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OPINION	:	No. 83-701
of	:	NOVEMBER 2, 1983
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THE HONORABLE MARIAN BERGESON, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. May a state legislator continue to serve as a legislator when, during his term of office and after the enactment of a legislative reapportionment bill, he moves his residence to a reapportioned district which contains no territory in common with his original district?

2. In such case can the legislator use the ballot designation "incumbent" when he runs for reelection from the reapportioned district to which he has moved his residence?

CONCLUSIONS

1. A state legislator may continue to serve as such when, during his term of office and after the enactment of a legislative reapportionment bill, he moves his residence to a reapportioned district which contains no territory in common with his original district.

2. Whether the legislator may use the ballot designation "incumbent" when he runs for reelection from the reapportioned district to which he has moved will depend upon a proper application of section 10212 of the Elections Code at the first election after reapportionment.

ANALYSIS

Article IV, section 2, subdivision (c), of the California Constitution sets forth the qualifications of state legislators, and provides:

> "(c) A person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year, and a citizen of the United States and a resident of California for 3 years, immediately preceding the election."

The California Legislature consists of 120 members. Of these 80 are members of the Assembly who are elected every two years and serve 2-year terms, and 40 are senators who serve 4-year terms, but on a staggered basis, 20 being elected every two years. (Cal. Const., art. IV, § 2, subd. (a).)

For purposes of choosing state legislators the state is divided into 80 assembly districts and 40 senatorial districts. (Cal. Const., art. IV, § 6.) In the year following each decennial census the Legislature is mandated to adjust or "reapportion" senatorial, assembly, congressional, and board of equalization districts in accordance with specified standards. (Cal. Const. XXI, § 1.) The Legislature has complied with this mandate through the enactment of Statutes of 1983, chapters 6-8, effective as an urgency measure on January 2, 1983.[1]

Under the constitutional plan a member of the assembly is elected from and for each assembly district every two years. As to the state senate, a senator is elected from each even-numbered senatorial district at the same time the governor is selected, whereas

[1] The original post-1980 reapportionment by the Legislature (Stats. 1981, chs. 536, 537) was rejected by the people by referendum at the June 8, 1982, Primary Election.

those who are to represent the odd-numbered districts are elected during a presidential year. This is true even immediately after reapportionment where district lines have changed and somewhat anomalous results in representation may be the necessary by-product of reapportionment. (See *Legislature* v. *Reinecke* (1973) 10 Cal.3d 396, 404-405.)[2]

Our opinion is requested as to whether a state legislator may continue to serve as such when, during his term and after the enactment of a legislative reapportionment bill, he moves his residence from his original district to a reapportioned district which contains no territory in common with his original district.[3] Our opinion is further requested as to whether such legislator can use the ballot designation "incumbent" when he runs for reelection.

1. The Question of Change of Residence

As noted at the outset, the California Constitution provides a one-year durational residency requirement for election *to* the Legislature. Nothing in the Constitution, however, specifically states that residency must continue throughout the legislator's term. Likewise, the constitutional debates both as to the 1849 Constitution and the 1879 Constitution contain nothing helpful on this point. For example, at the 1878-1879 constitutional convention the predecessor to present article IV, section 2, subdivision (c), was adopted with no debate or even discussion. And at the 1848 convention the predecessor provision was adopted with merely the comment that "[a] proposition had already been voted upon which covered the same ground."[4] (See, Report of the Debates, Sept. & Oct. 1849, p. 84; Debates and Proceedings, Cal. Const. Conv. 1878-1879, p. 1248.)

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[2] Thus, in the *Reinecke* case the court pointed out that electors who were moved from an odd-numbered district to an even-numbered district under the prior reapportionment were able to vote in 1972 and 1974 for a state senator, thus giving them in effect two senators. However those moved from an even-numbered district to an odd-numbered district could not vote for two years after reapportionment and in essence were unrepresented for those two years.

[3] We are informed that the legislator in question, who is a state senator, moved from an odd numbered district to another odd numbered district, and that the districts contain no common territory. Accordingly, in either district, he would run for reelection in 1984.

[4] We presume that what was meant was that the debate as to who should be "electors" covered the same ground, since the original provision with respect to electors required durational residency of one year in the state and six months within the local district, county, city or town prior to the election for such status. The debate on this provision was one of durational residency so as to demonstrate permanency in the state as opposed to the transiency of those who were merely prospecting for gold. (See Debates, Sept. & Oct. 1849, pp. 73-74.)

