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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 81-1214
	:	
of	:	<u>FEBRUARY 24, 1982</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Clayton P. Roche	:	
Deputy Attorney General	:	
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THE HONORABLE JOHN A. DRUMMOND, COUNTY COUNSEL,
MENDOCINO COUNTY, has requested an opinion on the following question:

When will the judges who succeed to office in the judicial districts established by the consolidation ordinance enacted on December 1, 1981 in Mendocino County be required to stand for election?

CONCLUSION

The judges who succeed to office in the judicial districts established by the consolidation ordinance enacted on December 1, 1981, in Mendocino County will be required to stand for election at the June 1984 statewide primary election whether they succeed to office automatically pursuant to subdivision (a) of section 71080 of the Government Code, or whether they succeed to office pursuant to a "run-off" election held pursuant to subdivision (b) of that section.

ANALYSIS

On December 1, 1981 the board of supervisors of Mendocino County, pursuant to the authority granted by section 71040 of the Government Code,¹ enacted an ordinance consolidating the Sanel Judicial District with the Ukiah Judicial District, creating a new judicial district to be known as the Ukiah Judicial District, and consolidating the Ten Mile High Judicial District with the Big River Judicial District, creating a new judicial district to be known as the Ten Mile Judicial District. The effective date of the consolidation ordinance was December 30, 1981. Each of the prior four districts were, and the consolidated districts are, justice court districts, having 40,000 or less residents. (See Cal. Const., art. VI, § 5.) Accordingly, although the prior districts had a total of four justice court judges, the new districts are entitled to only two judges, that is one justice court judge per district. (See *County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665; 56 Ops.Cal.Atty.Gen. 316 (1973).)

The initial entitlement to the two justice court judgeships in the consolidated districts, which are legally *new offices*, is determined by the so-called succession statute, section 71080. (*Phelps v. Brennan* (1976) 16 Cal.3d 508; 62 Ops.Cal.Atty.Gen. 32, 38-40 (1979).) In our situation, the aim of the succession statute would be to reduce the number of judgeships from four to two, permitting the incumbents of the superseded districts the opportunity to succeed to the two new judgeships. Thus, subdivision (a) of section 71080 in summary provides:

1. That the judges of the superseded courts, if eligible, shall become the judges of the new courts;
2. That their tenure shall be "until the election or appointment of their successors;"
3. That the time for such election shall be the time previously fixed for the regular election of judges in the superseded courts; but that
4. No election for successors may be held within 10 months of the judges' succession to the new offices.²

¹ All section references are to the Government Code unless otherwise indicated.

² Subdivision (a) provides in full:

"(a) after January 1, 1952, upon the establishment of a municipal or justice court, the judges of existing courts inferior to the superior court in any city, township, or judicial subdivision situated wholly or partly in the district or city and county for which a municipal or justice court is established shall, if eligible, become the judges of such

Upon consolidation of two municipal or justice courts into a single new court, subdivision (a) can be operative only if but one judge is eligible for succession to the new court, or if only one judge elects to take advantage of his right of succession where there are several eligible judges. We are informed that no disclaimers have yet been filed with the county by any of the four justice court judges affected by the Mendocino County ordinance. Consequently, we must also examine subdivision (b) of section 71080, the succession statute, which provides for the eventuality that there are more judges eligible for and desiring to succeed to the newly created judgeships than there are new offices. Subdivision (b) in summary provides:

1. That a "run-off" election shall be held among *only* the judges who are eligible to succeed in the new districts at the first general state elections following a 90-day period after the consolidation, and until such time the superseded courts shall continue to exist;

2. That the winner or winners at such "run-off" elections (in our case, one judge for each new district) shall become the judges of the new courts "until the election or appointment and qualification of their successors;"

3. That the time for such election shall be the time previously fixed for the regular election of judges in the superseded courts; but that

4. No election for successors shall be held within 10 months of the judges' succession to the new offices.³

municipal or justice court until the election or appointment and qualification of their successors. The time for election and qualification of their successors shall be that previously fixed for the election and qualification of their successors for the court and office superseded, had such courts not been superseded, but in no event shall any such election of successors be held within 10 months of succession to the office of the new court."

