any congressman elected at any special election to fill the vacancy which will be caused by the resignation of Congressman Breen.

In *Hunt v. Menard*, reported in 2 Bartlett Contested Congressional Election Cases, page 477, the House of Representatives refused seats to two persons who based their claims thereto upon a special election held in a new district. I quote from the report of the Congressional Committee in such case:

"It would not be preservation of the purity of the elective franchise, nor would it be a just guardianship of the republican principle that all shall have a right to be represented, to admit the power of a State Legislature to provide that a portion of the people should have two Representatives in Congress, while another portion should have none, or not be represented by the man of their choice. * * * If the people who choose a Representative are not entitled to fill the vacancy happening by his resignation, it is impossible to tell what portion of the population may most properly exercise this privilege. It seems to be assumed in this case that the new district made by the act of July 11, 1850, and numbered three, has the right to send a Representative in place of General Wilson, because the number corresponds with that which General Wilson represented. But the order of numbering is an unimportant circumstance, and the first or the fourth district might have been as properly called the third as any other; * * *

"This reasoning, which your committee consider as sound and pertinent, applied to the case under consideration seems to be conclusive against this election; and it may also be added that whatever power a State Legislature may have in the matter, it is absurd to say that a district, when once established and a Representative chosen therein, is not to continue for the whole Congress for which the election has once been operative. * * *"

A prior Congress, by a close vote of 98 to 90, had held, in the case of *Perkins v. Morrison*, 1 Bartlett Contested Congressional Election Cases, page 142, that a representative was entitled to be seated who had been

elected to fill a vacancy at a special election held in the new district. The case of *Hunt v. Menard*, *supra*, disavowed and specifically overruled the precedent established by the prior holding.

The case of *Sloan v. Donoghue*, 20 Cal (2nd) 607, 127 P. (2nd) 922, also is squarely in point on the question here involved. In that case the court held that although the legislature had changed the boundaries of a congressional district, a special election to fill a congressional vacancy should be held in the district as it existed at the time of the regular congressional election, notwithstanding the repeal of the act creating and delineating the old district. I quote from the opinion of the court in such case :

“While this appears to be the first instance in which this court has been called upon to determine whether under the circumstances here presented a special election to fill a vacancy is properly called in the old district, and not in the new district, it is not the first time the problem has arisen in this state. The attorney general states that similar problems have arisen with the adoption of each apportionment act by the Legislature and that his office uniformly has advised that the special election should be held in the old district, the new district being effective for the first time at the general election next following the adoption of the apportionment act. He cites us to five such opinions, exclusive of the one rendered to the governor in this instance, emanating from his office since 1929.

“Nothing in the Apportionment Act of 1941 indicates that it was intended to apply to special elections held to fill vacancies arising in terms occupied at the time of its passage. It was intended to apply to the next general election and succeeding elections. * * *”

McCrary on Elections, 4th ed., page 141, states :

“The true rule, therefore, must be that a district once created, and having elected a Representative in Congress, should be allowed to continue *intact* for the purpose of filling any vacancy which may occur, until the end of the Congress in which it is represented.”

Based on the same logic of reasoning employed in the cases herein cited, I have no hesitancy in concluding that Amended Substitute House Bill No. 16 does not and can not have any application to any election of congressmen prior to the regular election of members of the 83rd Congress in November, 1952. It is clear that upon the effective date of such act,

the positions of congressmen in the 82nd Congress are not abolished because of any changes made in the congressional districts and that *vacancies* do not exist in each of the amended districts. Nor will a vacancy exist in the twenty-third district which, as such, has never elected a congressman. The only vacancy which can possibly exist in the office of *congressman of the 82nd Congress* must arise from resignation or death of a member of such Congress. The filling of a *vacancy* necessarily implies that the successor to such congressman will occupy *his* same office. The position occupied by Congressman Breen is that of congressman of the 82nd Congress, representing the geographical area of Montgomery, Butler and Preble counties. As stated in the case of Hunt v. Menard, *supra*, the order of the numbering of a congressional district is an unimportant circumstance.

Section 4829, General Code, provides that a special election to fill a vacancy in the office of representative to Congress shall be held "in the territory entitled to fill it." The only territory entitled to fill the vacancy in Congress of Congressman Breen is the same territory which elected him to his office of Congressman of the 82nd Congress.

Specifically answering your question, therefore, it is my opinion that :

1. Amended Substitute House Bill No. 16, enacted by the 99th General Assembly, has no application to special elections held to fill a vacancy in the office of member of the 82nd Congress, but was intended to and can be applicable only as to elections to the 83rd and succeeding Congresses.

2. Any special election to fill a *vacancy* in the office of member of the 82nd Congress from the "Third District" of Ohio must be conducted within such district as it existed at the time of the regular election of the congressman of such district in November, 1950, namely, within the counties of Montgomery, Butler and Preble, regardless of the enactment of any legislation changing the boundaries of the "Third District."

Respectfully,

C. WILLIAM O'NEILL

Attorney General