

Opinion No. 74-31

September 12, 1974

OPINION OF: DAVID L. NORVELL, Attorney General

BY: W. Royer, Assistant Attorney General

TO: The Honorable George H. Perez District Judge, Division II Thirteenth Judicial District P.O. Box 130 Bernalillo, New Mexico 87004

QUESTIONS

Does the New Mexico Constitution require the district judge appointed under Chapter 77, Laws of 1974, to stand for election in the 1974 general election?!

CONCLUSION

Yes.

ANALYSIS

{*61}

Chapter 77, Laws of 1974, amended Section 16-3-3.13, NMSA, 1953 Comp. to provide for two district judges in the Thirteenth Judicial District. Section 6 of that act provided a temporary provision for the appointment and term of the judgeship created thereunder. Section 6 reads in part:

"Upon the effective date [July 1, 1974, Section 7] of this act, the governor shall appoint one additional district judge to serve in the thirteenth judicial district until the general election in 1976, and thereafter the office shall be filled by persons elected to such office."

The controlling constitutional provisions are as follows:

N.M. Const., Art. 6, sec. 12:

"(Judicial districts -- Judges, election {*62} and term.) -- The state shall be divided into eight judicial districts and a judge shall be chosen for each district by the qualified electors thereof at the election for representatives in congress. The terms of office of the district judges shall be six years."

N.M. Const., Art. 6, sec. 16:

"(Additional district judges -- Redistricting.) -- The legislature may increase the number of district judges in any judicial district, and they shall be elected as other district judges. At its first session after the publication of the census of the United States in the year nineteen hundred and twenty, and at the first session after each United States census thereafter, the legislature may rearrange the districts of the state, increase the number thereof, and make provision for a district judge for any additional district."

N.M. Const., Art. 20, sec. 3:

"(Date terms of office begin.) -- The term of office of every state, county or district officer, except those elected at the first election held under this constitution, and those elected to fill vacancies, shall commence on the first day of January next after his election."

N.M. Const., Art. 20, sec. 4:

"(Vacancies.) -- If a vacancy occur in the office of district attorney, judge of the Supreme or district court, or county commissioner, the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term."

In **State ex rel Swope v. Mechem**, 58 N.M. 1, 365 P.2d 336 (1954), the New Mexico Supreme Court addressed itself to the nature of an office creating an additional judgeship. The Court concluded that a vacancy was created and that Article XX, Section 4 of the New Mexico Constitution thus conferred the power of appointment upon the governor. The Court rejected the idea that the legislature was invested with the power of appointment. The Court declared:

"With us, the people are the source of government and the power of selecting persons for office belongs to them. Therefore, the power of appointment belongs where the people have chosen to place it by their Constitution or laws. **State ex rel. Swope v. Mechem, supra**, 58 N.M. at 5.

The Court further noted:

"The Constitution says the governor shall fill the vacancy; this necessarily confers a power of appointment on the governor. It is inconceivable that there is a competing power of appointment lodged in the legislature by implication from Art. 6, sec. 16 of the Constitution. The following general statement from the text at 42 Am.Jur., sec. 94, p. 952, seems necessarily true:

'. . . where the Constitution makes the act of appointment an executive one, it cannot be exercised by the legislature, nor can the legislature rob the executive of such power by conferring it on an outside agency of its own choosing.'" **State ex rel. Swope v. Mechem, supra**, 58 N.M. at 6.

In considering the length of the term of judges elected under Article XX, Section 4, the Court concluded that the judge's term would expire on the same date as the other district court judgeships.

In **State ex rel Noble v. Fiorina**, 67 N.M. 366, 355 P.2d 497 (1960), the Court investigated the requirement that a Justice of the Supreme Court run for office "at the next general election" after his appointment. The Court held this to mean the next general election immediately following the appointment. The Court said at 67 N.M. 370:

{*63} ". . . by such construction, the true intent and meaning of our constitutional provision are given full effect, and the rights of the people to choose their own officials at the earliest possible time are preserved."

In **State ex rel. Speer v. Secretary of State, et al.**, No. 9952, decided March 19, 1974, as amended on August 22, 1974, the Supreme Court considered the effect of the 1974 primary election on the two additional district judgeships created by Chapter 301, Laws of 1973. The judgeships involved were to become effective on July 1, 1974. The Court concluded that the "vacancies" did not occur until July 1, 1974 and as such could not be voted upon in the primary election; that the appointees would serve until the 1974 general election, and that the nominees for the position of district judge on the general election ballot would be designated by the political parties.

We conclude from the above authorities that a law establishing an additional judgeship creates a vacancy in that office as of the date the post is to be filled. Once the vacancy occurs, the constitutional provisions become operative. Thus, the appointment is made pursuant to the constitution and, notwithstanding the temporary provisions of the act, the term of office mandated by the constitution is controlling. As such, Article XX, Section 4 of the New Mexico Constitution requires that a successor to such appointed district judge be elected at the general election following the appointment. In the situation you present, it is our opinion that you must stand for election at the general election to be held on November 5, 1974.

It is also our opinion that **Mechem, supra**, mandates that the term of office for the individual elected to such judgeship is to end on the same date as all other district judgeships. In the case you present, the term will end on December 31, 1978.

In conclusion, it is our opinion that **Speer, supra**, mandates that the candidates for the general election to be held on November 5, 1974, shall be chosen by the political parties in the manner prescribed in Section 3-8-8, NMSA, 1953 Comp.