Opinion No. 18-2088

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BY: HARRY L. PATTON, Attorney General

TO: Honorable R. D. Bowers, Attorney at Law, Roswell, New Mexico.

Two Judges to Be Elected for the Fifth Judicial District at the November, 1918, Election.

OPINION

We have your letter of the 18th wherein you ask the opinion of this office as to whether or not there are two judges to be elected for the Fifth Judicial District at the coming election.

We presume there is no controversy and no question but that there is one judge to be elected. The term for which he was elected expires December 31, 1918. The question of the other judge is an entirely different matter, as this office was not filled at the first election and was not filled by election until the year 1914. By the Laws of 1913, Section 2, Chapter 34, an additional judge was authorized for the Fifth Judicial District. This act also provided that the judgeship thereby created should be filled in the manner provided for filling vacancies. Accordingly, the present incumbent of the office was appointed to fill this vacancy until the next general election, which was to be held in 1914; at this time the appointee was duly elected by the people. The question now arises: Was the election of the additional judge, at the election held in 1914, for a full term of six years, or was it only for an unexpired term, which would end at the same time the terms of the other District Judges throughout the State end? If the answer to this question is that the election held in 1914 was for a full term of six years, it is obvious that the term will not expire until 1920, and, consequently, there will be but one judge to be elected at the election to be held this year. On the other hand, if the other view is correct, it is equally obvious that there will be two judges to elect this year.

In the consideration of this question it becomes necessary to turn to various statutory and constitutional provisions. The authority for the increasing of the number of judges in any judicial district is found in Section 15, Article VI. of the Constitution, which reads in part as follows:

"The legislature may increase the number of district judges in any judicial district, and they shall be elected as other district judges."

Pursuant to this prevision, the legislature, in 1913, passed the following law:

"The number of District Judges in the Fifth Judicial District of the State of New Mexico is hereby increased to two (2)."

It is by virtue of these provisions that the office under question is held. It may be noticed the law authorizing the additional judge also provides that the office should be filled in the manner provided for filling vacancies. The manner of filling vacancies is found in Section 4, Article XX, of the Constitution, and is:

"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."

The constitutional provision regarding the filling of vacancies is plain and unambiguous. Applying it to the present case it is seen the additional judge authorized by the Laws of 1913, was properly appointed to hold office until the general election in 1914; that such election only gave the judge so elected authority to hold the office for the remaining portion of the six-year term, which term began at the beginning of the other terms and ended with them. With this view it is apparent the office does expire December 31, 1918, and there are two judges to elect at the coming election; but before it can be logically said this is correct, it is necessary to notice some other phases presented by the question raised.

We think it is well settled, and the act authorizing an additional judge for the Fifth Judicial District, did create a vacancy. In 23 Cyc. 516, it is said:

"It is well settled that a vacancy may occur by reason of the creation of a new judicial office which has never been filled."

Also see cases in the note to the foregoing text. In Knight v. Trigg, 16 Ida. 256, 100 Pac. 1060, the Supreme Court of Idaho said:

"It has been repeatedly held by many courts that the word 'vacancy' as aptly and fitly applies to and describes the condition of a newly created office, and before it is filled by an incumbent, as it does to an office that has been occupied by a duly elected officer who subsequently died or resigned. As said by the Supreme Court of New York: 'A newly created office which is not filled by the tribunal which created it becomes vacant on the instant of its creation.' In re Collins, 16 Misc. Rep. 598, 40 N. Y. Supp. 519. See, also, Walsh v. Commonwealth, 89 Pa. 419, 33 Am. Rep. 771; State v. Maloney, 108 Tenn. 82, 65 W. 871; State v. Co. Court of Boone Co., 50 Mo. 317, 11 Am. Rep. 415; State v. Scott, 36 W. Va. 704, 15 S. E. 405. It is well stated by one court by way of argument and reasoning that 'a new house is as vacant as one tenanted for years which was abandoned yesterday.' Clark v. Irwin, 5 Nev. 130. The latest edition of the Standard Dictionary defines the word 'vacant' as 'devoid of occupants, empty, unfilled, unoccupied, having no incumbent,' and further in the definition it is said: 'That is vacant which is without that which has filled or might be expected to fill it; vacant has extensive reference to rights or possibilities of occupancy.' It is said by one court that 'an existing office without an incumbent is vacant.' State v. Boecker, 56 Mo. 21. See, also, Stocking

v. State, 7 Ind. 326; People v. Rucker, 5 Colo. 464; State v. Blakemore, 104 Mo. 340, 15 S. W. 960."

