

CONSTITUTION - Rules of construction for constitutional language;

ELECTIONS - Meaning of the phrase “current term” in Article IV, section 8;

ELECTIONS - Term limits for statewide elected officials and legislators;

LEGISLATURE - Term limits for legislators;

MONTANA CODE ANNOTATED - Sections 1-2-107, 1-3-223, -232, 2-16-214, 13-10-201, (8), (a), (b), (c);

MONTANA CONSTITUTION OF 1972 - Article IV, section 8, (1), (a), (b), (c), (d), (e), (2), (3);

OPINIONS OF THE ATTORNEY GENERAL - 47 Op. Att’y Gen. No. 9 (1997).

HELD: Pursuant to section 13-10-201, the phrase “current term” in article IV, section 8, means the term served after regular election to a full term of office. Based upon that definition, a candidate may file for office if, at the time the candidate begins to serve in that office, he or she will have had an 8-year break in service over a 16-year period of time.

January 11, 2012

Ms. Linda McCulloch  
Secretary of State  
Montana State Capitol  
P.O. Box 202801  
Helena, MT 59620-2801

Dear Secretary McCulloch:

[P1] You have requested my opinion on the question of whether Senate Bill 311, enacted by the 2011 Legislature, fulfills its intent which was to clarify the way term limits are calculated under Montana law. It is my opinion that SB 311 does fulfill its intended purpose and that term limits should now be calculated based upon the statutory definition of “current term” provided in the bill. In order to explain my conclusion, I provide the following background.

[P2] In 1992, through a constitutional initiative referred to as CI-64, Montana voters amended the Montana Constitution to place limits on the years of service of certain elected officials. The text of CI-64, which became article IV, section 8 of the Montana Constitution provides as follows:

**Section 8. Limitation on terms of office.** (1) The secretary of state or other authorized official shall not certify a candidate's nomination or election to, or print or cause to be printed on any ballot the name of a candidate for, one of the following offices if, at the end of the current term of that office, the candidate will have served in that office or had he not resigned or been recalled would have served in that office:

(a) 8 or more years in any 16-year period as governor, lieutenant governor, secretary of state, state auditor, attorney general, or superintendent of public instruction;

(b) 8 or more years in any 16-year period as a state representative;

(c) 8 or more years in any 16-year period as a state senator;

(d) 6 or more years in any 12-year period as a member of the U.S. house of representatives; and

(e) 12 or more years in any 24-year period as a member of the U.S. senate.

(2) When computing time served for purposes of subsection (1), the provisions of subsection (1) do not apply to time served in terms that end during or prior to January 1993.

(3) Nothing contained herein shall preclude an otherwise qualified candidate from being certified as nominated or elected by virtue of write-in votes cast for said candidate.

[P3] Generally, the law limits legislators and certain statewide elected officials from serving no more than 8 years in office in any 16-year period. Following enactment of article IV, section 8, questions arose as to its meaning and application and then Secretary of State Mike Cooney requested an Attorney General's Opinion to clarify its application. An Opinion was issued by then Attorney General Joe Mazurek that answered a number of questions and, as you note in your request, has been used by subsequent Secretaries of State in calculating term limits and certifying candidates for placement on the ballot (hereinafter referred to as the 1997 AG Opinion). See 47 Op. Att'y Gen. No. 9 (1997).

[P4] One of the questions answered in the 1997 AG Opinion was the meaning of the phrase "at the end of the current term of that office" in section 8(1) and whether it operated to preclude a candidate from running for office if, at the time the candidate *filed* for office, they had served 8 or more years in a 16-year period. The example given in the

opinion was that of an officeholder who served two four-year terms in the state senate. The second term expired in 2001 and the elected official then sat out two terms before seeking to run again. The question presented was whether that office holder could file for office in 2008. The 1997 AG Opinion concluded that although such a candidate would satisfy the required 8-year break in service in any 16-year period after *election to a full term*, based on the structure of CI-64 they would be barred from becoming a candidate. The 1997 AG Opinion found that rather than creating a true term limit, CI-64 operated to restrict a candidate's access to the ballot.

[P5] The 1997 AG Opinion also answered the question of whether the partial term of an official who is appointed or elected after a death or vacancy should be included when calculating the official's constitutional term limit. The opinion concluded that it should not and that time served completing a term of office upon a death or vacancy would not be held against a candidate who chose to seek that office after such service.

[P6] During the 2003 session, the Legislature passed a bill to codify this conclusion. House Bill 305, which was subsequently codified as Mont. Code Ann. 2-16-214, provided:

As used in Article IV, section 8, of the Montana constitution, "current term" means the term served *after regular election to a full term* to an office and does not include time served in an appointed or an elected capacity in an office to finish the term of the original incumbent after a vacancy has occurred.

(Emphasis added.)

[P7] Then, in 2011 the Legislature passed SB 311, which gave rise to your opinion request. The title of SB 311 provides that the intent of the bill is to clarify "the terms of office and years served for officials elected to and candidates seeking nomination for offices that are constitutionally term-limited."

[P8] The text of the bill amended Mont. Code Ann. § 13-10-201, which governs a candidate's declaration for nomination, to provide a new subsection intended to clarify application of the term limits set forth in article IV, section 8:

(8) For the purposes of implementing Article IV, section 8, of the Montana constitution, the secretary of state shall apply the following conditions:

(a) A term of office for an official serving in the office or a candidate seeking the office is considered to begin on January 1 of the term for which the official is elected or for which the candidate seeks election and end on December 31 of the term for which the official is elected or for which the candidate seeks election.

(b) A year is considered to start on January 1 and end on the following December 31.

