

The Authority of Assistant DAs When the Elected DA Resigns

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Two elected district attorneys resigned mid-term yesterday: Colon Willoughby in Wake County ([to move into private practice](#)), and Jerry Wilson in Watauga and four other mountain counties ([citing medical reasons](#)).

When an elected DA resigns, the governor is empowered to appoint an interim DA until the next election. N.C. Const. art. IV, § 19. Sometimes there is enough time to have an interim DA selected and sworn in so that there is no gap between the resignation of the elected DA and the appointment of the interim DA. But sometimes there isn't time, and there is a gap. In such instances, the question arises: do assistant DAs have the authority to prosecute criminal cases in the absence of an elected DA?

Although there's no case on point in North Carolina, the answer is likely yes. The state constitution contains several "hold over" provisions that allow public officials to continue in office until a successor is properly qualified and sworn in. See N.C. Const. art. IV, § 19 (judicial officials); N.C. Const. art. VI, § 10 ("all officers"). Assistant DAs take the same oath as the elected DA and have the duties assigned by the elected DA. G.S. 7A-63. Thus, they are public officers subject to those hold over provisions. The hold over provisions were written for the situation where an official's term ends but there is a problem that prevents the official's successor from taking office. That's not exactly what's happening with the assistant DAs, since they don't really have terms and they're not waiting for a successor. But the purpose behind the hold over provisions is "a sound public policy which is against vacancies in public offices and require[s] that there should always be some one in position to rightfully perform these important official duties for the benefit of the public." *Markham v. Simpson*, 175 N.C. 135 (1918). Reading the hold over provisions broadly in keeping with that public policy, assistant DAs likely retain their authority to act while awaiting an interim DA.

This conclusion is consistent with the result reached in several Texas cases raising this very issue. See *Bolding v. State*, 493 S.W.2d 181 (Tex. Ct. Crim. App. 1973) (holding that the resignation of the elected district attorney during the defendant's trial did not deprive the assistant district attorneys prosecuting the defendant of the power to do so); *LaSalle v. State*, 923 S.W.2d 819 (Tex. Ct. App. Amarillo 1996) (citing *Bolding* and the Texas Constitution's hold over provision and stating that "in the event of the resignation or death of an occupant of an office, the officer's previously qualified assistants or employees may continue the operation of the office pending selection of a successor"); *Lewis v. Johnson*, 2001 WL 169730 (N.D. Tex. Jan. 16, 2001) (unpublished) (citing *LaSalle* and rejecting defendant's claim that "due to the death of the criminal district attorney . . . no district attorney was empowered to act on behalf of the State of Texas at the time petitioner was tried"). If there are cases in other states on point, I couldn't quickly find them.

Having said all that, the time between the resignation of an elected DA and the appointment of an interim DA probably isn't a good time to make the biggest decisions a DA's office makes, like whether to proceed capitally against a defendant. But there's no reason to put the day-to-day business of the courts on hold just because there is a momentary vacancy at the head of the DA's office.