

Study J-1300

May 27, 1998

Memorandum 98-33**Trial Court Unification: Judicial Elections**

In response to a Judicial Council request for comments, Judge Alan Rosenfield (Presiding Judge, Newhall Municipal Court) raised a concern regarding the timing of judicial elections where an appointed municipal court judge becomes a superior court judge through unification. The Judicial Council referred this matter to the Commission. Understanding and analyzing Judge Rosenfield's suggestion requires familiarity with the existing rules governing the timing of municipal and superior court elections.

EXISTING SYSTEM FOR MUNICIPAL AND SUPERIOR COURT ELECTIONS

Judicial elections are nonpartisan. Cal. Const. art. II, § 6(a). Consequently, the primary election is often decisive. If a judicial candidate receives a majority of the vote at the primary, the candidate is elected and no general election is necessary. Elec. Code § 8140.

Timing of Superior Court Elections

The timing of superior court elections is governed by Article VI, Section 16(b) and (c) of the state Constitution:

(b) Judges of other courts [i.e., courts other than the Supreme Court and the courts of appeal] shall be elected in their counties or districts at general elections. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

(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.

SCA 4 would amend Section 16(b) and (c) as follows:

~~(b) Judges of other~~ (1) In counties in which there is no municipal court, judges of superior courts shall be elected in their counties at general elections except as otherwise necessary to meet the requirements of federal law. In the latter case the Legislature, by two-thirds vote of the membership of each house thereof, with the advice of judges within the affected court, may provide for their election by the system prescribed by subdivision (d), or by any other arrangement. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

(2) In counties in which there is one or more municipal court districts, judges of superior and municipal courts shall be elected in their counties or districts at general elections. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

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

Timing of Municipal Court Elections

The timing of municipal court elections is governed by statute, not by the Constitution. There are three key provisions:

Gov't Code § 71141. Municipal judge elections

71141. Judges of the municipal court and justice court shall be elected at the general state election next preceding the expiration of the term for which the incumbent has been elected.

Gov't Code § 71145. Municipal judge term

71145. 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.

Gov't Code § 71180. Municipal court vacancy

71180. (a) Any vacancy in the office of judge of a municipal court shall be filled by appointment by the Governor, but no vacancy shall be deemed to exist in any office before the time fixed in Sections 71080, 71082, and 71083 for the selection of the judges of that court and the time fixed by law for their qualification. The appointee shall hold office for the remainder of the unexpired term

of his or her predecessor and until his or her successor is elected and qualifies.

If the office to which any person so appointed was not previously occupied, he or she shall hold office until his or her successor is elected at the general state election next succeeding the occurrence of the vacancy and qualifies. No successor to the appointee shall be elected at any election held within 10 months of the date of the occurrence of the vacancy.

(b) If a vacancy in the office of judge of a municipal court occurs between the last day candidacy declaration papers may be filed and the June direct primary election and that vacancy occurs because of the appointment of the incumbent judge to another office by the Governor, or because the incumbent has resigned, retired, died, or been removed from office in accordance with subdivision (b) or (c) of Section 18 of Article VI of the California Constitution, and if one or more qualified persons other than the incumbent have filed candidacy declaration papers for the office, no vacancy shall be deemed to exist for purposes of subdivision (a), and the election for the office of judge shall be postponed until the next November statewide election.

If the Governor appoints the incumbent judge to another office within 68 days of the June direct primary election, and, as a result, the elections officer does not have sufficient time to remove the candidates' names from the ballot, the June direct primary election for the office shall not be deemed to have been held. At the next November statewide election, the candidate who receives the most votes shall be elected.

In order for a person's name to appear on the ballot at the next November statewide election the person shall file nomination documents in accordance with Article 2 (commencing with Section 8020) of Chapter 1 of Part 1 of Division 8 of the Elections Code. No previously filed documents shall satisfy this subdivision. Qualified persons who did not file nomination documents for the June direct primary election, as well as qualified persons who filed nomination documents for the June direct primary election, shall be permitted to file nomination documents for the November statewide election.

Persons who had previously paid the filing fee at the time of filing nomination documents for the June direct primary election shall not be required to pay a filing fee for the November statewide election.

Comparison of Superior Court and Municipal Court Elections

“What sense there is in an entirely separate scheme for the timing of elections to the two trial courts is not apparent.” R. Grace, *Timing in Judicial Elections*, Part 1: The Superior Court, *Metropolitan News* (Tues., Feb. 3, 1998). “In

interpreting the various election provisions, there is a marked tendency on the part of courts to show how creative they can be.” *Id.*

A chart summarizing the basics of the two election schemes is attached. (Exhibit pp. 1-3.) This chart does not cover every possible situation. Key differences between the two schemes include:

- A municipal court appointee holds office “for the remainder of the unexpired term of his or her predecessor and until his or her successor is elected and qualifies.” Gov’t Code § 71180(a). A superior court appointee does not serve out the remainder of the predecessor’s six-year term, but instead is up for election at the “next general election after the January 1 following the vacancy.” Cal. Const. art. VI, § 16(c); *see also* Cal. Const. art. VI, § 16(c) (as amended by SCA 4) (“after the *second* January 1 following the vacancy”).

- The so-called “ten-month rule” applies to a municipal court appointee: “No 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(a); *see also* *Donnellan v. Hite*, 139 Cal. App. 2d 43, 293 P.2d 158 (1956); *Campbell v. Hite*, 57 Cal. 2d 484, 369 P.2d 944, 20 Cal. Rptr. 328 (1962); *Brailsford v. Blue*, 57 Cal. 2d 335, 369 P.2d 13, 19 Cal. Rptr. 485 (1962). This rule does not apply to a superior court appointee.

JUDGE ROSENFELD’S SUGGESTION

SCA 4 includes a transitional provision (proposed Cal. Const. art. VI, § 23), which provides in part:

When the superior and municipal courts within a county are unified, the judgeships in each municipal court in that county are abolished and the previously selected municipal court judges shall become judges of the superior court in that county. The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court.

Proposed Government Code Section 70211 would reiterate much of this constitutional language, making it readily accessible:

70211. When the municipal and superior courts in a county are unified:

(a) The judgeships in each municipal court in that county are abolished and the previously selected municipal court judges become judges of the superior court in that county. Until revised by statute, the total number of judgeships in the unified superior court shall equal the previously authorized number of judgeships in the municipal court and superior court combined.

(b) The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court.

