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January 31, 1990

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The Honorable William Forbes
Kanawha County Prosecuting Attorney
Kanawha County Courthouse
Charleston, West Virginia 25301

Dear Prosecutor Forbes:

We are in receipt of your letter of January 31, 1990, requesting our opinion concerning the appropriate procedure for filling an election vacancy in the Thirteenth Judicial District of Kanawha County. More precisely, you have asked our opinion regarding the vacancy created by the former Circuit Judge, Honorable Margaret D. Workman, who assumed her duties as a Justice of the West Virginia Supreme Court of Appeals on January 1, 1989.

Former Circuit Judge Workman was elected in November, 1984, for an eight (8)-year term as Circuit Judge of Kanawha County. Her term of office would have expired December 31, 1992. Subsequent to Justice Workman vacating the office of circuit judge, Arch A. Moore, Jr., then Governor of West Virginia, appointed Paul Zakaib Judge of the Circuit Court of Kanawha County to fill the vacancy.

In connection with this request, we have reviewed the relevant portions of Chapter 3, Article 10 of the West Virginia Code, as amended, and Article VIII, Section 7 of the Constitution of West Virginia.

West Virginia Code § 3-10-3 (1987) provides in pertinent part:

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Any vacancy occurring in the office of secretary of state, auditor, treasurer, attorney general, commissioner of agriculture, United States senator, judge of the supreme court of appeals, or in any office created or made elective, to be filled by the voters of the entire state, or judge of a circuit court, a common pleas, intermediate, criminal or other inferior court, shall be filled by the governor of the state by appointment. If the unexpired term of a judge of the supreme court of appeals, or a judge of the circuit court, a common pleas, intermediate, criminal or other inferior court, be for less than two years; or if the unexpired term of any other office named in this section be for a period of less than two years and six months, the appointment to fill the vacancy shall be for the unexpired term. If the unexpired term of any office be for a longer period than above specified, the appointment shall be until the next general election and until the election and qualification of a successor to the person appointed, at which election the vacancy shall be filled by election for the unexpired term. . . .

Thus, in the instant case, Judge Zakaib was appointed until the next general election which is to be held in November, 1990.

The controlling language governing the filling of vacancies in the office of a circuit judge in a single county circuit is contained in the 1974 Judicial Reorganization Amendment to the Constitution of West Virginia. W. Va. Const. Article VIII, § 7 reads in part:

If from any cause a vacancy shall occur in the office of a justice of the supreme court of appeals or a judge of a circuit court, the governor shall issue a directive of election to fill such vacancy in the manner prescribed by law for electing a justice or judge of the court in which the vacancy exists, and the justice or judge shall be elected for the unexpired term; and in the meantime, the governor shall fill such vacancy by appointment until a justice or judge shall be elected and qualified. If the unexpired term be less than two years, or such additional period, not exceeding a total of three years, as may be prescribed by law, the governor shall

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fill such vacancy by appointment for the unexpired term.
(Emphasis added.)

At issue is whether the voters will be given the opportunity to nominate through a primary election a candidate for the remainder of Justice Workman's unexpired term.

West Virginia Code § 3-10-3 (1987) provides in part that:

Candidates to fill any vacancy in any office named in this section shall be nominated in the manner provided in this article for nominating candidates to fill a vacancy in the office of governor, to be voted for at a general election, but, in selecting candidates for the office of judge to serve in a single county, the county executive committee of the county shall perform the duties relating thereto, and, in selecting candidates for the office of judge of a circuit court in circuits embracing more than one county, the county executive committees of the counties concerned shall resolve themselves into a judicial circuit committee for discharge of the duties relating to such nominations.

This portion of W. Va. Code § 3-10-3 indicates that candidates to fill a vacancy in the office of circuit judge are to be nominated in the same manner provided in the Code for filling a vacancy in the office of Governor. The manner for filling a gubernatorial vacancy is found in W. Va. Code § 3-10-2, which is essentially the same as Section 3. West Virginia Code § 3-10-2, in pertinent part, states:

Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy. . . .

If the vacancy is to be filled at a general election and shall occur before the primary election to nominate candidates to be voted for at such general election, candidates to fill the vacancy shall be nominated at such primary election in accordance with the time requirements and the provisions and procedures prescribed in article five [§ 3-5-1 et seq.] of this chapter. When nominations to fill such vacancy cannot be so accomplished at such primary election, and in all cases wherein the vacancy

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is to be filled at a special election, candidates to be voted for at such general or special elections shall be nominated by a state convention to be called, convened and held under the resolutions, rules and regulations of the political party executive committees of the state. . . .

The contention that the Executive Committee should nominate the judicial candidate ignores the mandate of the 1974 Judicial Reorganization Constitutional Amendment and is based upon an incomplete reading of the election laws contained in W. Va. Code, Chapter 3, Article 10, Sections 2 and 3.

An interpretation of these provisions can be found in an Official Opinion of the Attorney General dated July 2, 1964, issued by C. Donald Robertson in response to a request made by Circuit Judge Rudolph J. Murensky. 51 Op. Att'y Gen. 3 (1964). The Murensky factual situation differs from the instant case in that the judicial vacancy, there, occurred after the primary election. Furthermore, the Murensky opinion was issued prior to the adoption of the 1974 Judicial Reorganization Amendment to the Constitution of West Virginia.

In the instant case, since the vacancy occurred prior to the primary election, W. Va. Code, Chapter 3, Article 10, Sections 2 and 3, mandate that candidates be chosen by the electorate in the primary. A different interpretation would make the language in W. Va. Code, Chapter 3, Article 10, Sections 2 and 3 meaningless.

Very truly yours,


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KATHERINE A. SCHULTZ
ASSISTANT ATTORNEY GENERAL

RWT/KAS/dgc