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MEMORANDUM

Date: September 3, 2013

From: WTT 

To: A.J. Spiker
State Chairman, Republican Party of Iowa
Via e-mail to ajspiker@iowagop.org

RE: Ballot Vacancy

Chairman Spiker,

Thank you for asking that I opine regarding ballot vacancies that may occur in the event a candidate for Senate does not receive 35% of the primary vote.

The requirement that a candidate receive 35% of the vote arises at Iowa Code Section 43.45. "However, if there are more than two candidates for any nomination and none of the candidates receives 35% or more of the votes cast by the voters of that party for that nomination, the primary is inconclusive and the nominations shall be made as provided by Section 43.78, Subsection 1, Paragraph a".

Referring on then to Section 43.78, this Section states "1. A vacancy on the election ballot may be filled by the political party in whose ticket the vacancy exists, as follows: a. For Senator in the Congress of the United States or any office listed in Section 39.9, by the party's state convention, which may be reconvened by the state party chairperson if the vacancy occurs after the convention has been held or too late to be filled at the time it is held. ..."

Section 43.78 therefore anticipates that the partisan state conventions may occur before the ballot vacancy is a legal fact.

There is very little appellate law on these kinds of issues and therefore one must look to the face of the statutes as a beginning point. Code Section 43.64 is entitled State Canvass Conclusive, and

states "the canvass and certificates by the State Board of Canvassers shall be final as to all candidates named therein." It is obvious then, that there is no finality to the issue of whether or not there is a candidate until after the canvass is concluded.

The mood of the courts regarding these matters is that the statutes be as strictly construed as possible, according the case of *Zellmer v. Smith, Secretary of State*, 206 Iowa 725 (Iowa Supreme Court 1928). While this case is very old, it has certainly not been overruled and probably continues to reflect how the judiciary would view these statutes. While this was kind of an interesting and convoluted case, the dicta of the case indicates that the court expects a certified list of nominees or certificate in case of failure to nominate. While that was certainly dicta in the case, there does not appear to be any reason to think that the court would act otherwise at the present time.

In sum then, it is my opinion a ballot vacancy does not exist until the conclusion of the state canvass. (See Code Section 43.63). It is my further opinion that if a ballot vacancy does not exist, it cannot be filled.

Please let me know if I may be of further assistance in this matter.