(c) The 10-year membership or service requirement of Section 15 of Article VI of the California Constitution does not apply to a previously selected municipal court judge.

Comment. Section 70211 restates the first three sentences of Constitution Article VI, Section 23(b), with the addition in subdivision (a) of a provision maintaining the total number of judgeships in the county. The Legislature prescribes the number of judges. Cal. Const. art. VI, §§ 4, 5.

The references in this section to a “previously selected” judge includes selection by election or by appointment to fill a vacancy. *Cf. Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm’n Reports 1, 82 (1994) (Article VI, § 23(b) Comment).

Judge Rosenfield would add a second sentence to Section 70211(b), to clarify how unification affects a municipal court judge appointed by the governor: “Municipal court judges holding office following gubernatorial appointment shall first stand election as provided in Government Code Section 71180.” (Exhibit pp. 10-11.) He explains:

The added language is necessary because the time frame for election of municipal court judges varies depending upon the time of the vacancy giving rise to the appointment (i.e., the 10 month rule). Without the added language, an ambiguity arises between the existing language of the subparagraph and the new language in SCA 4 amending Cal. Const., Section 16, Art. 6, to provide for the filling of vacancies at an election after the SECOND January 1 following the vacancy (for SUPERIOR court judges).

MC judges at the time of conversion become judges of the superior court, but their current term is “unaffected.” The definition of that term is possibly governed by G.C. 71180, in terms of defining the date for the first election following appointment. Such date may vary under municipal court law depending upon the date of the vacancy filled by the appointment.

(Exhibit p. 11.)

Judge Rosenfield essentially asks whether Government Code Section 71180 governs the time for holding an election where a municipal court appointee becomes a superior court judge through unification. The answer hinges on the constitutional mandate that the “term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court.” Cal. Const. art. VI, § 23(b) (as amended by SCA 4).

RELATED ISSUE: UNIFICATION DURING A MUNICIPAL COURT ELECTION

Judge Rosenfield’s question led the staff to consider an important related point: The interrelationship between unification and an ongoing municipal court election. Suppose, for instance, that a municipal court primary occurs, a runoff is necessary, but the court unifies before the runoff is held. What happens? Similarly, suppose that several persons have declared candidacy for a municipal court primary, but unification occurs before the primary is conducted. Again, what happens? Providing clarification on these points is a matter of some urgency, because 1998 is an election year and many courts are planning to unify soon after a favorable vote on SCA 4.

ANALYSIS

The staff’s analysis of these issues, focusing on the constitutional mandate that the “term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court,” is presented below. The Commission’s consultant, Professor J. Clark Kelso, has also prepared an analysis, which is attached. (Exhibit pp.12-16.)

Application to Appointees

This constitutional provision clearly applies to appointees, as well as elected municipal court judges. The Commission’s report on SCA 3 (the predecessor of SCA 4) includes the same language, with the following Comment:

Subdivision (b) makes clear that existing municipal ... court judgeships are not continued after unification. New superior court judgeships are created, and this section ensures the continuation in office of existing municipal ... court judges in the unified trial court for the duration of their former terms, *regardless whether their selection was by appointment or election.*

(Emphasis added.) The Commission deliberately used the word “selected” in Section 23(b), because “selected” had previously been interpreted to encompass both elected and appointed judges. See *Lungren v. Davis*, 234 Cal. App. 3d 806, 822, 285 Cal. Rptr. 777 (1991).

Section 23(b) thus mandates that the “term of office” of a previously elected or appointed municipal court judge “is not affected by taking office as a judge of the superior court.” But what does this mean?

Interpretations of “Term of Office”

An obvious interpretation is that unification does not affect how long a former municipal court judge holds office; the judge will be up for election at the same time as if unification had not occurred. “Term of office” essentially means “tenure in office.” This interpretation preserves existing expectations of the judge, the electorate, and potential judicial candidates.

It is possible, however, to interpret “term of office” to refer to the six-year term for which the judge (or the judge’s elected predecessor, in the case of an appointee) was elected. This may differ from the judge’s tenure in office, because the judge may leave office before the end of the term. The six-year term may also differ from the judge’s tenure in office, because the judge holds office until a successor is elected *and qualifies* (Gov’t Code §§ 71145, 71180), which occurs only when the successor is sworn in at the start of the successor’s term (Gov’t Code §§ 1360, 71144). Where, for instance, a municipal court vacancy occurs less than ten months before the next general state election, an appointee to that vacancy need not stand election until the following general state election. Gov’t Code § 71180. The appointee holds office until a successor is elected and qualifies, even if the six-year term of the appointee’s elected predecessor expires earlier. *Campbell v. Hite*, 57 Cal. 2d 484, 369 P.2d 944, 20 Cal. Rptr. 328 (1962).

Which interpretation of “term of office” is correct? Both case law and constitutionally embedded policy considerations must be examined.

Case Law

The “six-year term” interpretation of “term of office” arguably draws support from *Lungren v. Davis*, 234 Cal. App. 3d 806, 285 Cal. Rptr. 777 (1991), in which a superior court appointee was elected, but resigned before his elective term began so that he could become chief deputy attorney general. The issue was whether the appointee was eligible to be chief deputy attorney general, in light of a

constitutional provision (Cal. Const. art. VI, § 17) making a judge ineligible for nonjudicial public employment or office during the judge's "term." The Court of Appeal determined that he was eligible.

In reaching that result, the court concluded that a superior court appointee does not serve a "term" within the meaning of Section 16 of Article VI. *Id.* at 820-26. The "very fact that an appointee does not have a fixed and definite time at which his right to hold office, and the accompanying disabilities, will terminate precludes considering him to have a 'term' of office within the general meaning of the word." *Id.* at 824. "Term" refers only to the six-year term of an elected superior court judge in Section 16; "term" means the same thing in Section 17. *Id.* at 820-25. Consequently, a superior court appointee is "not ineligible for public office or employment beyond the period of his actual service." *Id.* at 822.

From *Lungren* one could argue that "term of office" in Article VI, Section 23(b) refers to a judge's fixed term, just as in Article VI, Sections 16 and 17. "There can be no question ... that words and phrases within article VI of the Constitution must be interpreted in the light of other provisions of that article." *Id.* at 823.

But *Lungren* also says that "[t]he word 'term' must be interpreted to effectuate the statutory scheme pertaining to the particular office under examination." *Id.* at 815. The Court of Appeal carefully distinguished a superior court "term" from the "term" of other judicial offices. *Id.* at 818-19, 822.

