

**VOLUME NO. 35****Opinion No. 97**

**LEGISLATURE — Senate, vacancies; LEGISLATURE — Vacancies, conviction of felony; OFFICES AND OFFICERS — Vacancies, conviction of felony; VACANCIES — State senator, conviction of felony. Article IV, Section 4; Article V, Section 10; Constitution of Montana, 1972; Sections 43-215, 59-602, 59-603, 94-1701, 94-1805, 94-2001, 94-2701, R.C.M. 1947.**

- HELD:**
- 1. A vacancy was created in Senator McKeon's office at the time of his conviction,**
  - 2. The proper procedure to declare that a vacancy exists in Senator McKeon's office is for the presiding judge who entered the order of judgment and commitment to the state penitentiary of Senator McKeon to notify the boards of county commissioners from Senatorial District No. 19 of that fact, and**
  - 3. Any exercise by Senator McKeon of his voting privileges in his senatorial capacity after his conviction is a nullity and of no legal effect.**

October 15, 1974

Mr. W. Gordon McOmber  
President of the Senate  
Fairfield, Montana 59436

Dear Senator McOmber:

I am in receipt of your letter requesting my opinion on the applicability of certain provisions of the Constitution of Montana and the Revised Codes of Montana to state Senator John L. McKeon subsequent to his conviction of a felony. For the purpose of this opinion, I have framed your questions in the following manner:

1. Does the office of a state senator become vacant upon his conviction of a felony?
2. If the answer to question one (1) is affirmative, what procedure, if any, is appropriate to declare the office of state senator vacant?
3. If state Senator McKeon casts a vote on the question of whether a special session of the legislature should be held, should this vote be counted?

John L. McKeon, while serving as an incumbent state senator, plead guilty to four felony charges under the provisions of sections 94-1701, 94-1805, 94-2001 and 94-2701, Revised Codes of Montana, 1947.

The law is well settled that a guilty plea, upon acceptance and entry by a court, constitutes a conviction. *State v. Scalise*, 131 Mont. 238, 251, 309 P.2d 1010 (1957).

Article IV, section 4, Constitution of Montana (1972), provides in part:

... no person convicted of a felony shall be eligible to hold office until his final discharge from state supervision.

Furthermore, Article V, section 10, Constitution of Montana (1972), provides in part:

... Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.

The above-quoted Montana constitutional provisions circumscribe the problem without coming to grips with it. However, section 59-602, R.C.M. 1947, does address itself to the very question that you have presented. That section deals, in part, with vacancies occurring in the state senate and specifically provides in part:

An **office becomes vacant** on the happening of either of the following events before the expiration of the term of the incumbent:

8. **His conviction of a felony**, or of any offense involving moral turpitude, or a violation of his official duties. (Emphasis supplied)

*State ex rel. Anderson v. Fousek*, 91 Mont. 448, 8 P.2d 791 (1932), addressed itself to the very question presented here and interpreted the force and

effect of section 511, R.C.M. 1921 (re-enacted as section 59-602, R.C.M. 1947), by stating:

By force of the statute, his office became vacant upon his conviction of the felony.

The vacancy in the state senate occasioned by Senator McKeon's conviction of a felony occurred:

... at the time of the event which is the cause of the vacancy, and no judicial determination that the vacancy has occurred is necessary. **State v. Eaton, Lieutenant Gov.** 114 Mont. 199, 133 P.2d 588 (1943).

Therefore, I would conclude that a vacancy occurred in Senator McKeon's office at the time of his conviction for a felony.

You have next asked what procedures are necessary or appropriate to declare the office that was occupied by Senator McKeon vacant.

Section 59-603, R.C.M. 1947, provides in pertinent part:

Whenever an officer is ... convicted of a felony ..., the ..., judge, ... before whom the proceedings were had must give notice thereof to the officer authorized to fill the vacancy.

When a vacancy occurs in the office of a state senator by reason of his conviction of a felony, the officer authorized to fill that vacancy is the board or boards of county commissioners of the district from which the senator was elected. Section 43-215, R.C.M. 1947, provides:

When a vacancy occurs, in either house of the legislative assembly, the vacancy shall be filled by appointment by the board of county commissioners, or, in the event of a multicounty district, the boards of county commissioners comprising the district sitting as one appointing board. The chairman of the board of county commissioners of the county in which the person resided whose vacancy is to be filled shall call a meeting for the purpose of appointing the member of the legislative assembly, and he shall act as the presiding officer of the meeting.

Senator McKeon was elected from Senatorial District No. 19 which consists of Deer Lodge, Granite and Powell counties and the Bonner-Clinton census enumerator division of Missoula County. The board of county commissioners from these counties are "the officer(s) authorized to fill the vacancy" upon notification by the presiding judge. Therefore, in Senator McKeon's case, I would conclude that notification of the respective boards of county commissioners by The Honorable Peter Meloy, District Judge of the First Judicial District, would be the appropriate procedure to declare the office of Senator McKeon vacant.

You have also asked whether Senator McKeon may vote on the question of whether a special session of the legislature should be held. Since Senator McKeon was convicted prior to the vote on the special session in question, a vacancy existed in his office, and his vote, if any, would have been a nullity.

**THEREFORE, IT IS MY OPINION:**

1. A vacancy was created in Senator McKeon's office at the time of his conviction,
2. The proper procedure to declare that a vacancy exists in Senator McKeon's office is for the presiding judge who entered the order of judgment and commitment to the state penitentiary of Senator McKeon to notify the boards of county commissioners from Senatorial District No. 19 of that fact, and
3. Any exercise by Senator McKeon of his voting privileges in his senatorial capacity after his conviction is a nullity and of no legal effect.

Very truly yours,

**ROBERT L. WOODAHL**  
Attorney General