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OPINION	:	No. 84-201
	:	
of	:	<u>JUNE 28, 1984</u>
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THE HONORABLE RALPH J. GAMPELL, DIRECTOR,
ADMINISTRATIVE OFFICE OF THE COURTS, has requested an opinion on the
following question:

Will Associate Justice Edward Thomas Butler of the Court of Appeal, Fourth
Appellate District, Division One, stand for election for a full 12-year term at the next
gubernatorial election, or merely for the unexpired term of Associate Justice Margaret
Morris which she vacated upon being elevated to be Presiding Justice of Division Two of
that court?

CONCLUSION

Associate Justice Edward Thomas Butler will stand for election for a full 12-
year term at the next gubernatorial election.

ANALYSIS

Courts of Appeal are provided for in article VI, section 3 of the California Constitution. That section provides:

"The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment.

"An acting presiding justice shall perform all functions of the presiding justice when the presiding justice is absent or unable to act. The presiding justice or, if the presiding justice fails to do so, the Chief Justice shall select an associate justice of that division as acting presiding justice."

Accordingly, with the caveat that each division of a court must have a presiding justice and at least two associate justices, the Constitution *delegates* to the Legislature the power and discretion to determine the number of courts of appeal through districting, the number of divisions each court shall have, and the number of judges each division shall have.

Pursuant to this power and discretion, the Legislature has enacted section 69100 of the Government Code which divides the state into "six court of appeal districts." The Legislature has then enacted sections 69101 through 69106 of that code to prescribe the number of divisions each court shall have, and the number of judges for each division.

Our focus herein is on section 69104 which provides for the Fourth Appellate District. Prior to its amendment in 1981 it stated:

"The Court of Appeal for the Fourth Appellate District consists of two divisions. One division shall hold its regular sessions at San Diego and shall have five judges and the other shall hold its regular sessions at San Bernardino and shall have five judges."

Thus, District Four had two divisions, each consisting of five judges, which met in the designated cities.

Section 69104 of the Government Code was then amended by Statutes of 1981, chapter 959, to read:

"The Court of Appeal for the Fourth Appellate District consists of three divisions. One division shall hold its regular sessions at San Diego and shall have six judges. One division shall hold its regular sessions at San Bernardino and shall have four judges. One division shall hold its regular sessions in Orange County and shall have four judges."

Thus, the number of judges in Division One (San Diego) was increased from five to six, the number of judges in Division Two (San Bernardino) was decreased from five to four, and a Third Division (Orange County) was added consisting of four judges. This restructuring of the Fourth Appellate District was effective January 1, 1982. (Cal. Const., art. IV, § 8(c).)¹

At the time of this restructuring, there were two vacancies in Division Two (San Bernardino). Justice Stephen K. Tamura had resigned on October 25, 1981, and Justice Robert Gardiner had retired on December 26, 1981. Thereafter, but not until 1982, Division Two was increased from three to four judges by the assumption of office of Associate Justice John K. Trotter, Jr., on April 16, 1982. Several days later, the Honorable Margaret Morris, who had served on Division Two as an associate justice since 1976, was elevated to and took the oath of office as Presiding Justice of Division Two.

Accordingly, on the crucial date herein, December 3, 1982, Division Two consisted of four judgeships, all of which were filled.² On that date, Division One (San Diego), which now consisted of six judgeships, had only five judges. A vacancy existed in that Division by virtue of the increase in the number of offices from the recent court restructuring.

On December 3, 1982, the Honorable Edmund G. Brown, Jr., then Governor, sent the following communication to the Chief Justice of the California Supreme Court.

"Pursuant to Sections 7 and 16(d) of Article VI of the Constitution, I am making the following appointment to the vacancy created in the Court of Appeal, Fourth Appellate District, Division *One* by the elevation of Associate Justice Margaret Morris to the position of Presiding Justice of Division *Two*:

¹ Statutes of 1981 also restructured the Courts of Appeal in the First, Second and Fifth Districts and added the Sixth Appellate District.