This case is cited and approved by the Supreme Court of Oklahoma in State v. Breckenridge, 34 Okla. 649, 126 Pac. 806, where a similar question was decided.

These authorities, we think, are sufficient to show that there was really a vacancy and the legislature had the power to fill the office, as in the manner provided for filling vacancies. If this is true, it necessarily follows that the election in 1914 was for the unexpired term.

This view is further evidenced by the fact that the term thus filled was not a new term created by the act of 1913. The term of the District Judges are all fixed by the Constitution. They all begin at the same time and they all end at the same time. The term of office of the District Judge of the Fifth Judicial District was in existence from and after the adoption of the State Constitution. The creation of the additional judge created no new term. It only provided for the filling of a term already in existence, which had been created by the Constitution. The office had been there all the time. It was impossible for the legislature to create a new term for this district for the reason, as we have previously said, the term was already created and in existence by the provisions of the Constitution. The very language of the Constitution shows this. We call attention to Section 16 of Article VI: Does it say the legislature may create a new office -- a new term? We think not. No construction can be given the wording of this section which would have this effect. The language is that the number of judges may be increased. The meaning is plain and is that the number of judges for the term already in existence, as provided by the Constitution, may be increased. We repeat that there was no new term created, and that it was impossible for the legislature to create a new term. Only the number of judges to occupy said office is affected by the Laws of 1913. If our reasoning is correct, then, the term of the judge under question is the same identical term provided for by the Constitution, and which begins and ends at the same time the other term begins and ends, and does expire December 31, 1918.

This being true the term was not shortened by the election held in 1914. Merely because a person is elected to an office, does not necessarily give him the right to hold the office the full term. The time a person may occupy an office may have no bearing upon the length of the term of office. In the present case it is the term of office that is fixed at six years by the Constitution, and not the right of any one incumbent to hold the office for six years. If it were true, that every officer, whose term is fixed by the Constitution, is entitled to hold for the full time allotted, without regard to the time or circumstances under which he took office, we would have ceaseless and never-ending difficulties in holding elections; disorder and confusion would result; special elections would be held every year; and it would take a wise executive to keep track of the various elections to be held throughout the State. In this connection the language of the Supreme Court of Arkansas, in the case of State ex rel. Smith v. Askew, 48 Ark. 82, 2 S. W. 349, seems to us to be very much in point. The court said:

"Now, if every officer whose term is fixed by the constitution is entitled to hold for the quantum of time allotted, without regard to the date when, or the circumstances under which, he took office, then it follows that the people must be harassed with frequent special elections, and doubt and uncertainty must prevail at which time their successors are to be chosen, causing widespread confusion; for it is not alone judicial officers whose terms are assured by constitutional sanction, but also county and township officers, such as circuit clerks, judges of the county court, sheriffs, assessors, coroners, county treasurers, justices of the peace, and constables. Article 7, Secs. 19, 29, 38, 46, 47. So that it would happen upon the erection of every new judicial circuit, and upon the creation of every new county, which must be organized and equipped with officers chosen at a special election, the persons so selected, and their successors for all time, or as long as this constitution lasts, will not go out of office at the same time as other officers of their class, but will hold for the length of time mentioned in the constitution, computing from the date of their commissions or qualifications, -- which has not been the practical construction of the constitution by the several departments of the state government and by the people themselves."