However, in the early case of *People* v. *Markham* (1892) 96 Cal. 262 the California Supreme Court ruled upon the question of the necessity for continuing residency under then article IV, section 4, of the California Constitution. In that case Streeter, a resident of San Bernardino County, was elected to the state Senate in November 1890 for a full four-year term from the 40th district, which consisted of San Bernardino County and San Diego County. In 1891 the Legislature reapportioned and redistricted the state so that the 40th district consisted solely of San Diego County. The Act, however, provided that senators elected from even-numbered districts in 1890 should continue in office for the full four-year term. An application for a writ of mandate was filed to require the governor to call a special election to fill what was alleged to be a vacancy in the 40th senatorial district on the theory that "Streeter ceased to live in the 40th district; and that therefore, under the constitution of this state, there . . . [was] a vacancy in the office of senator for said district." (*Id.* at p. 264.) The court sustained a demurrer to the application and dismissed the proceeding, stating:

> ". . . But the only constitutional provision upon the subject is in section 4 of article IV., and is as follows: 'No person shall be a member of the senate or assembly who has not been a citizen and inhabitant of the state three years, and of the district *for which he shall be chosen* one year, next before his election.' And it is quite clear that, so far as residence is concerned, this provision does not in the least affect the question before us. *Streeter was elected for a district composed of the counties of San Bernardino and San Diego; and at the time of his election he was, and for a year theretofore had been, and* (*if that be material*) *still is*, *a resident of said district*. The cases cited by petitioner are not in point. They were cases where officers of counties, or other municipal corporations, were required by law to reside at the seat of government of the municipalities; and the provisions of law under review in these cases were materially different from the provision of our constitution above quoted. For instance, in the leading case, cited by petitioner, of *State* v. *Choate*, 11 Ohio, 121, the constitutional provision construed was as follows: 'There shall be appointed in each county not more than three nor less than two associate justices, who, *during their continuance in office*, shall reside therein.'" (*Id.*, at p. 264; middle emphasis added.)

It is thus seen that the main basis for the court's decision was that the constitution did not contain a continuing residency requirement. The court in essence accepted the petitioner's factual contention that the senator ceased to be a resident of the district for purposes of its holding. It only parenthetically pointed out that "*if* that be material" he was still a resident of the district. The "ratio decidendi" of the case thus appears to be that under the constitution a legislator does not cease to be qualified for his office where he ceases to be

a resident of his legislative district during his term. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, pp. 4589-4591.)

This office also recognized this to be the case in a 1974 opinion of this office. It is to be recalled that the reapportionment finally implemented after the 1970 decennial census was a court-ordered reapportionment formulated by Special Masters appointed by the court. When formally adopted by the court, less than one year remained before the 1974 election. Accordingly, the court in *Legislature* v. *Reinecke*, *supra*, 10 Cal.3d 396 waived the one-year durational residence requirement for that election. Then in 57 Ops.Cal.Atty.Gen. 73 (1974) this office clarified certain problems concerning residence, concluding, inter alia, that:

> "[a] Senator elected in 1970 [from an even numbered district] and now residing in an odd numbered district may not seek reelection in that district and will have to move to an even numbered district, *not necessarily a part of his former district* in order to seek reelection." (*Ibid*., emphasis added.)

We further concluded:

> "The court did not hold [in *Reinecke*] that a senator previously representing an even-numbered district and now residing in an odd-numbered district would have to move to a portion of his former district which might now be in an even- numbered district in order to seek reelection. The residency requirements in the constitution require residence in any district for which election is to be sought. The Supreme Court held that a residence established by January 28, 1974 would satisfy this constitutional requirement. Therefore, a senator presently representing an even-numbered district may establish his residence by January 28, 1974 *in any even-numbered senatorial district* and run for reelection therefrom." (*Id.*, at p. 76, emphasis added.)

Thus, this office clearly pointed out that a state legislator does not cease to be qualified for his office where he moves from one legislative district to another after a legislative reapportionment and that district may be odd or even numbered and need not contain any territory of his former district. Stated otherwise, we concluded that there is no continuing district residence requirement imposed upon members of the State Legislature.

Additionally, another ground exists for concluding that a legislator who moves from one legislative district to another - whether before or after a legislative reapportionment - may continue to serve in that capacity. In no case would there be any automatic forfeiture of office, even assuming continuing residency qualifications for office.

