

## Memorandum 94-7

**Trial Court Unification: Election of Judges—election following appointment**

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## BACKGROUND

The Commission's tentative recommendation on trial court unification would amend California Constitution Article VI, Section 16(c) to read:

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 third January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.

**Comment.** Subdivision (c) is revised to provide for an election to fill a superior court vacancy at the general election following the third, rather than the first, January 1 after the vacancy occurs. This represents a compromise between the system formerly applicable to superior court judges under this section (election during the first year after vacancy) and the system formerly applicable to municipal and justice court judges by statute. Gov't Code § 71145 (election at the general election immediately preceding expiration of the term to which the judge is appointed to fill a vacancy).

By inserting the word "third" into the existing provision, this proposal would extend by two years the time before an election is held to fill a vacancy. The proposal is intended as a compromise between the existing system for superior court judges and the existing system for municipal and justice court judges. The superior court system requires that when a vacancy occurs, an election will be held at the next general election after the January 1 following the vacancy. The municipal court system essentially provides that a vacancy is filled by appointment for the remainder of the term, with an election during the final year of the term. The justice court system provides for a short interim appointment, followed by an election at which, as a general rule, a judge is elected to serve the remainder of the predecessor's term.

The tentative recommendation would lengthen the appointment period for superior court judges and delay the election to fill a vacancy in the superior

court. Benefits of the change may include improved recruitment of top appointees, decreased likelihood that a judge would be voted out of office based on the judge's political views, and reduced incentive for a judge to decide a case based on how popular the decision would be with the electorate. Additionally, voters would not have to vote on an appointee who lacks a track record.

## OVERVIEW

This memorandum examines the mechanics and rationale of the existing superior court selection system and the impact of the proposed amendment. The existing system is based on a strong, repeatedly reaffirmed policy favoring the electorate's right to select its trial judges of general jurisdiction. Even under the existing system, an appointee may serve for three years or longer before an elected judge assumes office. The effect of the proposed amendment would be dramatically to extend this time period, such that an appointee might serve for five years or longer before a judge chosen by the electorate assumes office. Although the tentative recommendation is intended as a compromise, the actual effect may be to accord a superior court appointee protection as good as, or better than, that under the existing municipal and justice court system.

The memorandum concludes that the Commission should delete the proposed amendment from the recommendation. This would preserve the existing system for superior court judges, avoid a potentially heated side issue that may jeopardize SCA 3, and bolster the concept that trial court unification replaces municipal and justice court judgeships with superior court judgeships, rather than preserving the lower court judgeships in modified form.

## EXISTING SELECTION SYSTEM FOR SUPERIOR COURT JUDGES

### **Existing System**

Under the existing constitutional provision, as interpreted by the California courts, a superior court judge serves a six year term, commencing on the Monday following January 1 after election and ending on December 31 six years later. (There is a gap of up to seven days between the end of one term and the beginning of the next.) When a vacancy occurs, a temporary appointment is made pending assumption of office by a judge elected at the next general election after the January 1 following the vacancy. When an appointment is made to fill a

superior court vacancy, the appointee's tenure in office does not constitute a "term" within the meaning of the California Constitution.

In practice, the person appointed to fill the vacancy expects to run for, and be elected to, a full six-year term. The length of time the appointee may serve before standing for election depends on when the appointment occurs in relation to the next "general election" after the January 1 following the vacancy. There is a built in grace period: the election cannot be held until the calendar year following the year in which the vacancy occurs, at the earliest. But as explained below, this can result in a period as short as three months, or as long as two years.

### **General Election**

**Former Law.** In interpreting the term "general election" as used in Section 16(c), the California Supreme Court has looked to the statutory definition of a general election—the election held throughout the state on the first Tuesday after the first Monday of November in each even-numbered year. Former Elec. Code § 23; *Fields v. Eu*, 18 Cal. 3d 322, 324, 556 P.2d 729, 134 Cal. Rptr. 367 (1976); *Pollack v. Hamm*, 3 Cal. 3d 264, 268 n.3, 475 P.2d 213, 90 Cal. Rptr. 181 (1970). That statutory definition remained unchanged until January 1, 1994. See discussion below of "New Legislation."

**Primary Election.** The cases also provide that a primary election is a general election for purposes of Section 16(c) if a candidate receives a majority of the votes cast for the office. The Supreme Court has explained the operation of constitutional provision as follows:

[S]ubdivision (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 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.

*Fields, supra*, 18 Cal. 3d at 326.

The Court commented that this means “the prescribed delay in filling a superior court vacancy by election can be as short as 6 months (e.g., from December 1975 to June 1976) or as long as 29 months (e.g., from January 1976 to June 1978).” *Id.* at 326 n.4.

**New Legislation.** Legislation enacted in 1993 expands the statutory meaning of “general election:”

“General election” means either of the following :

(a) The election held throughout the state on the first Tuesday after the first Monday of November in each even-numbered year.

(b) Any statewide election held on a regular election date as specified in Section 2500.

Elections Code § 20

We may assume that the courts will continue to use the statutory definition of “general election” to interpret Section 16(c), as they have in the past.

