

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 31

CONSTITUTIONS - Appointment of district judge;
COURTS, DISTRICT - Appointment of district judge;
ELECTIONS - Election of district judge following
appointment and confirmation;
JUDGES - Appointment of district judge;
LEGISLATURE - Senate confirmation of district judge;
MONTANA CODE ANNOTATED - Section 3-1-1014;
MONTANA CONSTITUTION - Article VII, sections 8(1), 8(2);
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen.
No. 52 (1986).

- HELD: 1. An individual nominated by the governor while the state senate is not in session to fill a vacancy in the office of district judge serves until the end of the next legislative session. If confirmed at the next session, he or she continues to serve until the next general election for which the statutory filing deadline has not passed.
2. Where the tenure of an individual nominated by the governor to fill a vacancy in the office of district judge runs into a next term of

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office, this fact does not shorten the length of the next term. At the next general election for district judge a successor is elected to serve the remainder of the unexpired term of office.

21 October 1987

Hon. Jim Waltermire
Secretary of State
Room 225, State Capitol
Helena MT 59620

Dear Mr. Waltermire:

You have asked my opinion concerning the timing of judicial elections for district judges in the third and seventh judicial districts. As you note in your letter, the Governor made nominations to fill the vacancies on those courts in July 1987. The terms of office were due to expire in January 1989, and the positions were therefore scheduled to appear on the ballot in November 1988.

Your first question concerns whether the two positions should appear on the 1988 ballot. There has been no opportunity for the Senate to confirm the nominees. Article VII, section 8 of the Montana Constitution provides for the election and confirmation of nominees to fill vacancies in the office of district court judge.

(1) The governor shall nominate a replacement from nominees selected in the manner provided by law for any vacancy in the office of supreme court justice or district court judge. If the governor fails to nominate within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the nomination. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session shall be effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.

(2) If, at the first election after senate confirmation, and at the election before each succeeding term of office, any candidate other than the incumbent justice or district judge

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files for election to that office, the name of the incumbent shall be placed on the ballot. ... [Emphasis added.]

In 41 Op. Att'y Gen. No. 52 (1986), I concluded that Senate confirmation of a nominee to a district judgeship is a prerequisite to the placement of that office on the ballot for election. Moreover, I concluded that the "first election after senate confirmation" referred to in article VII, section 8(2) of the Montana Constitution, means the next general election after Senate confirmation for which the statutory filing deadline for judicial candidates has not passed.

Consistent with that opinion, the judicial positions in question should not appear on the November 1988 ballot if Senate confirmation of the nominees does not occur before the filing deadline for the 1988 primary election. In that case, the nominations will remain effective as appointments through the end of the next legislative session. At the next session, if the nominations are not confirmed, other nominations must be made. Mont. Const. art. VII, § 8(1). If the nominations are confirmed, section 3-1-1014, MCA, provides that the nominees shall serve "until the next succeeding general election," i.e., the next general election after Senate confirmation for which the statutory filing deadline has not passed.

It is possible that the next legislative session will not convene until 1989. Under those circumstances the individuals nominated in July 1987 would serve through the 1989 legislative session, and, if confirmed, they would continue to serve until the next general election for which the statutory filing deadline has not passed.

Your second question is: What is the length of term for the two offices of district judge when they finally do appear on the ballot? Section 3-1-1014, MCA, provides that where an appointee confirmed by the Senate serves until the next general election, the candidate elected at the next election holds office for the remainder of the unexpired term of office. The phrase "term of office" refers to a fixed and definite period of time. State ex rel. Rusch v. Board of Commissioners, 121 Mont. 162, 166, 191 P.2d 670, 672 (1948). That phrase must not be confused with "tenure of office," which may include a period of time between the expiration of an officer's term and the qualification of his successor. See State ex rel. Olsen v. Swanberg, 130 Mont. 202, 211, 299 P.2d 446, 451 (1956).

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The fixed term of office, in this case six years, is not affected by the holding over of an officer beyond the expiration of the term. The holdover merely shortens the tenure of the succeeding officer, who takes office for the unexpired balance of the new term. Opinion of Justices, 298 A.2d 118, 120 (N.H. 1972); State v. Johnson, 57 N.W.2d 531, 535 (Neb. 1953); Gilson v. Heffernan, 192 A.2d 577, 581 (N.J. 1963); Graham v. Lockhart, 91 P.2d 265, 267 (Ariz. 1939); Holbrook v. Board of Directors, 64 P.2d 430, 431 (Cal. 1937); State v. Amos, 133 So. 623, 625 (Fla. 1931). Accord 63A Am. Jur. 2d Public Officers and Employees § 169 (1984); 67 C.J.S. Officers § 73 (1978). The holdover does not postpone the beginning of the next six-year term of office. See Opinion of Justices, supra, 298 A.2d at 119.

THEREFORE, IT IS MY OPINION:

1. An individual nominated by the governor while the state senate is not in session to fill a vacancy in the office of district judge serves until the end of the next legislative session. If confirmed at the next session, he or she continues to serve until the next general election for which the statutory filing deadline has not passed.
2. Where the tenure of an individual nominated by the governor to fill a vacancy in the office of district judge runs into a next term of office, this fact does not shorten the length of the next term. At the next general election for district judge a successor is elected to serve the remainder of the unexpired term of office.

Very truly yours,

MIKE GREELY
Attorney General