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Secretary Gale issues statement on term limits opinion

LINCOLN – Nebraska Secretary of State John Gale today issued a statement regarding a Sept. 27 attorney general’s opinion regarding the application of legislative term limits provisions in the Nebraska Constitution. Below is Gale’s statement regarding the attorney general’s opinion.

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September 30, 2011

Statement of Secretary of State John Gale Concerning Attorney General Opinion # 11005

In May of 2011, during the legislative session, I became acquainted with rumors that Senator Tony Fulton might wish to consider an additional elective term after having first been appointed to complete the term of Auditor Mike Foley and then successfully running for a full elective term. In addition, I became aware that an informal comment had originated from the Attorney General’s Office to certain legislative members or to their staff that Senator Fulton would likely be eligible for an additional elective term.

This concerned me as the policy I had openly applied over the past ten years would not have allowed Senator Fulton to seek a second full elective term. I inquired about the informal opinion and its rationale and found that nothing had been prepared in writing to explain the possible conflict with my policy as Chief Election Officer.

I want to make clear that my decision is not about Senator Tony Fulton or any other specific person. Senator Fulton and I have had a great working relationship. He is a conscientious, dedicated, and principled Senator, and has been serving our state and his district well. His service continues through 2012 regardless of any decision I make on a possible additional elective term. Any reference to Senator Fulton’s situation in this statement is solely because he is the only state senator who could be impacted in the current election cycle.

In May of this year, I prepared a lengthy letter to the Attorney General outlining my policy and how it had been applied in the three prior inquiries by state senators, and asked for the Attorney

General to provide a formal opinion on that policy, or what different policy the Attorney General considered more proper.

My policy, which has been utilized since adoption of the term limits amendment, measures the time period from when a state senator is sworn in until the end of his or her elected term. In determining what constitutes half a term, I have used the plain and ordinary meaning of the word “half”. The Merriam-Webster dictionary defines “half” as “either of two equal parts that compose something”. For a senator who is appointed or elected to complete the original term, the time period from when they are sworn in to the completion of the original term is compared to the full original term. If the replacement time period is more than half of the original term, then under the provisions of the term limit amendment it is deemed a full term. This determination is easy to calculate once I or anyone else had the date of appointment or election and a calendar.

Since this issue was first raised in May, I have kept an open mind about other possible interpretations of what is meant by “half of a term”. I believe that the Attorney General Opinion makes a very plausible argument for measuring the mid-point for a “term” of office as the date of convening of the legislature on the third year of a “term” of office. However, despite the thoughtful discussion of the Attorney General Opinion on that issue, I believe it simply stretches the current language of the constitution too far.

My concern with this approach is that the Nebraska Constitution and the Attorney General Opinion itself both describe a term as a “matter of time”. When the opinion comes to determining what is “half” of that term, it is based on an event or an occurrence, being the first day of a legislative session. So, under the principle of “plain meaning”, “half” becomes irrelevant and is replaced by a fixed event or occurrence, being the day of convening of the legislature and may not result in two equal portions.

While I agree that a fixed event or occurrence for determining “half” of an elective term might be a more precise and clear standard for everyone, nevertheless we must be bound by the language of the constitutional amendment for term limits. We have to live with that language, and construe the best meaning of it.

Despite my concerns with the Attorney General’s analysis, I do recognize it as a plausible approach, as the Attorney General Opinion recognizes my current policy as a plausible approach. The opinion was thoughtful and extensive, and covered six pages of single spaced discourse. However, under our system of government, the ultimate decision on the interpretation of constitutional provisions rests with the judicial branch of government.

I have disagreed with an Attorney General’s Opinion on a prior occasion, and my decision was upheld by the Supreme Court in that situation. I have the discretion under the law to differ with the Attorney General again in this case. But having a reasoned disagreement between us does not mean that government has failed. It rather means that the executive branch of government cannot reach consensus on a common policy to be applied under the Constitution.

The customary way to resolve such differences is that the third branch of government, the judicial branch, will ultimately have to resolve this issue to get finality.

Until such a decision is rendered by the courts, as Chief Election Officer, it is my duty to apply the provisions of the term limits amendment. My decision can only be about the intent of the citizens of Nebraska, and the language they approved to amend our Constitution to impose term limits on our state legislators.

For the above reasons, I believe the policy utilized previously is more compatible with the language approved by the voters of Nebraska and I therefore affirm my current policy, and decline to follow the Attorney General's Opinion. I will not accept the filing of Senator Fulton should he choose to file for an additional full elective term. I believe that to be the intent of the people of Nebraska expressed in the constitutional amendment on term limits.

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