In *Campbell v. Hite*, 57 Cal. 2d 484, 487-88, 369 P.2d 13, 20 Cal. Rptr. 328 (1962), the Supreme Court specifically considered the tenure of five municipal court appointees who sought to run for election in 1962. The Court determined that the appointees were not up for election that year, because the vacancies to which they were appointed occurred less than ten months before the 1962 primary. *Id.* Dismissing the notion that Government Code Section 71145 creates an exception to the ten month rule, the Court stated: "[T]he term of office of each of the petitioners is for the term of his predecessor *and* until his successor is elected and qualifies." *Id.* at 488 (emphasis in original). The Court thus equated the "term of office" of the appointees with their statutorily prescribed tenure in office pursuant to Government Code Section 71180 ("The appointee shall hold office for the remainder of the unexpired term of his or her predecessor and until his or her successor is elected and qualifies").

The Legislature is presumed to have been aware of this judicial interpretation in drafting SCA 4, suggesting that "term of office" should also be interpreted to mean "tenure in office" in proposed Article VI, Section 23(b). See, e.g., *Walters v.*

Weed, 45 Cal. 3d 1, 10, 11, 752 P.2d 443, 246 Cal. Rptr. 5 (1988); *People v. Woods*, 12 Cal. App. 4th 1139, 15 Cal. Rptr. 2d 906 (1993). The strength of this inference depends on whether the Court's reference to "term of office," rather than "tenure in office" is regarded as essential to its decision. *Harris v. Capital Growth Investors XIV*, 52 Cal. 2d 1142, 1155-56, 805 P.2d 873, 278 Cal. Rptr. 614 (1991).

A third case, *Caldwell v. Bruning*, 64 Cal. 2d 111, 114, 410 P.2d 353, 48 Cal. Rptr. 849 (1966), suggests still a third possibility. *Caldwell* involved an appointee who replaced a municipal court judge who was reelected but left office before his new term began. The Court determined that the appointee's "term of office" included the term for which his predecessor had been elected, even though his predecessor never took office. The Court explained that the "term of office" of municipal court judges "is unrelated to the tenure of the person elected." *Id.* at 119. It necessarily follows that "term of office" is not synonymous with "tenure in office" for an elected municipal court judge.

With regard to appointees, however, *Caldwell* reiterates the quoted language from *Campbell* ("the term of office of each of the petitioners is for the term of his predecessor and until his successor is elected and qualifies"). *Caldwell* thus reinforces the view that a municipal court appointee's "term of office" is the same as the appointee's "tenure in office." Under *Caldwell*, then, "term of office" seems to mean one thing for elected municipal court judges ("six-year term") and another for municipal court appointees ("tenure in office" — i.e., the remainder of the elected predecessor's term and until a successor is elected and qualifies).

Thus, the case law does not provide a definitive answer in interpreting Article VI, Section 23(b): "Term of office" could mean "six-year term," it could mean "tenure in office," or it could even mean "term of office" for appointees and "six-year term" for elected judges. *Campbell* and *Caldwell* are Supreme Court decisions concerning municipal court judges, but they do not construe constitutional language. *Lungren* interprets Article VI of the Constitution, but in reference to superior court judges. There is as yet no case law interpreting proposed Article VI, Section 23. Cases construing other provisions are of limited relevance, because "the meaning of the words 'term of office' is not governed by any uniform rule but must be determined by reference to the other portions of the statutes in which they are found." *Caldwell*, 64 Cal. 2d at 117.

Constitutionally Embedded Policy Considerations

Although the case law does not provide a clear answer, constitutionally embedded policy considerations do.

The constitutionally stated purpose of the SCA 4 amendments is to permit the Legislature to provide for abolition of the municipal courts and unification of their operations within the superior courts. Cal. Const. art. VI, § 23(a) (as amended by SCA 4). To this end, SCA 4 gives the Legislature broad authority to effect an “orderly transition.” *Id.*

If “term of office” in Article VI, Section 23(b) is interpreted to mean that a previously selected municipal court judge’s tenure in office is unaffected by unification, existing expectations concerning the timing of the election would be preserved and the date of the election would be determined pursuant to well-established, previously litigated, rules. Application of the rules would be straightforward. (Exhibit pp. 3-8 (Scenarios 1-5).) Barring unusual circumstances (such as election of a replacement who resigns before qualifying), the former municipal court judge would serve no more than about six years before he or she could be replaced. (Exhibit pp. 3-8 (Scenarios 1-5).) Even where an appointment occurs near the end of the judge’s term, the gap between elections would be no more than eight years, which is no different than what happens under existing law when an elected superior court judge resigns early in the last year of the term. (Exhibit pp. 5 (Scenario 2), 7 (Scenario 4).) This would promote an “orderly transition.”

In contrast, if “term of office” in Article VI, Section 23(b) is interpreted to mean that a previously selected municipal court judge is entitled to serve out the remainder of the judge’s (or the judge’s elected predecessor’s) six-year term, many questions arise. (Exhibit pp. 3-9 (Scenarios 1-5).) What happens where a municipal court appointee has already served the remainder of his or her elected predecessor’s six-year term before unification occurs? Where the six-year term has not expired before unification, is the term preserved only if it is served by the “previously selected municipal court judge,” or also if an appointee replaces a “previously selected municipal court judge”? (Exhibit pp. 5-6 (Scenario 2), 8-9 (Scenario 5).) Where the six-year term has not expired before unification, what rule should be used to determine the date of the next election?

For example, consider an elected municipal court judge, elevated through unification, who serves to the end of the term. (Exhibit pp. 3-5 (Scenario 1).) Does the rule for an elected superior court judge apply, such that the judge is up for

election at the general election preceding expiration of the term? Since the judge has never been elected to the superior court, and no judge has ever been elected to the new judgeship, is it more appropriate to apply the rule for a newly created superior court judgeship? If so, then the judgeship would be considered vacant (presumably upon expiration of the six-year term) and the rule for filling a superior court vacancy would apply: A successor would be selected at the “next general election after the second January 1 following the vacancy.” Cal. Const. art. VI, § 16(c) (as amended by SCA 4). In the interim, is the Governor entitled to fill the vacancy with someone other than the previously selected municipal court judge? Under this scenario, there would almost certainly be challenges by the previous municipal court judges (and possibly also by criminal defendants or other litigants), disrupting the transition to unification.