(c) "Current term," as used in Article IV, section 8, of the Montana constitution, has the meaning provided in 2-16-214.

[P9] In your opinion request, you note that the phrase "current term" has already been defined by the 2003 legislature, and that after the passage of SB 305, the 1997 AG Opinion regarding calculation of term limits continued to be followed. You therefore question whether SB 311 has any effect.

[P10] In light of this concern, I have reviewed the legislative history of HB 305. That history indicates that the definition of "current term" was intended to codify the conclusion of the Attorney General regarding calculation of term limits for officials appointed or elected to finish the term of an incumbent after a vacancy, not to provide a broader definition for use in calculating term limits for officials elected to a new term in office. 03/05/03 Hr'g on HB 305, Tape 1, Side A at 13-16.1. The sponsor explained that the intent of the bill was to provide "that if a person is appointed to fill a vacancy, that term will not count toward the term limits law" and that the bill "was consistent with the Attorney General's Opinion. . . ." Minutes Senate Committee on State Administration, March 5, 2003 (remarks of [bill sponsor]). The conclusion that the enactment of section 2-16-214 was only meant, at that time, to clarify the situation of an elected official taking office after a vacancy created by death or resignation of the incumbent is supported by the fact that then Secretary of State Bob Brown, through his chief legal counsel, testified in support of the bill. Secretary Brown continued to calculate term limits in the manner set forth in the 1997 AG Opinion indicating he did not understand the bill to have broader meaning. Based upon this history, I do not believe HB 305 resolved the issue SB 311 was intended to address.

[P11] It is a basic maxim of jurisprudence that the legislature does not perform useless acts. Mont. Code Ann. § 1-3-223. An interpretation that gives effect is always preferred over an interpretation that makes the statute void or treats the statute as mere surplusage. Mont. Code Ann. § 1-3-232, see also American Linen Supply Co. v. Department of Revenue, 189 Mont. 542, 545, 617 P.2d 131, 133. If the legislature did not intend to clarify the meaning of "current term" as it is used in article IV, section 8(1), it would not

have amended section 13-10-201 to provide for application of the definition used in section 2-16-214.

[P12] While section 2-16-214, at the time it was enacted, was only meant to incorporate the vacancy holding of the 1997 AG Opinion, SB 311's reference to section 2-16-214 and its definition of "current term" is clearly intended to clarify how that phrase should be construed in calculating term limits pursuant to Article IV, section 8. SB 311 thus supersedes part IV of 47 Op. Att'y Gen. No. 9, which concluded that a candidate for office must have had an 8-year break in service in any 16-year period at the time of *filing* for office.

[P13] In his opinion interpreting the construction and meaning of article IV, section 8, Attorney General Mazurek acknowledged the ambiguities of this voter-enacted constitutional initiative. The 1997 AG Opinion strived to provide a reasonable construction of the initiative based on what limited legislative history existed and, importantly, on how the average voter would have understood the intent of the initiative. In trying to reach the proper construction of section 8(1), Attorney General Mazurek concluded that "current term" meant "the term during which the former office holder seeks to file for office."

[P14] Constitutional language is interpreted by the same rules generally applied in the interpretation of statutes. State ex rel Gould v. Cooney, 253 Mont. 90, 831 P.2d 593 (1992). When interpreting a statute, I seek to implement the intention of the legislature, or in this case, the voters. Mont. Code Ann. § 1-2-102; Montana Vending v. Coca-Cola Bottling, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499 (citations omitted). The general rule I must follow when interpreting statutes is that if the language is clear on its face, its meaning must be determined solely from the plain import of the language used. See, e.g., State v. Trull, 2006 MT 119, ¶ 32, 332 Mont. 233, 136 P.3d 551 (citations omitted). Reliance on legislative history and extrinsic sources is only appropriate when the plain meaning of the law cannot be determined from the language used. See, e.g., State v. Merry, 2008 MT 288, ¶ 17, 345 Mont. 390, 191 P.3d 428.

[P15] Like Attorney General Mazurek, I find certain aspects of article IV, section 8 to be ambiguous, including the meaning intended by the phrase "current term." And while the 1997 AG Opinion relied upon the plain meaning of section 8(1) in reaching the conclusion discussed above, it also noted that "[a] voter reading CI-64 might not readily conclude that this is the result of the language used. A reading of CI-64 could produce the conclusion that the intention is to limit a former officeholder to eight years of service in any 16-year period, and that at the conclusion of the eight-year period the former officeholder would be free to serve in the office again."

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[P16] While it is the role of the judicial branch to interpret the constitution, it is a proper function of the legislative branch to provide definitions to bring meaning and clarity to the law. See Mont. Code Ann. § 1-2-107. SB 311 is intended to clarify the laws governing term limits in Montana. It provides that in implementing the term limits provided for in article IV, section 8, the phrase “current term” shall have the meaning given in section 2-16-214, which provides “‘current term’ means the term served *after* regular election to a full term to an office.” (Emphasis supplied.) Thus SB 311 incorporates the meaning Attorney General Mazurek acknowledged voters may have envisioned when voting for CI-64, and thereby fulfills the Legislature’s intent to clarify the way term limits are calculated under Montana law.

THEREFORE, IT IS MY OPINION:

Pursuant to section 13-10-201, the phrase “current term” in article IV, section 8, means the term served after regular election to a full term of office. Based upon that definition, a candidate may file for office if, at the time the candidate begins to serve in that office, he or she will have had an 8-year break in service over a 16-year period of time.

Sincerely,

STEVE BULLOCK  
Attorney General

sb/anb/jym