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State of California

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OPINION	:	No. 79-1119
	:	
of	:	<u>April 30, 1980</u>
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SUBJECT: OFFICE OF CONSTABLE—County officials may not abolish the office of constable for judicial districts in which a justice court is established.

The Honorable John A. Drummond, County Counsel, Mendocino County, has requested an opinion on the following question:

May county officials abolish the office of constable for judicial districts in which a justice court is established?

CONCLUSION

County officials may not abolish the office of constable for judicial districts in which a justice court is established.

ANALYSIS

By statute, constables are obligated to “attend the justice court of the judicial district in which they are appointed or elected to act whenever so required, and within their

counties shall execute, serve and return all writs, processes and notices directed or delivered to them by judges of the justice courts or by competent authority.” (Gov. Code § 27820;¹ see also § 71264.)²

While constables are peace officers with general law enforcement authority (Pen. Code § 830.1, §§ 27823, 71265, 41 Ops. Cal. Atty. Gen. 130, 131 (1967)), their primary function is that of officers of the justice courts. (59 Ops. Cal. Atty. Gen. 97, 101 (1976); 49 Ops. Cal. Atty. Gen. 130, *supra*.)

We are informed that in the County of Mendocino there is a proposal to abolish the office of constable and have the sheriff function as ex officio constable. Thus the question that is presented to us is whether county officials have the authority to so abolish the office of constable. With respect to this question we initially note that under article IV, section 5 of the California Constitution the Legislature has been granted “the ultimate power to control the justice courts” (*County of Madera v. Superior Court* (1974) 39 Cal. App. 3d 665, 669.) In pertinent part, article IV, section 5 provides:

“The Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts. It shall prescribe for each municipal court and provide for each justice court the number, qualifications, and compensation of judges, officers, and employees”

While the Constitution also authorizes counties through their charters to provide for the selection, consolidating and removal of county officers (Cal. Const., art. XI, § 4), the authority afforded by article VI, section 5 of the Constitution to the Legislature prevails over any authority a county might otherwise have with respect to the officers and employees of municipal and justice court.³ (*County of Madera v. Superior Court, supra*, 39 Cal. App. 3d 665, 669; *Slavich v. Walib* (1947) 82 Cal. App. 2d 228, 232–233; 32 Ops. Cal. Atty. Gen. 161, 163 (1958); 30 Ops. Cal. Atty. Gen. 11, 12–13 (1957); 28 Ops. Cal. Atty. Gen. 103, 105 (1956); Attorney General unpublished opinion IL 61–19 (1961), LB 369 P. 721.)

¹ Hereafter all section references are to the Government Code unless otherwise specified.

² Marshals have the same duties and functions with respect to municipal courts. (§ 71264, 51 Ops. Cal. Atty. Gen. 28 (1968).)

³ It is noted that Mendocino is a general law (i.e., non-charter) county. See California Roster, 1979–1980, p. 91.

“As stated in *County of Madera v. Superior Court, supra*, 39 Cal. App. 3d at P 669:

“[A]lthough the county board of supervisors has authority to legislate with respect to local matters, the functioning of the courts is a statewide and not a local matter and this power is specifically granted to the Legislature. [Citations omitted.] indeed it appears that in formulating the wording of Article VI, section 5 (formerly Art. VI, § 11), the Legislature was careful to reword that section so as to ‘clarify its authority over individual municipal and justice courts.’”

See also the report of the California Constitutional Revision Commission which noted that the provisions in article XI which authorized county charters to provide for “judges and officers of the courts have been superseded by Article ‘VI which governs the judiciary.” (California Constitution Revision Commission, proposed revision of Article[s XI-XVIII] of the California Constitution (1968), p. 66.)

With specific reference to constables, this office in an unpublished opinion (IL’61–19, *supra*) stated:

“This office has previously issued opinions that the 1950 enactment of Article VI, [former] section 11, being of more recent date, is controlling and repealed by implication Article XI, section 7½ and charter provisions enacted pursuant thereto [citations omitted]. Thus current general legislation, rather than County Charter provisions, are applicable to determine the number of constables to be elected in each judicial district.”