Another possibility is that the judgeship is considered vacant, but the vacancy is to be filled by the previously selected municipal court judge until a successor is elected and qualifies at “the next general election after the second January 1 following the vacancy.” *Id.* Even without unusual circumstances, for some elected municipal court judges this would mean that there would be approximately ten years between when they take office and when they can be replaced. (Exhibit pp. 3-5 (Scenario 1).) The same result could occur with respect to a municipal court appointee. (Exhibit pp. 5-6 (Scenario 2), 7 (Scenario 3); see also pp. 7-8 (Scenario 4) (ten year gap between elections), 8-9 (Scenario 5) (same).)

This lengthy interval without an election 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.” *Pollack v. Hamm*, 3 Cal. 3d 264, 273, 475 P.2d 213, 90 Cal. Rptr. 181 (1970); *see also Stanton v. Panish*, 28 Cal. 3d 107, 112, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980). The right of suffrage, protected by Article II of the state Constitution, is a fundamental right preservative of other basic civil and political rights. *Stanton*, 28 Cal. 3d at 115. Every reasonable presumption and interpretation should be indulged in favor of the right of the people to exercise the elective process. *Id.* Here, that means interpreting Article VI, Section 23(b) such that a municipal court judge elevated through unification is up for election at the same time as if unification had not occurred.

Summary

The constitutional mandate that the “term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court” (Cal. Const. art. VI, § 23(b) (as amended by SCA 4)) should be interpreted to mean that the tenure of a previously elected or appointed municipal court judge is unaffected by unification. In other words, existing law governing the timing of municipal court elections applies in determining when that judge (not an appointee replacing that judge) is next up for election:

- This is the obvious, commonsense interpretation that preserves existing expectations (not a technical construction).

- It is most consistent with the constitutional principle 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.” *Pollack*, 3 Cal. 3d at 273; see also *Stanton*, 28 Cal. 3d at 112.

- It should be easy to implement and would help facilitate an “orderly transition” to a unified superior court, as constitutionally mandated. The well-established rules governing the timing of a municipal court election would simply apply one more time after unification, to determine when a “previously selected municipal court judge” is up for election. It would not be necessary to use a hybrid election system on a transitional basis (combining the six-year term of the “previously selected municipal court judge” with the rules governing superior court elections).

RECOMMENDATION

Professor Kelso reaches the same conclusion as the staff concerning the proper interpretation of Article VI, Section 23(b). (Exhibit pp. 12-16.) He believes that “it is unnecessary and unproductive to draft any further implementing legislation which attempts to define more precisely what ‘term of office’ means in Section 23(b).” (Exhibit p. 16.) He explains:

It is an issue that can easily be resolved by the courts without further assistance, and probably will be resolved as indicated above. Moreover, the issue will almost certainly be the subject of litigation even if the Legislature enacts a more precise or different definition; therefore, attempting to be more precise with

implementing legislation will not significantly clarify matters and will not avoid the necessity for litigation and an authoritative interpretation of Section 23(b) (indeed, implementing legislation may be more likely to trigger litigation than simply leaving the provision to stand on its own).

(Exhibit p. 16.)

The staff agrees that in deciding on a course of action, the Commission should focus on achieving an orderly transition to unification. As Professor Kelso points out “the combination of circumstances involving appointments, elections, vacancies and votes to unify are extremely numerous and probably not entirely foreseeable.” (Exhibit p. 16.)

Nonetheless, **the staff believes that providing statutory clarification of the constitutional provision would be helpful.** SCA 4 expressly delegates broad authority to the Legislature to promote an orderly transition to unification:

The purpose of the amendments to Sections 1, 4, 5, 6, 8, 10, 11, and 16, or this article, and the amendments to Section 16 of Article I, approved at the November 5, 1996, general election is to permit the Legislature to provide for the abolition of the municipal courts and unify their operations within the superior courts. Notwithstanding Section 8 of Article IV, the implementation of, and orderly transition under, the provisions of the measure adding this section may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests, where otherwise permitted under this Constitution.

There is a strong presumption in favor of the Legislature’s interpretation of an unclear or ambiguous constitutional provision. *Heckendorn v. City of San Marino*, 42 Cal. 3d 481, 488, 723 P.2d 64, 229 Cal. Rptr. 324 (1986); *Penner v. County of Santa Barbara*, 37 Cal. App. 4th 1672, 1678, 44 Cal. Rptr. 2d 606 (1995). In light of that presumption, the Legislature’s interpretation will not be disregarded unless there is a “plain and unmistakable conflict” between the statute and the Constitution. *Penner*, 37 Cal. App. 4th at 1678; *Armstrong v. County of San Mateo*, 146 Cal. App. 3d 597, 624, 194 Cal. Rptr. 294 (1983). Consequently, providing a legislative interpretation of Article VI, Section 23(b) may deter litigation over its meaning, or at least facilitate prompt resolution of such litigation.

The staff therefore suggests the following revision of proposed Government Code Section 70211:

§ 70211. Conversion of judgeships

70211. When the municipal and superior courts in a county are unified:

(a) The judgeships in each municipal court in that county are abolished and the previously selected municipal court judges become judges of the superior court in that county. Until revised by statute, the total number of judgeships in the unified superior court shall equal the previously authorized number of judgeships in the municipal court and superior court combined.

(b) The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court. A previously selected municipal court judge is entitled to hold office for the same time period as if the judge had remained a judge of the municipal court. Until a previously selected municipal court judge leaves office or a successor is elected and qualifies, the time for election of a successor is governed by the law otherwise applicable to selection of a municipal court judge. Thereafter, selection of a successor to the office is governed by the law governing selection of a superior court judge.

(c) The 10-year membership or service requirement of Section 15 of Article VI of the California Constitution does not apply to a previously selected municipal court judge.

Comment. Subdivision (a) of Section 70211 restates the first three sentences sentence of Constitution Article VI, Section 23(b), with the addition in subdivision (a) of a provision maintaining the total number of judgeships in the county. The Legislature prescribes the number of judges. Cal. Const. art. VI, §§ 4, 5.

Subdivision (b) restates the second sentence of Constitution Article VI, Section 23(b), and clarifies how that provision applies. For provisions governing the timing of municipal court elections, see Government Code Sections 71141, 71145, 71180.

Subdivision (c) restates the third sentence of Constitution Article VI, Section 23(b).