Instead of a course resulting in confusion and disorder, it is the plain and evident policy of the Constitution that a coherent and systematic course be followed. With this in mind it was fixed that the terms of all District Judges should begin and expire concurrently. True, there is no exact language in the Constitution saying this, but they surely must have so intended because the manner of holding elections, the terms of offices and the manner provided for the filling of the same, can indicate and mean but the one thing, and that is that they all do begin and expire at the same time. If the framers of the Constitution had intended to have the terms expire at different times, they could have very easily so provided. As they made no such provisions, we are bound to believe they did not so intend, but that the real purpose was to have all the terms expire at the same time. This view is supported by the fact that when they wanted the terms of judicial officers to expire at different times they arranged accordingly. The provisions made for the terms of the Justices of the Supreme Court indicate this. We deem the only correct interpretation is, that the makers of the Constitution intended the terms of all the District Judges to expire at the same time; that they intended the same policy to apply to the judges authorized by Section 16, Article VI. is evidenced by the language of the Constitution itself. The statement -- "shall be elected as other district judges" means to us, that it was intended that the judges so authorized were to be governed by the same laws and policies provided for other judges. If we are correct in this, then, to hold that the judge elected in 1914 could hold office for two years longer than the other judges, would be to adopt a ruling clearly repugnant to this manifest meaning of the Constitution. On the other hand, as we have decided the term itself is not shortened, to hold that the right of the present occupant expires at the same time the terms of the other judges expire violates no Constitutional requirement and is in accord with the policy manifested by a reasonable interpretation of the various provisions.

We think the conclusions herein reached are supported by the great weight of authority. In the case of State ex rel, Hubbard v. Gorin, 2 Nev. 276, the Supreme Court of the State of Nevada said:

"Section five, which declares that District Judges elected, etc., 'shall hold office for the term of four years, simply means that four years shall be the regular full term of the district judgeship of this State. By the literal language of the Constitution, it is made incumbent upon every person elected to the judgeship to continue in the office for the period of four years. It will certainly not be claimed that any such construction is to be placed upon the clause in question, and the only other which can be placed upon it, is that it fixes the term of the office, and not of the officers. Nor does the election of a person to the office of judge necessarily fix the beginning of a four years term; for that may be, by the section quoted concerning the filling of vacancies, an election for a fractional part of a term. And it is from the reason which gave rise to this latter section, that we find a solution of this case. What, then, was the object sought to be accomplished by the provision limiting the election of judge, when a vacancy has occurred, to the residue of the unexpired term? A vacancy having happened, why not at the first opportunity allow the people to fill the office for the full term of four years? Manifestly, we think, because it was deemed desirable to have the election of these judges occur at the same time throughout the State, to prevent the expiration of one term at one time and another at another time. The beginning of the first term of office is definitely fixed in the Constitution, and it is provided that general elections shall recur every four years thereafter. Then it is evident that the term of office of all judicial districts formed by the Constitution itself, must inevitably and always begin and expire at the same election. This result cannot possibly be avoided. The consequence or result naturally and necessarily flowing from any clause or section of the Constitution, it is fair to presume, was intended by the framers of that instrument. Can any other conclusion be arrived at, than that the thing so completely accomplished was intended? Certainly not. And what was intended, respecting the judicial districts created by the Constitution itself, may with equal reason be said to have been intended respecting all districts afterwards created; the section limiting the election of a person to a vacant term having reference to all terms, whether in districts created by the Constitution or otherwise."

In the case of State v. Hicks, 36 La. Ann. 836, the Louisiana court held:

"It is, therefore, clear to our minds that in creating an additional judge under the provisions of Article 110, the legislature is powerless to fix the expiration of the term of the office at a time other than that fixed by the Constitution for the expiration of the term of office of all the elective district judges in the State."

In State v. Burkhead, 187 Mo. 38, 85 S. W. 901, will be found a very elaborate and extensive discussion of all the questions presented in your letter. We regret that space will not permit us to quote the opinion of the Missouri case in full, for the reasoning therein, we think, is decisive of everything involved in the present case. It discusses all the authorities both for and against the rule announced and arrives at what we consider is the only logical and reasonable conclusion. This case was cited and approved in a later Missouri case, that of Major v. Amick, 247 Mo. 271, 152 S. W. 591.

The foregoing authorities, we think, are sufficient to show that there are two judges to be elected in the Fifth Judicial District at the coming election, and such is our opinion.