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OPINION	:	No. 80-701
	:	
of	:	<u>August 27, 1980</u>
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SUBJECT: RESIGNATION OF SUPERIOR COURT JUDGE RUNNING FOR OFFICE—Where a superior court judge, who was appointed on April 6, 1979, to fill a vacancy on that court, runs for reelection and is nominated at that election for the November 1980 General Election, but thereafter resigns and accepts an appointment to the federal district court no new vacancy is created by the judge's resignation and the November 1980 election between the recently resigned judge and the other nominated candidate is not nullified.

The Honorable Edmund G. Brown, Jr., Governor of the State of California, has requested an opinion on the following questions:

Where a superior court judge, who was appointed on April 6, 1979, to fill a vacancy on that court, runs for reelection at the June 1980 Primary Election and is nominated at that election for the November 1980 General Election, but thereafter, on July 1, 1980, resigns and accepts an appointment to the federal district court:

1. Is a vacancy created on the superior court which the Governor may fill?
2. Is the upcoming November election between the recently resigned judge and the other nominated candidate nullified?

CONCLUSIONS

Where a superior court judge, who was appointed on April 6, 1979, to fill a vacancy on that court, runs for reelection and is nominated at that election for the November 1980 General Election, but thereafter, on July 1, 1980, resigns and accepts an appointment to the federal district court:

1. No new vacancy is created by the judge's resignation; the office, however, is without an incumbent so as to permit the Governor to appoint someone to the prior continuing vacancy until an elected judge qualifies and assumes the office.

2. The November 1980 election between the recently resigned judge and the other nominated candidate is not nullified unless the resigned judge complies with section 6653.3 of the Elections Code, which section would permit the removal of his name from the November 1980 ballot. In such event, the candidate who received the third highest number of votes at the Primary Election would appear as a candidate for election in November.

ANALYSIS

This request for our opinion involves problems which have arisen where a superior court judge, who ran for reelection on the June 1980 Primary Election, and who was nominated at such election, subsequently resigned to accept an appointment to the federal district court.

More precisely, on April 6, 1979, the judge in question was appointed to fill a vacancy in the superior court occasioned by the prior incumbent's appointment to the Court of Appeal. The prior incumbent had just been elected for a six-year term which had commenced on January 8, 1979. The judge in question then filed for reelection and received the highest number of votes cast at the June 1980 Primary Election. Since no candidate received a majority of the votes cast at the Primary Election,¹ the normal course of events would be that the incumbent and the next highest candidate would face each other in a "run-off" at the November 1980 General Election. However, on July 1, 1980, the incumbent judge resigned to accept an appointment to the federal district court, for which he has qualified and assumed the office.

¹ "Such a primary election is deemed a general election for a nonpartisan office of the candidate receives a majority of the votes cast." (*Fields v. Eu* (1976) 18 Cal. 3d 322, 325, fn. 1.)

Article VI, section 16(c) of the California Constitution, as added in 1966 as part of the revision of the California Constitution,² provides for the terms of superior court judges, and the manner in which vacancies are to be filled, and provides:

“(c) Terms of judges of superior courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge’s term begins.”

It is seen that a literal reading of the provision could lead one to conclude that the resignation of the judge in question on July 1, 1980, created a “vacancy” in the office. Accordingly, that “vacancy” would not be properly filled until “the next general election after the January 1 following” its occurrence, or the 1982 General Election. This being the case, the November 1980 General Election would be aborted—or so would go the argument. Thus, we are presented with the question as to whether the judge’s resignation on July 1, 1980, created a “vacancy” which the Governor is authorized to fill. We are also presented with the question as to whether the November 1980 run-off election is still to be held, or whether it has been aborted.