² The only appointment to Division *Two* after Justice Morris' elevation was the appointment of Orange County Judge Robert E. Rickles to replace Justice John K. Trotter, Jr., who became presiding justice of the new Division Three (Orange County) on December 27, 1982. No ambiguity existed as to that appointment.

"Edward Thomas Butler
Associate Justice, Court of Appeal
Fourth Appellate District, Division *One*

"I respectfully request the Commission on Judicial Appointments consider this appointment and, if confirmed, file with the Secretary of State written confirmation as required by the above sections of the Constitution.

"I am sending a copy of this letter to the Honorable George Deukmejian, Attorney General and to the Honorable Gerald Brown, Senior Presiding Justice of the Court of Appeal, Fourth Appellate District."
(Emphasis added.)

Justice Butler's appointment was confirmed by the commission on December 27, 1982. Since Justice Morris served on Division *Two* (San Bernardino), not *One* (San Diego), when she was elevated to Presiding Justice of Division Two, the appointment of Justice Butler to Division *One* to fill the vacancy created by Justice Morris is somewhat confusing.

The significance of unravelling this confusion is to determine whether Justice Butler, when he runs for election in 1986, will run for a full 12-year term, or whether he will run merely for the unexpired term of Justice Morris. If his appointment was to a *new* office, he will run for a full term. However, if he filled a vacancy in her *old* office, he will run solely for the unexpired term.³

We conclude that Justice Butler was appointed to a new office in Division One, and that accordingly he will run for a full 12-year term. We do so based upon an application of the general rules concerning the creation and abolition of offices.

³ The times for election of the judges of, the terms of office of the judges of, and the manner of filling vacancies on the California Supreme Court and the Courts of Appeal are set forth in article VI, section 16 of the California Constitution.

Judges are elected only at gubernatorial elections. Judges who are appointed to fill vacancies stand for election at the next gubernatorial election, but only for the unexpired term.

Judges appointed to a new district or division (where there are three per district or division) are first elected for staggered terms of 4, 8 and 12 years, determined by lot. (See Gov. Code, § 69107.) When additional judges are added to a district, *those* judges will stand for election to a full term of 12 years. (See Atty.Gen.Unpub.Opn. I.L. 71-20.)

Accordingly, if Justice Butler was appointed to a *new* office in Division One (San Diego), that being the sixth office in that division, he will stand for a full term. If, however, it can be somehow said he filled Justice Morris' old office, he will stand for election only to the remainder of her original 12-year term.

"It is well settled that a sovereign power which creates a public office may abolish it or change the tenure thereof even though the tenure of an incumbent is affected thereby, unless restricted by the constitution. Such offices are not held by contract or grant. . . . (*Martello v. Superior Court* (1927) 202 Cal. 400, 408.)

"So in this state it has been held that when the legislature has created an office provided for or contemplated by the constitution, and it has been filled, the office may be destroyed during the term of the incumbent . . . *the power to create an office included the power to abolish or destroy it* (*Ford v. Harbor Commissioners* (1889) 81 Cal. 19, 26; emphasis added.)

Or as stated in *Fresno County Employees Assn. v. Fresno County* (1966) 242 Cal.App.2d 828, 830, quoting from 3 McQuillin, *Municipal Corporations* (rev. 3d ed.) page 502:

"Every public office is the creation of some law, and continues as such only so long as the law to which it owes its existence remains in force. When the law is legally abrogated, the office ipso facto ceases unless perpetuated by virtue of some other legal provision. . . ."

(See also, generally, *Deupree v. Payne* (1925) 197 Cal. 529, 538; *Proulx v. Graves* (1904) 143 Cal. 243; *Attorney General v. Squires* (1859) 14 Cal. 13, 18; *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 633; *Azavedo v. Jordan* (1965) 237 Cal.App.2d 521, 529.)

We apply these general rules or principles to the action of the Legislature in 1981. In doing so, we conclude that the Legislature, which had and has the power to create⁴ the various offices of appellate court justices throughout the state, and hence also the power to abolish them, by enacting chapter 959 created a *new* office in Division One (San Diego) of the Fourth Appellate District and at the same time *abolished* the vacant office in Division Two (San Bernardino) previously occupied by Justice Morris. The language of section 69104, *supra*, as amended, is positive in its terms and merely declares the number of offices established *in each division*. It in no way indicates any intent on the part of the Legislature to have legally "transferred" an old office from Division Two to Division One.

