



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

September 27, 1972

Honorable John F. Onion, Jr.
Presiding Judge
Court of Criminal Appeals
Box 12308, Capitol Station
Austin, Texas 78711

Opinion No. M-1225

Re: Construction of and validity
of Article 1811e, Vernon's
Civil Statutes.

Dear Judge Onion:

Your request for an opinion reads in part as follows:

"In my administrative capacity as Presiding Judge of the Court of Criminal Appeals, I would like to submit to you the following question and request your opinion so that the State Comptroller's office will have some guidance in the matter involved.

"1. May an active appellate or district judge be designated and appointed under the provisions of Article 1811e, V.A.C.S., (As amended Acts 1971, 62nd Leg. R.S., p. 1646, Ch. 462; Acts 1971, 62nd Leg., 1st C.S., p. 14, Ch. 2) to sit as a Commissioner of the Court of Criminal Appeals for a designated period of time or for a particular case or cases and be compensated without violating Article 16, Secs. 12, 33 and 40, Texas Constitution or any other constitutional or statutory provision of the law?"

Senate Bill 529, Acts 62nd Leg., R.S. 1971, Ch. 462, p. 1646 (Article 1811e, Vernon's Civil Statutes), provides in part:

"Section 1. (a) The presiding judge of the Court of Criminal Appeals may, with the concurrence of a majority of the judges of the Court of Criminal Appeals, designate and appoint a retired appellate judge or district judge who has consented to be subject to appointment, or an active appellate judge or district judge, to sit as a commissioner

of the Court of Criminal Appeals, with the designated judge's consent. The presiding judge of the Court of Criminal Appeals may designate and appoint as many commissioners as he deems necessary to aid and assist the court in disposing of the business before it."

It is well settled that the Legislature is authorized to place added duties on members of the Judiciary without creating an office in violation of Sections 12, 33 and 40 of Article XVI of the Constitution of Texas. Eucaline Medicine Co. v. Standard Inv. Co., 25 S.W.2d 259, 261 (Tex.Civ.App. 1930, error ref.); Jones v. Alexander, 122 Tex. 328, 59 S.W.2d 1080 (1933); Jordan v. Crudgington, 149 Tex. 237, 231 S.W.2d 641 (Tex.Sup. 1950); Attorney General's Opinion M-305 (1968). It was held in Jones v. Alexander, supra:

". . . Under a provision of the Constitution then existing, substantially identical with that provision we now have under consideration, the Supreme Court in the case of Powell v. Wilson, 16 Tex. 59, said: 'But does it follow that the same, or at least some of the same duties may not be attached to two offices, to be exercised by the incumbents concurrently? or that the duties of an office may not be to act as substitute for another? We think not. * * * It does not constitute them incumbents of more offices than one; or subject them to the charge of holding or exercising two or more offices at the same time.' See also, Kirk v. Murphy, 16 Tex. 654, 67 Am.Dec. 640; Gaal v. Townsend, 77 Tex. 464, 14 S.W. 365.

"Unless the duties placed upon the district judges by virtue of this act create more offices than one, or subject them to the rule that they cannot hold two or more offices at the same time, or that the additional duties imposed are incompatible with their other duties conferred upon them by law, then the act cannot be condemned. The duties assigned by this act partake of the same general characteristics of other duties imposed by law. The duties assigned are made coterminous, in that the district judge ceases to sit as a member of the juvenile board when his term of office expires."

In Werlein v. Calvert, 460 S.W.2d 398, 401 (Tex.Sup. 1970), it was held:

". . . A retired judge assigned to active duty is authorized to exercise the powers of an office while serving on assignment. He does not by virtue of the assignment, however, hold an office that could possibly 'become vacant' upon termination of his powers either by death or operation of law. See Pickens v. Johnson, 42 Cal.2d 399, 267 P.2d 801." (Emphasis added.)

In construing the provisions of Article 1811a and Article 1811c, V.C.S., the Court of Criminal Appeals held in Ex Parte Sparks, 277 S.W.2d 916 (Tex.Crim. 1955) that:

"In no event does the commissioner have a voice in the approval or rejection of his opinion; he acts only in an advisory capacity, as an aid to the court. He performs no judicial function in so far as a decision of the case is concerned.

". . .

"The conclusion is reached that Commissioner Dice, in the preparation of the opinion in this case, did not perform a judicial function."

Since the Commissioner does not perform a judicial function, it is our opinion that no incompatibility exists between the constitutional duties of the appointee and the duties that may be imposed upon him pursuant to the provisions of Article 1811e, V.C.S.

In construing the provisions of Article 200a, Vernon's Civil Statutes, it was held in Attorney General's Opinion M-305, supra:

"If the foregoing amendment to Section 2 of Article 200a has the effect of now creating an 'office' as distinguished from constituting 'super-added duties that the legislature was authorized to require district judges to perform', Section 40 of Article XVI of the Constitution of Texas would prohibit a district judge from holding the additional office. We do not believe the legislature had any such intention. Likewise, Section 30 of Article XVI would limit the term of office to two years only, contrary to the four year term provided by the legislature. It is our opinion, however,

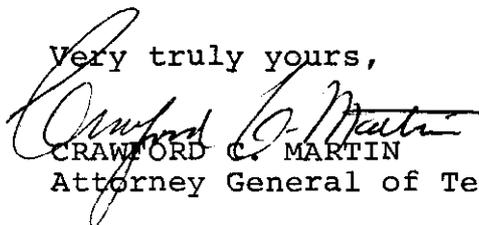
that since the legislature did not change by the amendatory language the duties of the presiding judge of the administrative district, the construction placed on Section 2 by the Court in Eucaline Medicine Co. vs. Standard Inv. Co., supra, remains equally applicable to Section 2, as amended. Therefore, no 'office' within the meaning of Sections 30 and 40 of Article XVI of the Constitution of Texas was created. Eucaline Medicine Co. vs. Standard Inv. Co., supra; cf. Aldine Independent School District vs. Standley, 154 Tex. 547, 280 S.W.2d 578 (1955). We therefore are of the opinion that the legislature merely placed added duties on regularly elected district judges pursuant to provisions of Section 7 of Article V, Constitution of Texas, and provided for the 'reassignment to active duty where and when needed' of voluntarily retired district judges pursuant to provisions of Section 1a of Article V, Constitution of Texas."

In view of the foregoing it is our opinion that the provisions of Senate Bill 529, Acts 62nd Leg., R.S. 1971, Ch. 462, p. 1646 (Article 1811e, Vernon's Civil Statutes), do not create an additional office, but merely place additional duties on members of the Judiciary when they are assigned under the provisions of Article 1811e, Vernon's Civil Statutes. Therefore, an active appellate or district judge may be designated and appointed to sit as a commissioner of the Court of Criminal Appeals without violating Sections 12, 33 or 40 of Article XVI of the Constitution of Texas.

S U M M A R Y

Senate Bill 529, Acts 62nd Leg., R.S. 1971, Ch. 462, p. 1646 (Article 1811e, Vernon's Civil Statutes), authorizing the designation and appointment of a retired appellate or district judge or an active appellate judge or district judge to sit as a commissioner of the Court of Criminal Appeals, does not create an "office", but merely provides additional duties on members of the Judiciary and is therefore valid. The appointee may be compensated.

Very truly yours,


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