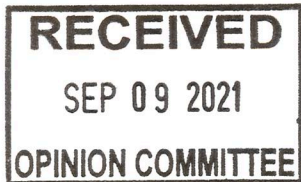


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September 7, 2021

Honorable Ken Paxton  
Attorney General  
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P.O. Box 12548  
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RQ-0430-KP  
FILE# ML-49014-21  
I.D.# 49014

Re: Interpretation of Section 1-a of Article 5 of the Texas Constitution relating to age qualifications for a Texas Judge to be placed on the Ballot

Dear Attorney General Paxton,

I respectfully request an opinion relating to the question below. The question relates to the 2022 election.

*Question : Can a District judge who runs for re-election in November of 2022 when the judge is 74 years of age on the date of the election (the second Tuesday of November) but turns 75 on December 22, 2022 serve the four year term he was elected to?*

For over a century there was no age qualification for judges in Texas.

In 1965 the Texas Legislature amended Section 1-a of Article 5. JUDICIAL DEPARTMENT of the Texas Constitution, to provide for an age qualification. In doing so the legislature provided for a "drop dead" age qualification of 75. The provision provided as follows:

*The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the legislature may prescribe, ...*

While the provision was flawed because it did not specifically prevent a candidate who was 75 from running for district judge, the effect of this provision was that a district judge was forced to vacate the Judge's office in the middle of the judge's term *after* having been elected by the voters to serve a full term.

In 2007, voters passed a constitutional amendment intended to prevent elected judges from being turned out of their office before the end of the elected term. This amendment added the eight words underlined below while deleting the one word in parentheses:

*The office of every such Justice and Judge shall become vacant on the expiration of the term during which (when) the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the legislature may prescribe, except that if a Justice or Judge elected to serve or fill the remainder of a six-year term reaches the age of seventy-five (75) years during the first four years of the term, the office of that Justice or Judge shall become vacant on December 31 of the fourth year of the term to which the Justice or Judge was elected.*

The effect of the amendment was to change the age of 75 years from a “drop-dead” retirement age and allow judges who had been duly elected by the voters to continue working and complete their elected terms in office.

The amendment allows judges, depending on their date of birth, to serve until age 79 if voters chose to elect a judge who was 74 years old.

The provision lacks clarity when it refers to the expiration of the term during which the incumbent reaches the age of 75...”. In this case there are two terms to consider, the term to which the judge was elected to four years prior (2018) and the term to which the judge was elected to in November of 2022.

The provision carries forward the lack of clarity from the 1965 amendment. Under both provisions, the plain language does not prevent a person that is 75 years of age from running for office and serving indefinitely. Under the 2007 amendment, the plain language of the constitutional provision, provides a person who is not an “incumbent”, otherwise qualified to serve, could run for election when 74 years old and serve as district judge, because the judge would not turn 75 during the term to which the judge was ELECTED.

When you look at the language as it applies to six year term Judges it is clear that the “term” referred to is the term to which the judge was “elected” and not the term that expires. The language specifically states:

*...that if a Justice or Judge elected to serve or fill the remainder of a six-year term reaches the age of seventy-five (75) years during the first four years of the term, the office of that Justice or Judge shall become vacant on December 31 of the fourth year of the term to which the Justice or Judge was elected.*

There would be no reason to have a different standard for a judge elected to a four-year term compared to that of a judge elected to a six-year term.

Additionally, where the amendment states the office “becomes vacant on the expiration of the term,” that statement is true of every term of every elected official, regardless of their age. Every elected official’s term becomes vacant at the expiration of the term (December 31<sup>st</sup>), requiring the official to be sworn into a new term (which begins the following day, January 1st).

No legal authority interpreting the 2007 amendment has been located. The case of Hatten v. Rains, 854 F 2d 687, United States Court of Appeals, Fifth Circuit, 1988, is distinguished from the situation presented in this question. Hatten dealt with Art. V, Section 1-a, Texas Constitution as it existed prior to its 2007 amendment. In 1988, arguably, Art. V, Section 1-a, Texas Constitution,

prior to the 2007 amendment required District Judges to vacate their term upon reaching age 75. Art. V, Section 1-a, Texas Constitution does not require vacating the term at age 75. Under the Constitution as amended, a District Judge could serve through age 78 before his term was vacated, depending upon his date of birth.

The Texas Constitution simply does not prevent a 74-year-old district judge from running for re-election in the 2022 election who would not turn 75 during the term beginning January 1, 2023, and ending December 31, 2026.

The Supreme Court of Texas has held that District Judges over the age of 75 are eligible for assignment to active duty. *Werlein v. Calvert*, 460SW2d 398,401-02 (Tex. 1970).

A retired District Judge over the age of 75 may be assigned to serve as an active judge.

Allowing a judge to run for the office of District Judge would not violate the Texas Constitution. It would give the voters the right to select their District Judge.

On another note, because this opinion may effect an upcoming election a timely response could be very helpful. It would give possible candidates guidance before early December (which is the beginning date candidates can file for the office).

Sincerely,

A handwritten signature in blue ink, appearing to read 'P. Guenther', with a stylized flourish at the end.

Pam Guenther