³ Subdivision (b) provides in full:

"(b) If the number of eligible incumbent judges who have not filed a written statement with the county clerk disclaiming their desire to succeed to office exceeds the number of judicial offices provided by law for such municipal or justice court, such incumbents shall not automatically succeed to judicial positions in the municipal or justice court, and the existing courts shall continue to function within the district until the first judge or judges of such municipal or justice court are elected by the qualified electors of the district at the first general state election held following the expiration of 90 days and qualify.

"In any election for the first judge or judges of such municipal or justice court, only such incumbents may appear on the ballot and be elected, and the provisions of Article

It is thus seen that with the exception of the requisite "run-off" elections, subdivisions (a) and (b) contain parallel provisions with respect to the tenure of the judges succeeding to the new offices, and the election of their successors - or, stated otherwise, when they must stand for election. Our focus herein is when that date will actually be whether the judges who succeed to the two new offices in Mendocino County do so pursuant to the automatic succession provisions of subdivision (a), or pursuant to the "run-off" election provisions of subdivision (b), which elections will be held in June at the statewide primary election.

The term of office of both municipal and justice court judges is six years. (§ 71145.)⁴ Municipal and justice court judges are "elected at the general state election next preceding the expiration of the term for which the incumbent has been elected." (§ 71141.) The terms of office thus run with the office and not with the officer-holder. (See, e.g., *Caldwell v. Bruning* (1966) 64 Cal.2d 111, 117.) The judges of each of the four superseded courts in Mendocino County held offices whose terms were to expire on January 2, 1983. Consequently, but for the enactment of the consolidation ordinance, each office would have appeared on the primary election ballot in June 1982.⁵

Applying the foregoing facts and statutory scheme to the Mendocino County consolidation it is seen that:

1 (commencing with Section 25300) of Chapter 3 of Division 13 of the Elections Code shall not apply. If only one such incumbent is to be elected, the incumbent receiving the highest number of votes cast shall be declared elected. If two or more incumbents are to be elected, those incumbents equal in number to the number to be elected who receive the highest number of votes for the office shall be declared elected. The incumbents elected shall become the judges of such municipal or justice court until the election or appointment and qualification of their successors. The time for election and qualification of their successors shall be that previously fixed for the election and qualification of their successors for the court and office superseded, had such courts not been superseded, but in no event shall any such election of successors be held within 10 months of succession to the office of the new court."

⁴ Section 71145 provides:

"The term of office of judges of municipal and justice courts is six years from and including the first Monday of January after the January 1st next succeeding their election. Judges shall hold office until their successors are elected and qualify, but the office shall be deemed to be vacant upon the expiration of the fixed term for the purpose of selecting a successor."

⁵ The general election includes the primary election. (See, e.g., *Barton v. Panish* (1976) 18 Cal.3d 624, 627; *Brailsford v. Blue* (1962) 57 Cal.2d 335, 338.)

1. As to any judges who may automatically succeed to new judgeships pursuant to subdivision (a) of section 71080, no election which otherwise should be held to select their successors in June 1982 may be held because of the ten-month limitation prohibiting such an election;⁶ and

2. As to any judges who may succeed to new judgeships in accordance with subdivision (b), that is, pursuant to a "run-off" election at the statewide primary election in June 1982, the election which otherwise should be held to select their successors in June 1982 obviously cannot be held since it coincides with such "run-off" election. Furthermore, any such election would also fall within the ten-month limitation. Accordingly, the question remains as to when the successors to such judges are to be selected.

