

RECEIVED

SEP 18 2009

OPINION COMMITTEE



The State of Texas  
House of Representatives

BURT R. SOLOMONS

District 65

Capitol Office:  
P.O. Box 2910  
Austin, TX 78768-2910  
512-463-0478

District Office:  
1029 Rosemeade Pkwy., Suite 108  
Carrollton, TX 75007

Thursday, September 17, 2009  
The Honorable Greg Abbott  
Attorney General for the State of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

FILE # ML 46172 09  
I.D. # 46172

RQ-0826-GA

**Re: Request for Opinion – Requirements for Appointing a District Judge to the 431st District Court created by 81R HB 4833.**

Dear Attorney General Abbott:

I respectfully request an opinion on the timeframe in which the Governor of the State of Texas must appoint a Judge to commence service on the effective date of the newly created 431st District Court, as created by 81R HB 4833, and the length of any appointed service for such Justice.

**Factual Background**

During the 81st Legislative Session, the Texas Legislature passed HB 4833 which, among other things, created the 431st District Court in Denton County, Texas on January 1, 2011 in Section 2 of the bill which has an effective date of January 1, 2011.

**Discussion**

The Texas Constitution requires the State to be divided into districts, and each district have one or more judge “by law or this Constitution” and further states that these judges “shall be elected by the qualified voters at a General Election....and hold office for four years.”<sup>2</sup> The Constitution goes on to state that if a vacancy occurs in specific courts including district courts, that the vacancy shall be filled “by the Governor until the next succeeding General Election for state officers, and at that election the voters shall fill the vacancy for the unexpired term.”<sup>3</sup>

The Texas Legislature has clarified the Constitution on this matter in Texas Election Code, § 201.027 that a vacancy for a new office occurs “on the effective date of the Act of the Legislature creating the office or on the date the order creating the office is adopted.” In addition to the Election Code, Texas Government Code, §24.311 states, “When a judicial district is created by amendment to this subchapter, the governor shall appoint a qualified person to the office of district judge. The appointee serves until the next succeeding general election.”

<sup>1</sup> Texas Constitution, Article 5, Section 7.

<sup>2</sup> *Ibid.*

<sup>3</sup> Texas Constitution, Article 5, Section 28.

On October 25, 1973, Texas Attorney General John Hill opined<sup>4</sup> that a newly created judicial office “*should* be filled by appointment by the Governor, which appointment would only be effective at the time of the above-stated effective date of the office (emphasis added).” General Hill went on to state that “...the proper time for making such appointments, prospective appointments to these judicial offices can be announced, but they cannot be effectively made until the offices exist, which will occur at the time these office (sic) become effective on January 1 and January 20, 1975, respectively. Accordingly, your official appointments cannot be made until that time.”

In 2007, Attorney General Greg Abbott was more forceful when he opined “a vacancy currently exists in each court such that the Governor is required to make an appointment to each court” which are required to be fully funded<sup>5</sup>.

During the 81st Legislative Session, the Texas Legislature passed HB 4833 which, among other things, created the 431st District Court in Denton County, Texas on January 1, 2011 in Section 2 of the bill which has an effective date of January 1, 2011. The 431st District Court shall be created on January 1, 2011, effectually creating a vacancy in the position of district judge which the Governor could fill under Texas Constitutional provisions.

Thus it would appear the Texas Constitution provides for the appointment of a District Judge in a new created court until candidates can file for the next general election. However, it is unclear if there is a requirement that the Governor perform such an appointment within a certain time frame and the impact that any announcement of an appointment to commence on the effective date of the court has on the county’s funding of said court.

District judges in the state of Texas run through the political party primary process and thus, must meet the filing deadlines required by the Election Code for the primary race. In their letter to the Department of Justice<sup>6</sup> for preclearance of 81R HB 4833, the Secretary of State indicated that the election of a Judge for District Court 431 would be eligible for the November, 2012 General Election.

### **Questions of Law**

- 1) Is there any requirement that the Governor appoints a judge or is the constitution permissive?
- 2) What is the time frame for the Governor to make such an appointment and is there a deadline for such an appointment?
- 3) Is it a requirement that a Governor make an appointment before the office is available for a general election ballot? In other words, if a Governor never makes an appointment, is the District Judge position vacant permanently?
- 4) If a Governor makes an announcement of an appointment which becomes effective at a later date,

---

4 Attorney General Opinion H-134, October 25, 1973

5 Attorney General Opinion GA-0578, October 31, 2007

6 Letter from Ann McGechan, Director of Elections for the Texas Secretary of State to Mr. Christopher Coates, Chief of the Voting Rights Section, United States Department of Justice, July 31, 2009

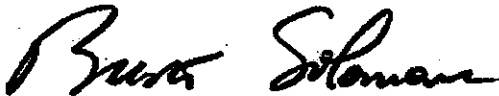
must the county provide offices and staff in expectation that the Justice will be seated on the first day the court is effective and may provide over a docket on that first day.

5) If the Governor makes an "announcement" of an appointment of a District Judge for District Court 431 prior to January 1, 2011 to commence on that date, when is that Judge sworn in?

6) If a Judge is appointed for the 431st District Court on January 1, 2011, what would be the last day of their term of office?

Thank you for your consideration of this important matter.

Sincerely,



Burt Solomons  
Chairman  
House Committee on State Affairs

brs/bb

Enc.

Interoffice mail

cc: Governor Rick Perry  
Lt. Governor David Dewhurst  
Speaker Joe Straus  
Senator Chris Harris  
Senator Jane Nelson  
Senator Jeff Wentworth  
Representative Myra Crownover  
Representative Todd Hunter  
Representative Tan Parker  
Judge Jake Collier  
Judge Lee Gabriel  
Judge David Garcia  
Judge Bruce McFarling  
Judge Carmen Rivera-Worley  
Judge Doug Robinson  
Judge L. Dee Shipman  
Judge Roger Jeffery Walker