This is by virtue of article IV, section 5, of the California Constitution. That section provides:

> "Each house shall judge the qualifications and elections of its members and, by roll call vote entered in the journal, two thirds of the membership concurring, may expel a member."[5]

This provision provides the Legislature with exclusive jurisdiction to determine the qualifications of its members, and a court will not rule upon that question. (See *In Re McGee* (1951) 36 Cal.2d 592; 62 Ops.Cal.Atty.Gen. 365, 369 (1979); 56 Ops.Cal.Atty.Gen. 365, 368 (1973); Compare *Powell* v. *McCormack*, *supra*, 395 U.S. 486.)

Accordingly, even assuming *arguendo* that a legislator was no longer qualified to serve as such by moving his residence out of his district, he would still be qualified to serve as such unless and until excluded pursuant to the provisions of article IV, section 5, of the California Constitution. As noted by this office in an analogous situation (conviction of a felony), the loss of qualifications to serve " . . . creates no more than an inchoate ground for removal; that loss of entitlement to office can occur only when the [appropriate house of the Legislature] . . . itself has acted." (25 Ops.Cal.Atty.Gen. 167, 169, (1955).)

In sum on the first question presented, a state legislator may continue to serve as such where, during his term of office and after the enactment of a legislative reapportionment bill, he moves his residence from his original district to a reapportioned district which contains no territory in common with his original district.

2. The Use of the Ballot Designation "Incumbent"

The second question presented is whether a legislator who has moved his residence to a completely new legislative district containing no common territory may use the ballot designation "incumbent" when running for reelection in the new district. The answer to that question varies with the facts and circumstances and is determined by a proper application of section 10212 of the Elections Code. That section, as amended by chapter 6, Statutes of 1983, provides:

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[5] For a difference between "exclusion" (which would only require a majority vote) and "expulsion" (which would require a two thirds vote) see *Powell* v. *McCormack* (1969) 395 U.S. 486. A legislator who is judged not to meet the constitutional qualifications for office can be excluded by the Legislature. However, expulsion may be voted for any reason.

"10212. At the first elections for Representative in Congress, State Senator, Assemblyman and Members of the Board of Equalization in each congressional, senatorial, Assembly, and Board of Equalization district following reapportionment acts of the Legislature redefining the boundaries of the congressional, senatorial, Assembly, and Board of Equalization districts pursuant to Section 6 of Article IV, Section 17 of Article XIII, and Section 1 of Article XXI of the Constitution, that candidate who shall be deemed the incumbent in a given district for purposes of the election shall be

"(a) That candidate who is running for the same office which he then holds and who is running for reelection in a district which has the identical boundaries and number as the district from which he was last elected.

"(b) In the event there is no candidate to whom the provisions of subdivision (a) apply, the incumbent shall be that candidate who is running for the same office which he then holds and who is running for reelection in a district which has the identical boundaries as the district from which he was last elected, but which has a different number.

"(c) In the event there is no candidate to whom the provisions of subdivision (a) or (b) apply, the incumbent shall be that candidate who is running for the same office which he then holds and who is running for reelection in a district which has the identical number as the district from which he was last elected; provided, however, that a candidate for the office of Member of the Assembly shall be considered the incumbent in such case only if the district bearing the same number is located in the same county as the district which previously bore that number.

"(d) In the event there is no candidate to whom the provisions of subdivision (a), (b), or (c) apply, the incumbent shall be that candidate who is running for the same office which he then holds and who is running for reelection in a district which contains some portion of the territory previously contained within the district from which he was last elected; provided, that in a new district which contains portions of the territory of more than one former district the incumbent shall be that candidate the greater portion of the territory of whose former district is included within the new district.

If there is no candidate in a given district to which any of the above provisions apply, the incumbent shall be any person who is a candidate

for the same office which he then holds who fulfills the residential requirements of law for candidacy within the district."[6]

Accordingly, under the final paragraph, a legislator moving from one district to another with *no* common territory and a different number could still be designated as the "incumbent."

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[6] It is also to be noted that the final paragraph of section 10212 of the Elections Code appears to constitute a legislative interpretation of article IV, section 2, subdivision (c), of the California Constitution that a disqualification for holding office will not ensue by moving from one district to another reapportioned district containing no common territory. Such a legislative interpretation is entitled to great weight. (See *Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 692-693.)