An examination of section 71080 in its entirety (see notes 2 and 3, *supra*) discloses a void under these circumstances. The statute simply does not provide the answer. The two alternatives would appear to be 1) that the judges should stand for election at the next general election at which judges may be selected, this is the statewide primary election in June 1984, or 2) that the judges should be given a full six-year term and accordingly should not be required to stand for election until the statewide primary election in June 1988.⁷

It is the conclusion of this office that the election for judges who succeed to offices *either* under subdivision (a) or subdivision (b) of section 71080, the succession statute, should be held in two years, that is, at the June 1984 statewide primary election.⁸

⁶ Similar ten-month proscriptions as to holding the elections for successors of municipal or justice court judges where the incumbent judges have yet to be *elected* to office are found in section 71180 (appointment to municipal court vacancy) and section 71180.3 (appointment to justice court vacancy.)

The purpose of the ten-month rule is to permit a judge who has assumed office other than through the usual electoral process (usually by appointment) a period of time to demonstrate his judicial qualifications to his electorate before having to stand for election. The rule is also "absolute on its face containing no exceptions." (See *Barton v. Panish*, *supra*, 18 Cal.3d at pp. 629-630; see also *Morrison v. Michael* (1979) 98 Cal.App.3d 507, 510.) Accordingly, whatever one may think the best "policy" may be in a given situation is immaterial. The Legislature has made the policy decision in the statutes.

⁷ There would be no statutory basis for any "special election" to be held before the June 1984 primary election. Furthermore, there would be no statutory basis nor logical reason to delay the election until the June 1986 primary election.

⁸ We note parenthetically that any "run-off" election held pursuant to subdivision (b) of section 71080 is merely an election to fill the office until January 1983. Accordingly, it is *not* the election

As the court noted in *Brown v. Hite* (1966) 64 Cal.2d 120, 129, in the context of a municipal court problem, but which observation is equally applicable to the similar and many times overlapping statutes governing justice courts:

"It is apparent that the statutes dealing with the election of municipal court judges are neither simple nor unambiguous. In individual cases they may produce arbitrary results; an individual appointed on a given day may be required to stand for election within a relatively short period of time whereas another person appointed on the following day may remain in office for a full six-year term or longer. This anomaly could be avoided by requiring all appointees to stand for election within a specified period of time. However the Legislature has provided otherwise, and it is beyond the powers of this court to do more than construe the statutes as they have been enacted."

Accordingly, we cannot merely say it would be better to give the judges who succeed pursuant to section 71080 a full six-year term (and in fact a little more) on the basis that that would be "logical" in that it would continue uninterrupted the six-year term which began in the superseded courts. Nor can we merely say it would be better to give the judges who succeed pursuant to section 71080 only a two-year "term" on the basis that that would permit the voters an opportunity to select their judges at the earliest date. We must examine the statutes, and any court decisions construing the same or similar statutes, in the hope that they will provide the answer. Having done so, we believe that the just quoted case, *Brown v. Hite*, provides such answer.

We return to our facts. It is to be recalled that the two surviving judicial offices after the consolidation are *new* offices. No judges will have been *elected* to those offices as contemplated by sections 71141 and 71145 in 1982 to *establish* a new (actually, the initial) six-year term to commence on January 3, 1982. This is because the electoral process contemplated by section 71080 to select the judges for the new six- year term has been "frustrated" by virtue of the timing of the consolidation of the four courts into two courts and the ten- month rule. It is further to be remembered that with respect to municipal and justice court judges, the term of office runs with the office and not with the incumbent. Accordingly, judges who succeed to offices pursuant to section 71080 have tenure in office pursuant only to that section, which is in practical terms for the "unexpired term" of the incumbents of the superseded courts, and until their, the succeeding judges, successors are

contemplated by sections 71141 and 71145 (see text and note 4, *supra*) which would invest the successful candidate or candidates with a full six-year term.

elected and qualify.⁹ "Tenure" in office and "term" of office are not synonymous. (See, e.g., *Caldwell v. Bruning* (1966) 64 Cal.2d 111, 117.) Consequently, the judges who succeed to the new judicial offices pursuant to section 71080 will, after January 2, 1983, have tenure in office unrelated to any term of office. For a *term* of office to arise, there must be an election pursuant to sections 71141 and 71145. Thus, under the statutory scheme, their tenure would be indefinite unless and until cut short by the election of a successor. (See, *Caldwell v. Bruning, supra*, at pp. 116-120; cf. 59 Ops.Cal.Atty.Gen. 563, 574-576.)