Additional new legislation, which is operative January 1, 1994, but has a 1998 sunset clause, affects interpretation of the terms “statewide election” and “regular election date” in Elections Code Section 20. The net effect of the 1993 revisions is to expand the dates when a “general election” may be held to include November of an even numbered year, the June primary held in even numbered years with no presidential election, the new March presidential primary, and even a statewide special election held on a “regular election date” in an odd numbered year.

Because the courts already interpreted the term “general election” to include primary elections, the change in the statutory definition of “general election” should have relatively little effect on superior court appointments. In some instances, however, the statutory expansion of the number of “general elections,” may decrease the time a superior court appointee may serve before being required to stand for election.

Specifically, by postponing the election until the general election after the January 1 following the occurrence of a vacancy, Section 16(c) guarantees a minimum time before the appointee stands for election. With the creation of a new presidential primary date on the fourth Tuesday in March, the minimum time may be quite short. If a vacancy occurs late in 1995, the next general election after January 1 will be held at the end of March 1996, a period as little as three months.

### **Vacancy During Last Year of Term**

If an incumbent superior court judge resigns or retires during the final year of the judge's term, at a time when another person has qualified as a candidate for the office, the scheduled election for that office is held despite any appointment to fill the vacancy. The election is not postponed until the general election following the next January 1. *Stanton v. Panish*, 28 Cal. 3d 107, 115-16, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980). An appointment made close to a general election date during the last year of a term could force the appointee into an immediate election.

### **Newly-Created Judgeships**

In *Fields*, *supra*, 18 Cal. 3d at 333-34, the California Supreme Court concluded that due to the interplay between Section 16 and the rules regarding when new statutes become effective, elections to fill certain new superior court judgeships would not be held until 1978, even though the Governor signed the statute creating the new judgeships on October 31, 1975. The Court explained:

[W]e are constrained to identify one of the contributing causes of the delay which will now ensue in filling these offices by election. [Fn. omitted.] The cause is not our reading of the Constitution, but the recent history of amendments to that document. Prior to the 1972 revision of the legislative article, new statutes took effect 90 days after adjournment. (Former art. IV, § 1.) In the case of regular sessions, this meant the statutes became operative in mid-September; and in such circumstances, "the January 1 following the vacancy" (art. VI, § 16, subd. (c)) was usually no more than a few months away. In 1972 the legislative article was amended to provide, *inter alia*, that new statutes do not take effect until the January 1 following a 90-day period after their enactment. (Art. IV, § 8, subd. (c)(1).) But no corresponding change was made in the quoted language of section 16 of the judicial article, thereby automatically adding two years to the delay in holding elections to fill new judgeships whenever the statute creating them is enacted in a nonelection year. [Fn. omitted.] We must assume that the failure to change the judicial article in this respect was a deliberate decision of the draftsmen of the constitutional revision. If it was not, the remedy is not for this court to rewrite any portion of the judicial article but for an appropriate process of amendment to be initiated.

*Fields*, 18 Cal. 3d at 333-34.

This problem of delay in electing judges to new judgeships may be somewhat mitigated by the increase in the frequency of general elections under the new election legislation.

### **Policy Favoring Judicial Election**

Recruiting appointees to run the risk of a short appointment may be difficult, particularly in small counties. Further, finding an appointee to serve may be more critical in small counties than in more populous counties, because in larger counties there will be other judges to absorb the workload of a departed colleague, whereas in smaller counties there may be no other judges and judicial business may come to a halt unless the vacancy is filled. These considerations are most acute when a vacancy occurs in the final year of a six year term and in presidential election years.

However, strong policy considerations support the requirement of a prompt election. “The right of suffrage, protected by article II of the California Constitution, is a fundamental right ‘preservative of other basic civil and political rights.’ [Citations omitted.] ‘Every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process.’ [Citation omitted.]” *Stanton, supra*, 28 Cal. 3d at 115. “[U]nless there is express constitutional or statutory provision otherwise, and whenever possible, the succession of superior court judges shall be by popular election.” *Id.* at 111. “[T]he intent of section 16(c) was 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.’” *Id.* at 112, *quoting Pollack, supra*, 3 Cal. 3d at 273.

Other cases also emphasize the power of the people to elect their superior court judges. For example, in *Lungren v. Davis*, 234 Cal. App. 3d 806, 826, 285 Cal. Rptr. 777 (1991), the court commented that “the provisions for a time gap between the vacancy and the election were *not written for the benefit of the Governor or his appointee, but were designed so that the full election process may be carried out.*” (Emph. added.) The court further explained:

While there may be a legitimate debate over the wisdom of the elective-judge system, from a constitutional perspective that debate has been resolved in favor of elected judges. Since the first Constitution in 1849, the Governor has never been given the power to appoint a superior court judge to a term of office. Vacancies are to be filled by election, and the Governor may only appoint a person temporarily to fill a vacancy in the superior court until the

election. . . . The linguistic insistence in the Constitution that judges be elected rather than appointed not only serves to reserve the right of suffrage to the people, it serves to maintain the independence of the judicial branch from undue influence by the executive and legislative branches.