The references in this section to a “previously selected” judge includes selection by election or by appointment to fill a vacancy. *Cf. Trial Court Unification: Constitutional Revision (SCA 3), 24 Cal. L. Revision Comm’n Reports 1, 82 (1994) (Article VI, § 23(b) Comment).*

UNIFICATION DURING A MUNICIPAL COURT ELECTION: OPTIONS

The staff also believes that statutory clarification would be helpful on the interrelationship between unification and an ongoing municipal court election.

Options

What are the alternatives?

(1) *Election Proceeds As a Municipal Court Election But Is Deemed a Superior Court Election.* One way of handling the problem would be to allow the ongoing election to proceed in the same manner as a municipal court election but deem it a superior court election. In other words, the election would not be canceled, nor would it be converted to a countywide election if the municipal court district is less than countywide. The election would simply proceed as originally planned, but the winner would be elected to the unified superior court, rather than to the municipal court.

This may be unconstitutional where the municipal court district is less than countywide. “In counties in which there is no municipal court, judges of superior courts shall be elected *in their counties* at general elections except as otherwise necessary to meet the requirements of federal law.” Cal. Const. art. VI, § 16(b) (as amended by SCA 4) (emphasis added). In other counties, constitutionality may not be a problem, but the election may proceed differently than it would if potential candidates and voters were aware at the outset that they were selecting a superior court judge.

(2) *Election Proceeds and Winner Is Deemed “Previously Selected.”* A second option would be to allow the ongoing election to proceed as originally planned, but statutorily deem the winner to be “previously selected” for purposes of Constitution Article VI, Section 23(b) and Government Code Section 70211. A statute along these lines may be given considerable deference, in light of the Legislature’s broad authority to promote an orderly transition to unification, as well as the presumption in favor of the Legislature’s interpretation of an unclear or ambiguous constitutional provision.

(3) *Statutorily Delay the Operative Date of Unification.* Another approach would be to statutorily delay the operative date of unification until after the municipal court election is completed. In counties where the municipal court district is less than countywide, however, this could be viewed as an unconstitutional end-run around the requirement that judges of superior courts shall be elected *in their*

counties at general elections except as otherwise necessary to meet the requirements of federal law.” Cal. Const. art. VI, § 16(b) (as amended by SCA 4) (emphasis added).

If the approach is used, it should not significantly delay unification in 1998. Only three municipal court elections involve more than two contestants, so runoffs in November should not be necessary elsewhere. Where an election is contested, the prevailing candidate is elected on the day of the election and not on the day that the results are officially declared. *Brown v. Hite*, 64 Cal. 2d 120, 127, 410 P.2d 373, 48 Cal. Rptr. 869 (1966). Thus, many judges should be elected as of June 2, 1998, the same day as the vote on SCA 4. If an incumbent is unopposed and the incumbent’s name does not appear on the ballot at the primary election, however, the incumbent is not elected until after the deadline for filing a petition for write-in candidacy in the general election. See Elec. Code § 8203 (Petition for write-in candidacy must be filed “not less than 83 days before the general election”); *Brown v. Hite*, *supra*, 64 Cal. 2d at 126-27. That deadline is in mid-August (83 days before the general election), less than two months after the vote on SCA 4.

(4) *Postpone the Election*. Still another approach would be to postpone the election to the next general election year. This may be unpopular with candidates in the ongoing election, but when the election does take place candidates and voters will know the nature of the election upfront and can proceed accordingly.

Choice of Approach

Choosing among these alternatives will have immediate political impact. We anticipate that interested parties will provide input on the options at or before the Commission’s meeting. This should help in determining which approach represents the best policy.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

TIMING OF JUDICIAL ELECTIONS

I. EXISTING SYSTEM

☞ The following chart shows some of the basic rules that apply to municipal and superior court elections. It does not cover unusual situations, such as a vacancy occurring while an election is in progress, or election of a judge who fails to qualify.

Inception of Term of Elected Judge

Municipal court approach. “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.” Gov’t Code § 71145.

Superior court approach. “Terms of judges of superior courts are 6 years beginning the Monday after the January 1 following their election.” Cal. Const. art. VI, § 16(c); *see also* Cal. Const. art. VI, § 20.

Expiration of Term of Elected Judge

Municipal court approach. A municipal court term expires on the first Monday after January 1, the same day that the successor takes office. *See* Caldwell v. Bruning, 64 Cal. 2d 111, 113, 410 P.2d 353, 48 Cal. Rptr. 849 (1966) (“The term of office to which petitioner assertedly was appointed in January 1965 will not expire until January 1971”); Brown v. Hite, 64 Cal. 2d 120, 123, 410 P.2d 373, 48 Cal. Rptr. 869 (1966) (petitioner received two appointments to hold office, one “for the remainder of a term expiring on January 4, 1965, and until his successor is elected and qualifies” and another “purportedly for the remainder of a new six-year term which had commenced on” January 4, 1965); Campbell v. Hite, 57 Cal. 2d 484, 485-487, 369 P.2d 944, 20 Cal. Rptr. 328 (1962) (discussing five municipal court terms “ending the first Monday in January 1963”); *see also* Gov’t Code § 71145.

Superior court approach. Footnotes in several Supreme Court cases state that “a superior court term is said to expire at the end of the year before which the elected successor is to take office.” Stanton v. Panish, 28 Cal. 3d 107, 111 n.1, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980); Pollack v. Hamm, 3 Cal. 3d 264, 273 n.6, 475 P.2d 213, 90 Cal. Rptr. 181 (1970); Barber v. Blue, 65 Cal. 2d 185, 187 n.2, 417 P.2d 401, 52 Cal. Rptr. 865 (1966). Whether these statements are correct or are spurious dictum is debatable.

Election to Determine Successor to Elected Judge Who Serves Entire Term

Municipal court approach. Municipal court judges “shall be elected at the general state election next preceding the expiration of the term for which the incumbent has been elected.” Gov’t Code § 71141.

Superior court approach. Judges of superior courts “shall be elected in their counties or districts at general elections.” Cal. Const. art. VI, § 16(b); *see also* Cal. Const. art. VI, § 16(b) (as amended by SCA 4) (Superior court judges in counties with no municipal court shall be elected in their counties at general elections except as required by federal law; superior court judges in other counties shall be elected in their counties or districts at general elections). The election of officers provided for by the Constitution “shall be held in the last even-numbered year before the term expires.” Cal. Const. art. II, § 20; *see also* Pollack v. Hamm, 3 Cal. 3d 264, 273, 475 P.2d 213, 90 Cal. Rptr. 181 (1970) (Constitution “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”); Stanton v. Panish, 28 Cal. 3d 107, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980) (1980 was proper year for election to replace judge whose term expired at the end of 1980).