The court in *Brown v. Hite, supra*, 64 Cal.2d 120 faced a similar dilemma with respect to several municipal court judgeships. There, the electoral process to select successors for six-year terms in an established municipal court had been "frustrated by virtue of the resignation of the elected incumbents and successive appointments to fill such vacancies. There, as in our situation, no election to establish new six-year terms had been completed. There, as in our situation, the court faced the problem as to when the incumbents who assumed office in an election year other than through the electoral process must stand for reelection. The court had, as we have, the same options of two years hence or six years hence for such elections. The statutes were, as in our case, silent. The court held as follows:

"We recognize that Government Code section 71141 contains no explicit provision authorizing an election at that time [in two years], for the 1966 election can, under no interpretation, be described as the election next preceding the expiration of a term. *However, in the absence of any statute dealing with the time of election in cases in which no term of office exists, we believe that this section should be construed as authorizing an election at the next succeeding general election in cases in which for some reason an election is not held on the regularly scheduled date.*" (Emphasis added.)

Although the court was considering judges appointed pursuant to section 71180, its reasoning is equally applicable to judges who succeed to office as in our situation pursuant to section 71080.

We further note that our conclusion that the judges in Mendocino County who will succeed to the two new judicial offices created by the consolidation ordinance must stand for election in 1984 is in conformity with two previous opinions of this office

⁹ Fortunately, all terms of office for the superseded courts terminate in January 1983. Accordingly, we have been spared the problem of having to determine *which* superseded offices bring into play the operation of the electoral process to select successors pursuant to section 71080.

decided under a prior version of section 71080, the succession statute.¹⁰ Thus in 27 Ops.Cal.Atty.Gen. 97 (1956) this office concluded, absent any language indicating when a successor should be elected to succeed a justice court judge who had assumed office automatically in a newly established municipal court, that a successor should be elected at the *next* general election following the establishment of the court. We did so on the basis of the general rule that, where doubtful, the matter should be presented to the electorate at the first opportunity. (See, e.g., *Ageller v. Dominguez* (1933) 217 Cal. 429, 433.) Later, in an unpublished opinion of this office (I.L. 64-102), we reached a similar conclusion where again a municipal court was established to replace a justice court. The timing was such that the electoral process for the superseded court had already commenced, and, accordingly, no election could be held for the new court in that year. We again concluded that the new municipal court judge who succeeded to office automatically pursuant to section 71080 was required to stand for reelection in two years, not six years. (Cf. § 71180, subd. (b); 71180.3, ¶ 3.)

In sum, it is concluded that the judges who succeed to office in the judicial districts established by the consolidation ordinance enacted on December 1, 1981 in Mendocino County will be required to stand for reelection at the June 1984 statewide primary election whether they succeed to office automatically pursuant to subdivision (a) of section 71080 or whether they succeed to office pursuant to a "run-off" election pursuant to subdivision (b) of that section. In short, the election is to be "deferred" until 1984.

¹⁰ When these opinions were issued, section 71080 provided as follows:

"After January 1, 1952, upon the establishment of a municipal or justice court, the judges of existing courts inferior to the superior court in any city, township, or judicial subdivision situated wholly or partly in the district or city and county for which a municipal or justice court is established shall, if eligible, become the judges of such municipal or justice court until the election or appointment and qualification of their successors. If the number of eligible incumbent judges who have not filed a written statement with the county clerk disclaiming their desire to succeed to office exceeds the number of judicial offices provided by law for such municipal or justice courts, such incumbents shall not automatically succeed to judicial positions in the municipal or justice courts, and the existing courts shall continue to function within the district until the first judge or judges of such municipal or justice court are elected by the qualified electors of the district at the first general state election held following the expiration of 90 days and qualify."

Thus, the section at such times did not contain any language with respect to the succeeding judges holding office essentially for the unexpired term of the judges of the superseded courts (i.e. when the election for successors should be held.) Nor did it contain the ten-month limitation.