² Immediately prior thereto, these matters were covered by Article VI, section 8 of the California Constitution, which provided:

“Sec. 8. The term of office of judges of the superior courts shall be six years from and after the first Monday of January after the first day of January next succeeding their election. A vacancy in such office shall be filled by the election of a judge for a full term at the next general state election after the first day of January next succeeding the accrual of the vacancy: *except that if the term of an incumbent, elective or appointive, is expiring at the close of the year of a general state election and a vacancy accrues after the commencement of that year and prior to the commencement of the ensuing term, the election to fill the office for the ensuing full term shall be held in the closing year of the expiring term in the same manner and with the same effect as though such vacancy had not accrued.* In the event of any vacancy, the Governor shall appoint a person to hold the vacant office until the commencement of the term of the judge elected to the office as herein provided.” (Emphasis added.) With respect to the 1966 amendment, the Constitutional Revision Commission stated:

“Comment: This provision is a restatement of existing Section 8 setting the terms of judges of superior courts. Part of the existing section requires a judge appointed during a general election year to run that year if the term he fills expires then. The Commission deleted that provision because it is only operable during the very early part of an election year.” (Cal. Const. Rev. Comm. Re., 1966 Proposed Rev., p. 94.)

1. Has a Vacancy Been Created Which the Governor May Fill?

It is our opinion that the answer to this question is found in, and is controlled by the California Supreme Court's decision in *Pollack v. Hamm* (1970) 3 Cal. 3d 264, the first case in which that court construed Article VI, section 16(c) as added in 1966. That case considered the question of when a "vacancy" was considered to have arisen where there had been *successive appointment* to the superior court as in our case, the first in an odd numbered year, and the second in an even numbered or "general election year." In December 1969, Judge West was appointed to a vacancy on the superior court occasioned by the elevation of the incumbent to the Court of Appeal. In 1970 Judge West filed for reelection. However, in April 1970 he was lost at sea and in May 1970 his death was judicially established. Judge Shaw of the municipal court was the only other candidate at the June 1970 Primary Election. The Governor, however, on June 30, 1970, appointed Petitioner Pollack to the vacancy created by Judge West's death. The issue presented was whether the full electoral process was to proceed, or whether a new vacancy arose in 1970 which required a postponement of the electoral process until 1972, which was arguably "the [year of the] next general election after the January 1 following the vacancy" within the meaning of Article VI, section 16(c) of the California Constitution. The court, however, held that Judge West's death had not created a new vacancy within the meaning of the constitutional provision, and thus Petitioner Pollack's appointment was to the original and the same vacancy which arose in 1969 to which Judge West had been appointed. Accordingly, the court held that 1970 was the proper year to fill the vacancy by election for a full term. The court reasoned as follows:

"A vacancy occurs in a superior court office when an elected incumbent dies. Pursuant to article VI, section 16, subdivision (c), the Governor's appointee shall 'fill the vacancy temporarily until the elected judge's term begins.' This language suggests that the vacancy continues to exist until the commencement of the elected judge's term although it may be temporarily filled. Therefore, if an appointee leaves the office it is the original vacancy to which the Governor may appoint another temporary incumbent. No new vacancy is created by the departure of an appointee. Were we to adopt petitioner's construction of article VI, section 16, subdivision (c), and hold that a new vacancy occurs each time an appointee vacates the office, it would be possible, through the device of appropriately timed resignations, to preclude any election to an office. This would be contrary to the intent of the constitutional provision that a superior court term be six years, a provision which contemplates that an opportunity to pass on the qualifications of superior court judges will be available to the electorate no less often than every six years. Since the language of article VI, section 16, subdivision (c), does not compel the result suggested by petitioner, we

are governed by the well established rules that constitutional and statutory provisions be construed consistently with the intent of the adopting body and in such manner as not to produce unreasonable results. (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal. 3d 594, 607 [86 Cal. Rptr. 793, 469 P.2d 665]; *Barber v. Blue*, *supra*, 65 Cal. 2d 185, 188; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal. 2d 640, 645 [335 P.2d 672]; *Aggeler v. Dominguez* (1933) 217 Cal. 429 [19 P.2d 241].)

“In holding that *the ‘vacancy’ referred to in article VI, section 16, subdivision (c), is one which arises upon the death or surrender of the office by an elected incumbent and exists until the accession to office of an elected successor*, although the office may be temporarily filled by a succession of appointees, we insure that the only circumstances in which an election may be postponed beyond the sixth year of the elected incumbent’s term will be those in which it is impossible to carry out the full elective process. Thus, only if the vacancy arises in the year of expiration of the elected incumbent’s term, or in the unlikely event that the situation presented in *Barber v. Blue*, *supra*, should recur and an unopposed incumbent die in an election year at a time when it is no longer possible to carry out that process, may more than six years elapse between elections or opportunity for election for the office.” (*Id.*, at pp. 272–273; footnotes omitted; emphasis added.)³

Applying the foregoing reasoning to the facts which we are considering, we see that the vacancy in the superior court arose in 1979 when the elected incumbent relinquished the office to go to the Court of Appeal. The judge in question herein, who is now a federal judge, was appointed to and filled the only vacancy in the office which could exist “until the accession to office of an elected successor.” Accordingly, when he resigned on July 1, 1980, to assume his federal office, no new vacancy was created in the superior court office. The Governor, however, may appoint, in the words of the court, another temporary incumbent” whose tenure will depend upon the accession of another elected incumbent.

