

THE SENATE OF THE STATE OF TEXAS



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July 2, 2002

The Honorable John Cornyn  
Attorney General  
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Austin, Texas 78711-2548

Dear General Cornyn:

As chairman of the Senate Committee on Nominations, I request your opinion in regard to an issue that arises under Article III, Section 18, of the Texas Constitution. That section provides, in applicable part: "No Senator or Representative shall, during the term for which he was elected, be eligible to . . . any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature." Previous attorneys general have determined that any appointment that requires Senate confirmation is an appointment made, in whole or in part, by a branch of the Legislature. Op. Tex. Att'y Gen. Nos. C-373 (1965); O-1092 (1939).

The 1965 opinion, which appears to be the most recent opinion on the subject, relies in large part on analogy to Article III, Section 19, which provides that a person holding one of several listed offices is ineligible to the Legislature "during the term for which he is elected or appointed." Two opinions of the Texas Supreme Court, *Kirk v. Gordon*, 376 S.W.2d 560 (Tex. 1964), and *Lee v. Daniels*, 377 S.W.2d 618 (Tex. 1964), had determined that resignation from the original office did not cure the officeholder's ineligibility for election to the Legislature. However, both of those cases were overruled by the Texas Supreme Court in *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992). In *Wentworth*, a case with eight written opinions among the nine justices, five justices agreed that *Kirk v. Gordon* and *Lee v. Daniels* should be overruled and that an officeholder who resigns the office is not prohibited by Article III, Section 19, from serving in the Legislature during the time when he would otherwise have remained in the former office. Although a majority of the court did not address the question of when such a resignation must occur in order to cure the ineligibility, the Attorney General determined that the officeholder must resign before filing for the legislative office. Tex. Att'y Gen. LO-95-069.

Although *Wentworth* presented a sympathetic set of facts (a sitting legislator, elected three times

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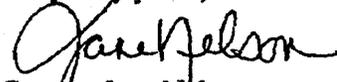
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to the House of Representatives, was seeking to overcome ineligibility to the Senate based on a few days' overlap of the term of appointive office long ago resigned), it is reasonably clear that the legal underpinning for the opinions of earlier attorneys general no longer exists. Accordingly, it is timely to revisit the issue. Please provide me with your opinion in regard to the following questions:

- (1) Under Article III, Section 18, of the Texas Constitution, is a member of the Legislature who resigns his or her legislative office ineligible, during the time when he or she would have otherwise remained in office, for a gubernatorial appointment that is subject to Senate confirmation?
- (2) If resignation would cure the legislator's ineligibility, when must that resignation occur in relation to appointment?

Very truly yours,



Senator Jane Nelson