Elected Judge Dies or Resigns in the Middle of the Term

Municipal court approach. “Any vacancy in the office of judge of a municipal court shall be filled by appointment by the Governor.” Gov’t Code § 71180.

Superior court approach. “[T]he Governor shall appoint a person to fill the vacancy temporarily.” Cal. Const. art. VI, § 16(c).

Length of Appointment

Municipal court approach. A municipal court appointee holds office “for the remainder of the unexpired term of his or her predecessor and until his or her successor is elected and qualifies.” Gov’t Code § 71180(a).

Superior court approach. A superior court appointee does not serve out the remainder of the predecessor’s six-year term. The appointee only fills the vacancy until a successor is elected and “the elected judge’s term begins.” Cal. Const. art. VI, § 16(c).

Election to Determine Successor to Appointee

Municipal court approach. Under Government Code Section 71141, a successor is chosen at the general state election next preceding the expiration of the elected predecessor’s six-year term.” *See* Caldwell v. Bruning, 64 Cal. 2d at 116. But the so-called “ten-month rule” applies to a municipal court appointee: “No 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(a); *see also* Donnellan v. Hite, 139 Cal. App. 2d 43, 293 P.2d 158 (1956); Campbell v. Hite, 57 Cal. 2d 484, 369 P.2d 944, 20 Cal. Rptr. 328 (1962); Brailsford v. Blue, 57 Cal. 2d 335, 369 P.2d 13, 19 Cal. Rptr. 485 (1962).

Superior court approach. A superior court appointee is up for election at the “next general election after the January 1 following the vacancy.” Cal. Const. art. VI, § 16(c); *see also* Cal. Const. art. VI, § 16(c) (as amended by SCA 4) (“after the second January 1 following the vacancy”).

A New Judgeship is Added

Municipal court approach. “If the office to which any person so appointed was not previously occupied, he or she shall hold office until his or her successor is elected at the general state election next succeeding the occurrence of the vacancy and qualifies. No 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.

Superior court approach. Every new office is vacant from the time of its creation until it is filled by appointment or election. *Fields v. Eu*, 18 Cal. 3d 322, 556 P.2d 729, 134 Cal. Rptr. 367 (1976). The vacancy is to be filled “at the next general election after the January 1 following the vacancy.” Cal. Const. art. VI, § 16(c).

Successive Appointments

Municipal court approach. If a municipal court appointee resigns and is replaced with a new appointee before the process of electing a successor begins, the resignation of the first appointee retriggers the ten-month rule. The ten months run from the date of the first appointee’s resignation, not from the date of the original vacancy. *Morrison v. Michael*, 98 Cal. App. 3d 507, 159 Cal. Rptr. 568 (1979).

Superior court approach. If a superior court appointee resigns and is replaced with a new appointee before the process of electing a successor begins, the next election is not postponed. The office is on the ballot at the general election after the January 1 following the *original* vacancy. *Pollack v. Hamm*, 3 Cal. 3d 264, 273, 475 P.2d 213, 90 Cal. Rptr. 181 (1970).

II. IMPACT OF UNIFICATION ON JUDICIAL ELECTIONS

☞ The following chart covers some basic situations involving interrelationship between unification and a judicial election. It does not cover unusual situations, such as a vacancy occurring while an election is in progress or election of a judge who fails to qualify.

Scenario (1). Elected Municipal Court Judge Serves Entire Term, During Which Unification Occurs

Situation. A judge is elected to the municipal court in 1998 and begins serving a six-year term in January 1999. The court unifies. The judge serves the remainder of the six-year term (i.e., until the first Monday after January 1, 2005). When is an election held to select a successor? When does the successor take office? How long does the former municipal court judge hold office?

“Term of office” means “tenure in office” in Constitution Article VI, § 23(b). Suppose the phrase “term of office” in Article VI, Section 23(b) is interpreted to mean that unification does not affect how long a former municipal court judge holds office; the judge will be up for election at the same time as if unification had not occurred. Then a successor to the judge would be chosen “at the general state election next preceding the expiration of the term for which the incumbent has been elected.” Gov’t Code § 71141. This means that the successor would be elected in 2004 (the election year next preceding January 2005) and take office in January 2005. The former municipal court judge would serve a total of approximately six years, some as a municipal court judge and some as a superior court judge.

“Term of office” means six-year term in Constitution Article VI, § 23(b). Suppose the phrase “term of office” in Article VI, Section 23(b) is interpreted to refer to the previously selected municipal court judge’s six-year term. Then what rule applies for selecting a successor?

One possibility is to use the rule for determining a successor to an elected superior court judge: In a county with no municipal court, a successor shall be elected in the county at the general election preceding expiration of the term, except as required by federal law. Cal. Const. art. VI, § 16(b) (as amended by SCA 4); *see also* Cal. Const. art. II, § 20; *Pollack v. Hamm*, 3 Cal. 3d 264, 273, 475 P.2d 213, 90 Cal. Rptr. 181 (1970); *Stanton v. Panish*, 28 Cal. 3d 107, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980). Under this approach, a successor would be elected in 2004 (the election year next preceding January 2005, when the judge’s six-year term expires) and take office in January 2005. The former municipal court judge would serve a total of approximately six years, some as a municipal court judge and some as a superior court judge.

But the judge is not an elected superior court judge serving a superior court term. He or she is an elected municipal court judge filling a newly created superior court judgeship until his or her municipal court term expires.

Thus, another possibility is to apply the rule for an election to fill a newly created superior court judgeship. Upon expiration of the six-year term, the judgeship is considered vacant, a newly created office to which no one has been elected. A successor will be chosen at “the next general election after the second January 1 following the vacancy.” Cal. Const. art. VI, § 16(c) (as amended by SCA 4); *see also* *Fields v. Eu*, 18 Cal. 3d 322, 556 P.2d 729, 134 Cal. Rptr. 367 (1976) (vacancy rule applies in holding election to fill new superior court judgeship). In the interim, it is debatable whether the former municipal court judge is entitled to fill the post, or the Governor is entitled to appoint someone else.