⁴ Significantly, the California Supreme Court itself has characterized the Legislature's action in 1981 as that of "creating" such offices. See *Brown v. Superior Court* (1982) 33 Cal.3d 242, 251:

". . . The Legislature's creation - with no contemporaneous appropriation - of these new judgeships in 1973 (ch. 1124) *and many new judgeships and appellate courts in 1981 (ch. 959)*" (Emphasis added.)

Accordingly, although the Governor's appointment language with reference to Justice Butler indicates that he was being appointed to an old office which was "transferred" from Division Two (San Bernardino) to Division One (San Diego), neither legal principle nor the language of section 69104 supports or requires such conclusion. In short, the vacancy to which Justice Butler was appointed was always in Division One. That vacancy was in a *new* office. The reference to Justice Morris in the appointment document was, in essence, surplusage.

Our conclusion herein may be supported by analogy to what occurs when boards of supervisors redistrict judicial districts. Under the provisions of article VI, section 5 of the California Constitution, as implemented by statute (see Gov. Code, § 71040),⁵ boards of supervisors are empowered as public convenience requires to divide the county into judicial districts. The net effect of such districting is to create or abolish municipal or justice courts and their attendant judgeships. As we explained in 62 Ops.Cal.Atty.Gen. 32 (1979), the board of supervisors has wide discretion as to the division or consolidation of districts when it redistricts. It may do so at any time, whether during an election year, during a nonelection year, during the term of incumbents, or at the end of their terms. In so doing it can create or abolish courts and their attendant judgeships. The Legislature appears to have been delegated similar powers with respect to Courts of Appeal by article VI, section 3.

Significant for our purposes herein is the conclusion we reached in the above cited opinion with respect to the two judgeships of the Madera Judicial District after its division into two districts.⁶ We relied primarily upon the case, *Phelps v. Brennen* (1976) 16 Cal.3d 508, which held that the redistricting of Shasta County from eight justice courts

⁵ Article VI, section 5, provides:

"(a) Each county shall be divided into municipal court and justice court districts as provided by statute, but a city may not be divided into more than one district. Each municipal and justice court shall have one or more judges.

"There shall be a municipal court in each district of more than 40,000 residents and a justice court in each district of 40,000 residents or less. The number of residents shall be ascertained as provided by statute.

"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.

"(b) Notwithstanding the provisions of subdivision (a), any city in San Diego County may be divided into more than one municipal court or justice court district if the Legislature determines that unusual geographic conditions warrant such division."

⁶ By special statute, the district had two justice court judges instead of the usual one judge.

into four such courts created four *new* courts, and hence four *new* judicial offices. We stated, inter alia:

"If, as in *Phelps*, the consolidation of eight justice courts into four such courts created new judicial offices in the four new districts, it likewise follows that the 'de-consolidation' of the Madera Judicial District in two judicial districts of less than 40,000 inhabitants would create two *new* judicial offices in the two new districts. The fact that the Madera Judicial District has two incumbent judges, instead of the usual one judge, would be immaterial. The establishment of the new court would necessarily abolish the old courts, and the judicial offices attached thereto. We accordingly so hold. (62 Ops.Cal.Atty.Gen., *supra*, at p. 40.)

No attempt was made to conclude that the old judgeships had been "transferred" to the new courts.

By a parity of reasoning, when the Legislature restructured the Fourth District Court of Appeal in 1981, it created one new division, Division Three, with four *new* judicial offices. It also incidentally *added* a new judgeship to Division One and *abolished* another in Division Two. All this was done pursuant to its constitutionally delegated powers.

Accordingly, it is concluded that Associate Justice Edward Thomas Butler of the Court of Appeal, Fourth Appellate District, Division One, was appointed to a *new* office in Division One; that, therefore, he will stand for election for a full 12-year term at the next gubernatorial election.