234 Cal. App. 3d at 825; *see also id.* at 819-20.

Similarly, in *Pollack, supra*, the Court stressed the right of suffrage in concluding that the death or resignation of a superior court appointee does not create a new vacancy in office, retrigger the grace period of Section 16(c), or delay the election to fill the office. As the Court explained:

[I]f 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.

3 Cal. 3d at 272-73.

Any change in Article VI, Section 16(c) should be sensitive to this repeatedly reaffirmed policy favoring the electorate.

#### EFFECT OF TENTATIVE RECOMMENDATION

Concern about recruitment of qualified appointees, requiring voters to vote for judges without long track records, and the potential influence of impending elections on judicial decision making underlay the Commission's decision to propose amendment of Section 16(c) to delay judicial elections an additional two years. As explained in the Comment, this proposal, which was initially suggested by the Judicial Council, is also intended to represent a compromise between the existing appointment system for superior court judges and the existing appointment system for municipal and justice court judges.

The municipal court system essentially allows a municipal court appointee to serve out the remainder of the predecessor's six-year term in office. *See Gov't*

Code §§ 71145, 71180. But “[n]o successor to the appointee shall be elected at any election held within 10 months of the date of the occurrence of the vacancy.” Gov’t Code § 71180(b); *see also* *Barton v. Panish*, 18 Cal. 3d 624, 627, 557 P.2d 497, 135 Cal. Rptr. 65 (1976). Thus, a municipal court appointee could serve in that capacity for less than a year, or as much as six years, or anywhere in between.

The justice court system is similar, but provides appointees with less protection. It essentially provides for a short interim appointment, followed by an election at which, as a general rule, a judge is elected to serve the remainder of his or her predecessor’s term. Gov’t Code § 71180.3.

Arguably, the system provided in the tentative recommendation would provide appointees to the unified court with at least as much protection as appointees to the municipal and justice courts currently enjoy. Under the tentative recommendation, an appointee to the unified court could serve anywhere between two and a quarter to four and a half years before being required to stand for election. The appointee also holds office for the additional six to nine month period between when an election is held and when the person elected takes office. Thus, an appointee could hold office for up to five years before being replaced by an elected judge, or commencing his or her own elected term. This may be seen as a significant incursion on the policy of allowing the people of California, rather than their Governor, to select their superior court judges.

The tentative recommendation would also create problems for filling newly created judicial offices by election, extending the time before an election may be held to anywhere between three and a quarter to four and a half years.

#### STAFF RECOMMENDATIONS

The proposed amendment to Section 16(c) may be considered a major disruption of the existing balance of power between the people of California and their Governor. Rather than embroiling SCA 3 in this potentially heated side issue, the staff recommends that the Commission omit the proposed amendment and leave **Section 16(c) unchanged**.

This would have the added benefit of furthering the concept that trial court unification abolishes municipal and justice court judgeships, rather than perpetuating those offices in modified form. This has advantages in the Voting



Rights Act context, as well as with regard to retirement benefits for retired municipal and justice court judges.

The existing scheme, even with the greater frequency of general elections under the new election law, already contemplates the possibility of an appointee having to stand for election after a short term in office. Under existing law, a superior court election may be held as early as three months after an appointment or as late as two and a half years after an appointment. This should be as workable for future appointees to the unified court as it is for current appointees to the superior court. We should not make trial court unification the occasion for a change that fundamentally alters the nature of judicial selection. If there are problems with the basic system of selection, the system itself should be the subject of a separate study and revision project.

If the Commission nonetheless decides to make the two-year extension of an appointee's term its final recommendation, the Commission also needs to decide whether the rule of *Stanton* (a judicial appointment made after candidates have qualified for an election does not cancel the election) is overruled, and should make the result clear in the Constitution. Because the proposed amendment would change the balance of power, it necessarily bears on the *Stanton* rule, which is based on preservation of the electorate's power to select superior court judges.

The Commission also will need to decide whether to preserve the rule that if an appointee dies or resigns before the election to fill a vacancy, a new appointment does not trigger a new grace period. This type of occurrence will be more frequent with an added two year delay in holding elections. The existing rule is based on the concept that an appointment merely holds a place until an election can be held. The tentative recommendation would change this philosophy and emphasize the right of the appointee to hold office for a sufficient time to perform well in the election. This philosophy would appear to require that each time a new appointment is made before an election is held, a new time period for the election starts to run. This issue requires resolution.

The staff will also revise the Comment to Section 16(c) to describe more accurately the existing appointment system:

Subdivision (c) is revised to provide for an election to fill a superior court vacancy at the general election following the third, rather than the first, January 1 after the vacancy occurs. This represents a compromise between the system formerly applicable

to superior court judges under this section (election ~~during~~ **at the first general election following** the first year **January 1** after the vacancy occurs) and the system formerly applicable to municipal and justice court judges by statute. Gov't Code §§ 71145, **71180, and 71180.3** (~~election at the general election immediately preceding expiration of the term to which the judge is appointed to fill a vacancy as a general rule, selection of an interim judge to serve the remainder of the predecessor's term).~~

Respectfully submitted,

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