Suppose the former municipal court judge remains in office. The first January 1 following the vacancy is January 1, 2006; the second January 1 following the vacancy is January 1, 2007. The next general election after January 1, 2007

probably will not be until 2008.¹ If the former municipal court judge loses that election, he or she nonetheless remains in office until the elected successor qualifies in January 2009.

Thus, in this scenario the judge would serve from mid-January 1999 to early January 2009 (approximately ten years) without standing election. Depending on when unification occurs, during much of this time the judge may be serving as a superior court judge.

Scenario (2). Elected Municipal Court Judge Resigns After Unification and Governor Appoints Replacement

Situation. A judge is elected to the municipal court in 1998 and begins serving a six-year term in January 1999. The court unifies. The judge resigns and the Governor appoints a replacement before the six-year term expires. When is an election held to select a successor? When does the successor take office? How long does the appointee hold office?

“Term of office” means “tenure in office” in Constitution Article VI, § 23(b). Suppose Article VI, Section 23(b) is interpreted to mean that the tenure in office of a previously selected municipal court judge is unaffected by unification (i.e., unification does not affect how long a former municipal court judge holds office). So interpreted, the provision would not apply to the appointee in this scenario, because the appointee is not a “previously selected municipal court judge.” The appointee is an appointee to a superior court judgeship and the rule for superior court appointees applies: The appointee is up for election at the “next general election after the second January 1 following the vacancy.” Cal. Const. art. VI, § 16(c)(as amended by SCA 4). If the vacancy occurs early in 2004, before the election process begins,² then the “next general election after the second January 1 following the vacancy” would be in 2006. The gap between elections would be eight years.

The same gap would result if an elected superior court judge resigned near the end of the term (but before the start of the election process) and an appointment was made. For instance, suppose a judge is elected to the superior court in 1998 and begins serving a six-year term in January 1999. The judge resigns early in 2004, before the election process begins, and an appointment is made. Under existing law, the appointee is up for election at the next general election after the first January 1 following the vacancy. This would be the first general election after January 1, 2005, which probably will not occur until 2006.³ The gap between

1. See Elec. Code §§ 324, 356, 357, 1000, 1001, 1003, 1200, 1201, 1202. Under these statutes, general elections occur in even-numbered years, unless the Governor calls a special statewide election to be held on a regular election date in an odd-numbered year.

2. If an elected superior court judge resigns after another candidate has filed nominating papers, the election will not be canceled. *Stanton v. Panish*, 28 Cal. 3d 107, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980). If the incumbent was the only candidate, a successor will be chosen at the “next general election after the second January 1 following the vacancy.”

3. See note 1, *supra*.

elections would be eight years. The result is the same under SCA 4: The “next general election after the second January 1 following the vacancy” would be in 2006.

“Term of office” means six-year term in Constitution Article VI, § 23(b). Suppose the phrase “term of office” in Article VI, Section 23(b) is interpreted to refer to the previously selected municipal court judge’s six-year term (i.e., the six-year term “of a previously selected municipal court judge is not affected by taking office as a judge of the superior court”). Then this scenario presents a difficult question: Is the six-year term preserved only if it is served by the “previously selected municipal court judge,” or also if an appointee replaces a “previously selected municipal court judge”?

The former interpretation draws support from the context of Section 23(b): It can be viewed as a transitional provision governing what happens to sitting municipal court judges upon unification, irrelevant to persons having no connection to the municipal court. Under this interpretation, the appointee would not serve out the six-year term of the former municipal court judge. Instead, the appointee would be up for election at the “next general election after the second January 1 following the vacancy.” Cal. Const. art. VI, § 16(c)(as amended by SCA 4).

The latter interpretation (i.e., the six-year term is preserved notwithstanding the departure of the former municipal court judge) is also plausible. *See Caldwell v. Bruning*, 64 Cal. 2d 111, 117, 410 P.2d 353, 48 Cal. Rptr. 849 (1966) (a municipal court term “relates to the office and not to the tenure of the person who has been elected, which might terminate prior to the expiration of this period.”). Under this interpretation, the appointee would serve the remainder of the six-year term (i.e., until the first Monday after January 1, 2005). As of that date, the office would be vacant and a further question would arise: Is the appointee entitled to remain in office until a successor is elected at the next general election after the second January 1 following the vacancy? May the Governor appoint another person to serve during that period instead? Regardless of how this issue is resolved, there would be a ten year gap between elections, from 1998 to 2008 (barring a special election in 2007).

Scenario (3). Municipal Court Judge Is Appointed Early in Term, Then Courts Unify

Situation. A judge is elected to the municipal court in 1998 and begins serving a six-year term in January 1999. The judge takes office, but resigns a few days later and is replaced by an appointee the same month. The municipal and superior courts later unify. When is an election held to select a successor? When does the successor take office? How long does the appointee hold office?

“Term of office” means “tenure in office” in Constitution Article VI, § 23(b). Suppose Article VI, Section 23(b) is interpreted to mean that the tenure in office of a previously selected municipal court judge is unaffected by unification (i.e., unification does not affect how long a former municipal court judge holds office). Then the appointee would serve the remainder of the elected judge’s six-year term

(until the first Monday after January 1, 2005). Under Government Code Section 71141, a successor is chosen “at the general state election next preceding the expiration of the term” *See* Caldwell v. Bruning, 64 Cal. 2d 111, 116, 410 P.2d 353, 48 Cal. Rptr. 849 (1966). In other words, the successor would be elected in 2004 (the election year next preceding January 2005) and take office in January 2005. The appointee would serve approximately six years, some as a municipal court judge and some as a superior court judge.

“*Term of office*” means *six-year term in Constitution Article VI, § 23(b)*. Suppose the phrase “term of office” in Article VI, Section 23(b) is interpreted to refer to the previously selected municipal court judge’s six-year term (i.e., the six-year term “of a previously selected municipal court judge is not affected by taking office as a judge of the superior court”). Then the appointee (now a superior court judge) would serve the remainder of the elected judge’s six-year term, i.e., until the first Monday after January 1, 2005. As of that date, the office would be vacant and a further question would arise: Is the appointee entitled to remain in office until a successor is elected at the next general election after the second January 1 following the vacancy? May the Governor appoint another person to serve during that period instead? Regardless of how this issue is resolved, there would be a ten year gap between elections, from 1998 to 2008 (barring a special election in 2007).

Scenario (4). Municipal Court Judge is Appointed Late in Term, Then Courts Unify

Situation. A judge is elected to the municipal court in 1998 and begins serving a six-year term in January 1999. The judge resigns late in 2003 or early in 2004, before the election process begins.⁴ An appointment is made right away. The court unifies. When is an election held to select a successor? When does the successor take office? How long does the appointee hold office?