In so concluding we note language in *Fields v. Eu*, *supra*, fn. 1, 18 Cal. 3d 322, indicating a possible broader interpretation of the term “vacancy,” e.g., the statement that “a vacancy arises within the meaning of that [constitutional] provision either when an incumbent superior court judge dies or for any reason relinquishes his office.” (*Id.* at p. 327.) However, in our opinion such statements must be read in the context of the facts and issue before the court, which were whether a “vacancy” existed in a newly created superior court office upon its establishment. No question of the creation of vacancies by “successive

³ A vacancy also occurs in a superior court office upon its initial establishment. (*Fields v. Eu* (1976) 18 Cal. 3d 322.)

appointments” during the same term was involved. Since the court in *Fields v. Eu* in no way purported to overrule or modify *Pollack v. Hamm*, the latter case is still good authority for the proposition that a new vacancy is not created by each successive relinquishment of the office of superior court judge during a single term.

The conclusion that the judge in question herein did not create a new vacancy leads to the second question, that is, what is the situation with respect to the upcoming “run-off” election in November?

2. Is the November 1980 Judicial Election Nullified?

Under the authority of *Pollack v. Hamm*, *supra*, 3 Cal. 3d 264, and the reasoning of the subsequent cases decided by the California Supreme Court with respect to Article VI, section 16(c), the answer is clearly no. The electoral process is to continue. In *Pollack v. Hamm* the court essentially held that since the vacancy originally arose in 1969, “the next general election after the January 1 following the vacancy,” within the meaning of subdivision (c) was in 1970. Accordingly, the electoral process was to take place in that year despite the fact that one of the two candidates, Judge West, had been lost at sea and had been declared dead.

As noted by the court in *Anderson v. Phillips* (1975) 13 Cal. 3d 733, 739:

“ . . . the only effect of the 1966 revision was to eliminate the requirement that an election be held during the last year of an incumbent’s term *if a vacancy accrues during that year*. . . .” (Emphasis added.)⁴

And as noted by the court in *Fields v. Eu*, *supra* fn. 1, 18 Cal. 3d at p. 326:

“ . . . subdivision (c) provides that superior court vacancies are to be filled by a two-step process of appointment and election. First, the Governor ‘shall appoint a person to fill the vacancy temporarily until the elected

⁴ In *Anderson v. Phillips*, Judge Sherman was elected to take office on January 6, 1975, to succeed Judge Staats, who had retired on September 14, 1974. Governor Reagan also appointed Judge Sherman to fill the vacancy left by Judge Staats. However, Judge Sherman, who was ill, resigned on October 31, 1974, and died on November 22, 1974. On January 4, 1975, Governor Reagan appointed Petitioner Anderson to the vacancy. The issue presented was whether a new vacancy arose on January 6, 1975, which Governor Brown could fill, or whether Judge Anderson continued in office for at least two more years. The court held that Judge Anderson remained in office since no elected judge had qualified so is to terminate the original vacancy which arose in 1974.

judge's term begins.' Then the latter—who may be the appointee or any other qualified candidate—must be chosen 'at the next general election after the January 1 following the vacancy. . . .' Because general elections are held only in alternate years, the last-quoted provision inevitably operates as follows: *If the vacancy occurs during a year in which there is no general election, the office will appear on the June primary ballot of the immediately following year*; but if the vacancy arises at any time in an election year, the office will not be placed on the ballot until the next election year, i.e., two years later." (Footnotes omitted; emphasis added.)

