Geoffrey S. Connor
ASSISTANT SECRETARY OF STATE
State of Texas

RQ-0488-JC

January 4, 2002

FILE # ML-42359-02
I.D. # 42359

The Honorable John Cornyn
Texas Attorney General
209 W. 14th Street
Austin, Texas 78701

Re: Request for Opinion on whether HJR 62, a constitutional amendment in 1999, which removed the staggered terms for certain county offices from Article XVI, Section 65, has substantively affected newly-created county offices.

Dear General Cornyn:

I respectfully request your opinion on an urgent issue related to Article XVI, Section 65 of the Texas Constitution.

Prior to the constitutional amendment election of 1999, Article XVI, Section 65 provided for an election schedule to stagger the terms of the listed district and county offices. That provision read:

> "The following officers elected at the General Election in November, 1954, and thereafter shall serve for the full terms provided in this Constitution: (a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (I) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.
>
> Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for full terms provided in this Constitution."

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Tex. Const. art. XVI, § 65.

Pursuant to this staggered term schedule, all the listed offices are regularly up for election every four years. The first group of listed offices is on the ballot in November of even numbered years along with the office of governor and the second group of listed offices is on the ballot in November of even numbered years along with the office of president. The language setting out the staggering schedule was removed in the "clean up" amendment, House Joint Resolution 62 ("HJR 62"). The amendment became effective on the date of the canvass, November 29, 1999. Tex. Const. art. XVI, § 65; see copy of HJR 62 (1999) attached.

The 1999 amendment was considered nonsubstantive. The House Bill Analysis of the Committee Report stated: "SECTION 55. Amends Section 65, Article XVI, Texas Constitution, to make nonsubstantive changes." House Bill Analysis, HJR 62 Committee Report (Substituted), April 23, 1999. As stated in the Senate Research Center analysis of the engrossed version of HJR 62: "There are several simplifying and clarifying revisions that can be made without affecting any substantive provisions." The specific analysis of Section 53 of the Joint Resolution stated: "SECTION 53. Amends Section 65, Article XVI, Texas Constitution, to provide that this section applies to certain offices. Deletes text regarding certain precincts, officer terms, and officer elections. Makes conforming and nonsubstantive changes." Senate Research Center analysis of HJR 62 Engrossed (emphasis added). The House Research Organization's analysis stated (at the analysis of the "Supporters" viewpoint): "It would not make a substantive change but merely update the fundamental law of Texas." House Research Organization analysis of HJR 62, May 6, 1999 (emphasis added). The Secretary of State is also responsible for publishing an explanatory statement of each amendment after the statement has been approved by the Attorney General. (Article XVII, Section 1, Texas Constitution) In 1999, the explanatory statement appeared in each newspaper as follows:

> ***HJR 62*** *– HJR 62 proposes a constitutional amendment that would simplify and clarify the language of the Texas Constitution. The amendment would make no substantive changes, but would eliminate duplicative, expired, out of date, and ineffective terms.*

The rationale for removing the staggering procedures appeared to be that because the election schedule was in place, it was no longer necessary to state the schedule expressly. Also, there did not appear to be any intent to remove the authority to set the terms and elections of the affected county offices from the Texas Legislature to the county commissioners courts. Unfortunately, the resulting silence has raised questions about newly-created district and county offices.

Before the 1999 amendment, it was clear that if a new county or district office listed in the Article XVI, Sec 65 schedule was created in time to place the office on the ballot in an even numbered year, the new office followed the constitutional schedule. Section 202.003 of the Texas Election Code sets out the dates for offices to appear on the general election ballot. If the even-numbered year was a year during which that office was not regularly scheduled for a full term, it appeared on the ballot as, and the officer was elected for, the remainder of the unexpired term. For example, when the Legislature created a new county court at law, the newly created county court at law appeared on the ballot for a full term with every other county court at law in the state. Accordingly, if the legislature created a new county court at law during the 76th Session in 1999, that new county court would have appeared on the 2000 ballot for a two-year unexpired term. The office would again appear on the ballot two years later in 2002 for a full term, pursuant to the constitutional schedule.

The Legislature also creates office of District Attorney and Criminal District Attorney. These offices were listed in Article XVI, Section 65 prior to the amendment. If the Legislature, for example, creates a new Criminal District Attorney effective September 1, 2003, that office would appear on the ballot in 2004. Prior to the amendment, that office would be put on the ballot for an unexpired term since all Criminal District Attorneys run in the same year as the office of Governor. (Please note, there was a constitutional amendment voted on in 1989, SJR 71 which allowed the District Attorney of the 268th Judicial District to run in the manner provided for Criminal District Attorneys. As a result of that amendment, this is the only District Attorney that is currently running with Criminal District Attorneys.)

However, under current law, as amended, there is no basis on the face of the law for applying the staggered schedule to newly-created offices which were listed in old Article XVI, Sec.65. Once an office is created and it is put on the ballot for the first election, the question is "Does the county or state have the authority to put the office on the ballot for any other term other than the constitutional four-year term?" Prior to the amendment, there was a constitutional provision that authorized a shortening of the full four-year term in order to keep the offices on a staggered schedule. This consequence conflicts with the Legislature's stated purpose of the amendment, which was intended to be a nonsubstantive change.

It appears that the offices that were listed in Article XVI, Section 65 will run on a schedule much like the District Judges, which was not one of the listed offices. After the creation of the office of District Judge, the first general election held after the creation is the election that sets the election cycle for that office. As a result, we have the office of District Judge on every general election ballot, depending on when the office was created. Our office's primary concern is the correct interpretation for purposes of advising candidates and the officials conducting elections. We also note that clarity on this issue is essential for assessing the effects of the "resign to run" provision of Article XVI, Section 65.

Because this question raises such broad implications for the terms of elected officers across the state, we are requesting an opinion from your office.

Thank you in advance for your attention and advice in this matter.

Very truly yours,

Geoffrey S. Connor

Enclosure: House Joint Resolution 62 (1999)

cc: The Honorable David Swinford

GC:MN:MB:lc