Therefore, with respect to the present question, the authority of county officials to abolish the office of constable and assign its duties to the sheriff must thus be measured against a paramount state legislative authority.

Section 71602 provides:

“For each judicial district in which a justice court is established, a constable shall be elected by the electors of the district at the general state election for a term of six years from and including the first Monday in January after the January 1st next succeeding his election” In any county governed by a charter which provides for the appointment of constables of townships, the constable of a justice court shall be appointed in the manner provided in the charter.”

Thus the statute, with the specified exception of counties with charters providing for township constables, has specifically vested in the electors of each judicial district the power to select the constable for that district. The proposal to have the sheriff assume the duties of the constable would in effect divest the electors of this legislatively authorized power. Such a proposal would therefore be in direct conflict with section 71602 and would thus be invalid. “An ordinance is void insofar as it prohibits what a state law authorizes.” (*Markus v. Justice v Court* (1953) 117 Cal. App. 2d 391, 396. *Accord*, 62 Ops. Cal. Atty. Gen. 90, 95 (1979).)

But it should be noted that in section 71602 there is a delegation by the Legislature to counties of control over the selection of constables in the specifically limited instance, indicated above, of a charter county whose charter “provides: for the appointment of constables of townships”⁴ However, townships are no longer extant in California. (*People v. Taylor* (1975) 46 Cal. App. 3d 513, 530 fn. 21; see also *Westbrook v. Mihaly* (1970) 2 Cal. 3d 765, 772 fn. 1; *People ex rel. Benwell v. Foutz* (1945) 27 Cal. 2d 1, 5.) As stated by the California Constitution Revision Commission: There are no townships and consequently no ‘constables for each township.’” (California Constitution Revision Commission, Proposed Revision of the California Constitution, *supra*, p. 66.) Therefore the exception in section 71602 for those counties with charter provision concerning township constables has no present operative effect. Nonetheless it does have significance as a persuasive indication that the Legislature did not intend those counties not covered by the exception to have the authority to eliminate elected constables in each judicial district. This point is illustrated by *County of Madera v. Superior Court*, *supra*, 39 Cal. App. 3d 665, where the court examined, within the same constitutional and statutory context under consideration here, a similar limited delegation of authority to the counties. In that case the court stated:

Under this section, the Legislature has delegated to the counties the authority and duty to regulate the compensation of both judges and constables and has also given the power and duty to regulate the number, qualifications and compensation of ‘clerks, deputies, and other attaches.’ [Citation omitted.] Significantly absent from this delegation of authority, however, is any mention of delegating the power to regulate the number of judges. This obvious omission clearly suggests application of the familiar maxim of statutory construction that the expression of one thing in a statute implies the exclusion of the omitted thing. [Citations omitted.] Under this

⁴ Although the Constitution grants controlling authority to the Legislature with regard to the judges, officers and employees of justice courts, the Legislature may delegate such authority to the counties. (*County of Madera v. Superior Court*, *supra*, 39 Cal. App. 3d at pp. 669–670; *Slavich v. Walsh*, *supra*. 82 Cal. App. 2d at p. 234.)

principle, the delegation to the counties in section 71600, *supra*, of the authority to regulate the number of clerks, deputies, and other attaches, plus the express mention of the compensation of judges in the same section without any reference to their number, manifestly indicates the intention not to delegate the power to regulate the number of judges.” (39 Cal. App. 3d at p. 670.)

Likewise, in the present situation the express delegation of authority with respect to counties with charters providing for township constables “without any reference” to such authority for other counties “manifestly indicates” that the Legislature did not intend to afford such other counties the authority to enact measures affecting the selection of constables.

We therefore conclude that by virtue of the provisions of section 71602 county officials are precluded from abolishing the office of constable.⁵

⁵ See 51 Ops. Cal. Atty. Gen. 28, *supra*, and 32 Ops. Cal. Atty. Gen. 161, *supra*, where this office concluded that a county could not combine the office of marshal and sheriff.