Since the "vacancy" in our case arose in 1979 when the elected judge resigned to go to the Court of Appeal, the office was properly on the June 1980 ballot. There is no provision in law for removing it from the ballot in November 1980 merely because one of the successful candidates for the "run-off" has assumed a federal judgeship.⁵ In fact, section 6653.3 of the Elections Code gives such successful candidate the option of remaining on the ballot, or having his name removed. It provides:

"Notwithstanding Sections 6653 and 6659 [providing that a candidate's name must remain on the ballot unless he dies], any candidate who has been nominated at any primary election for superior court judge in which election there were at least two other candidates, and who has, after the date prescribed for the filing of declaration of candidacy and declaration of acceptance of nomination pursuant to Article 4 (commencing with Section 6489) of this chapter, been appointed to any federal or state office may request the county clerk to have his or her name removed from the ballot of the next ensuing general election. If such request is received by the county clerk at least 59 days before the next ensuing general election, the county clerk shall remove such candidate's name from the ballot.

"If a candidate's name is removed from the ballot pursuant to this section, the two remaining candidates who received the highest number of votes cast on all the ballots of all the voters participating in the primary election for nomination for that office of superior court judge, shall be the candidates for that office at the ensuing general election, and their names as candidates for that office shall be placed on the official ballot at the ensuing

⁵ Neither *Anderson v. Phillips* nor *Fields v. Eu* involved situations where the original vacancy arose after the June 1980 Primary Election at which candidates had been nominated or at which a candidate had been elected. Nor are we faced with these situations herein. Accordingly, we do not discuss whether Article VI, section 16(c) would abort the election process for such year under these or similar facts.

election.” (Emphasis added.)

“May” is permissive. (Elec. Code § 11.) In short, the law appears to accord a successful June Primary Election candidate who accepts another state or federal office a choice whether to remain in such office, or whether to relinquish that office and qualify for the superior court should he be elected in November.⁶

We note that a candidate who has accepted another federal or state office is placed in a rather unique position since, if elected, he may elect not to qualify for the office and continue the Governor’s appointee in office for an additional two years. This is so since only an elected judge who qualifies may displace an incumbent appointee on the superior court. As stated in *Anderson v. Phillips*, *supra*, 13 Cal. 3d 733, 740:

“Since article VI, section 16, subdivision (c), makes no distinction between vacancies arising before or after a scheduled election, but expressly provides that the person appointed by the Governor shall ‘fill the vacancy temporarily until the elected judge’s term begins,’ and the term cannot begin until the person elected qualifies and assumes the office, it is apparent that the appointee may continue to fill the vacancy until such time as the vacancy is terminated by the assumption of office by an *elected judge*. . . .”

(See also *Pollack v. Hamm*, *supra* fn. 1, 3 Cal. 3d at p. 273.) This apparently is what the law contemplates unless the candidate complies with section 6653.3 of the Elections Code.

In summary, the superior court office in question is to remain on the ballot for the November 1980 General Election. The now federal district court judge remains a candidate for election in November unless he complies with section 6653.3 of the Elections Code. In the event that he does not and he is elected, he has the option of qualifying for the office or not qualifying as he sees fit. In the event he is elected but does not qualify, the present gubernatorial appointee will remain in office until another elected successor can be chosen

⁶ It is to be emphasized that the fact that the judge in question herein is now a federal judge does not disqualify him from being a candidate in November. Until 1966 a federal judge would have been so disqualified. (See Cal. Const., Art. IV, § 20.) However, in 1966 the constitutional language was changed (see now Art. VII, § 7) to specifically permit a federal officer or employee to inn for a state office, so long as he relinquishes his federal position before assuming the state office. (Cal. Const. Rev. Comm. Rep., 1966 Proposed Rev., pp. 50–51.) Thus, it cannot be argued that the voters will know in November that the candidate is “disqualified” and accordingly if he “wins,” the second highest candidate would actually be the winner. (Cf. *Blaine’s v. Board of Supervisors* (1934) 1 Cal. 2d 486; but see *Pollack v. Hamm*, *supra*, fn. 1, 3 Cal. 3d at p. 274.)

in 1982. Of course, if the other candidate selected by the voters in June 1980 is elected and qualifies, the Governor's appointee will be displaced by such elected judge. No new vacancy was created by the resignation of the incumbent judge on July 1, 1980, and accordingly, the full electoral process is to take place in 1980 under the clear terms of Article VI, section 16(c) of the California Constitution.