“*Term of office*” means “*tenure in office*” in *Constitution Article VI, § 23(b)*. The appointee holds office for the remainder of the fixed term (until the first Monday after January 1, 2005) and until a successor is elected and qualifies. Gov’t Code § 71180. “[N]o successor to the appointee shall be elected at any election held within 10 months of the date of occurrence of the vacancy.” *Id.* Thus, a successor would be chosen in 2006 (barring a special election in 2005). *See* Campbell v. Hite, 57 Cal. 2d 484, 369 P.2d 944, 20 Cal. Rptr. 328 (1962). The gap between elections would be eight years (from 1998 to 2006).

4. If a municipal court judge resigns after the last day for filing nominating papers, and a candidate other than the incumbent has filed nominating papers, the election goes forward that year. Depending on the time of the resignation, the primary may be canceled and a plurality of the vote may be sufficient to win the general election. *See* Gov’t Code § 71180(b); Cathey v. Weissburd, 202 Cal. App. 3d 982, 249 Cal. Rptr. 204 (1988).

If an incumbent is unopposed at the time of resignation and an appointment is made, the election will be postponed until the next election year, pursuant to the ten-month rule. Gov’t Code § 71180(a); Brown v. Hite, 64 Cal. 2d 120, 127-28, 410 P.2d 373, 48 Cal. Rptr. 869 (1966). This creates an eight year gap between elections.

For discussion of the impact of unification during the election process, see Memorandum 98-33, pages 6, 15-16.

“Term of office” means six-year term in Constitution Article VI, § 23(b). The appointee holds office for the remainder of the fixed term (until the first Monday after January 1, 2005). Then the office would be vacant. Is the appointee entitled to remain in office until a successor is elected at the next general election after the second January 1 following the vacancy? May the Governor appoint another person to serve during that period instead? Regardless of how this issue is resolved, there would be a ten year gap between elections, from 1998 to 2008 (barring a special election in 2007).

Scenario (5). Municipal Court Judge is Appointed, Then Courts Unify, Appointee Resigns, and Governor Makes New Appointment

Situation. A judge is elected to the municipal court in 1998 and begins serving a six-year term in January 1999. The judge takes office, but resigns a few days later and is replaced by an appointee the same month. The municipal and superior courts later unify. Thereafter, the appointee resigns and the Governor makes a new appointment. When is an election held to select a successor to the second appointee? When does the successor take office? How long does the second appointee hold office?

“Term of office” means “tenure in office” in Constitution Article VI, § 23(b). Suppose Article VI, Section 23(b) is interpreted to mean that the tenure in office of a previously selected municipal court judge is unaffected by unification (i.e., unification does not affect how long a former municipal court judge holds office). So interpreted, the provision would not apply to the second appointee in this scenario, because the second appointee is not a “previously selected municipal court judge.” The second appointee is an appointee to a superior court judgeship and the rule for superior court appointees applies: The appointee is up for election at the “next general election after the second January 1 following the vacancy.” (Cal. Const. art. VI, § 16(c)(as amended by SCA 4).

The date of the vacancy would be the date of the first appointee’s resignation. The earlier vacancy was not a superior court vacancy, so the rule governing successive superior court vacancies would not apply. *See Pollack v. Hamm*, 3 Cal. 3d 264, 273, 475 P.2d 213, 90 Cal. Rptr. 181 (1970) (If a superior court appointee resigns and is replaced with a new appointee before the process of electing a successor begins, the office is on the ballot at the general election after the January 1 following the *original* vacancy).

“Term of office” means six-year term in Constitution Article VI, § 23(b). Suppose the phrase “term of office” in Article VI, Section 23(b) is interpreted to refer to the previously selected municipal court judge’s six-year term (i.e., the six-year term “of a previously selected municipal court judge is not affected by taking office as a judge of the superior court”). Then this scenario presents the same difficult question as in Scenario (2): Is the six-year term preserved only if it is served by the “previously selected municipal court judge,” or also if an appointee replaces a “previously selected municipal court judge”?

Under the former interpretation, the appointee would not serve out the six-year term of the former municipal court judge. Instead, the appointee would be up for election at the “next general election after the second January 1 following the vacancy.” Cal. Const. art. VI, § 16(c)(as amended by SCA 4). The date of the vacancy would be the date of the first appointee’s resignation.

Under the latter interpretation (i.e., the six-year term is preserved notwithstanding the departure of the former municipal court judge) the second appointee would serve the remainder of the six-year term (i.e., until the first Monday after January 1, 2005). As of that date, the office would be vacant and a further question would arise: Is the appointee entitled to remain in office until a successor is elected at the next general election after the second January 1 following that vacancy? May the Governor appoint another person to serve during that period instead? Regardless of how this issue is resolved, there would be a ten year gap between elections, from 1998 to 2008 (barring a special election in 2007).

FEB 09 1998

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The following data was submitted from
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Proposal

Unified Superior Court W98-9

Position

Agree with Proposed Changes

Comment

Under the proposed legislative changes, the language for Gov.
Code Sec 70211(b), should have another sentence added (in
substance) as follows:

"Municipal court judges holding office following gubernatorial
appointment shall first stand election as provided in Government

The added language is necessary because the time frame for election of municipal court judges varies depending upon the time of the vacancy giving rise to the appointment (i.e. the 10 month rule). Without the added language, an ambiguity arises between the existing language of the subparagraph and the new language in SCA 4 amending Cal. Const., Section 16, Art. 6, to provide for the filling of vacancies at an election after the SECOND January 1 following the vacancy (for SUPERIOR court judges).

MC judges at the time of conversion become judges of the superior court, but their current term is "unaffected". The definition of that term is possibly governed by G.C. 71180, in terms of defining the date for the first election following appointment. Such date may vary under municipal court law depending upon the date of the vacancy filled by the appointment.

I have discussed this matter already with Clark Kelso at the Judicial Administrative Conference in Monterey. I believe that he agrees that the added language would clear this up for the judges holding municipal court offices by appointment at the time of a conversion under SCA 4.

Please reply to this e-mail comment via e-mail message, so that I may have confirmation that the message has been received.



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Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Nat:

My thoughts on the transition question regarding terms of office for previously selected municipal court judges are becoming clearer, and it leads me to believe that we do not need any implementing legislation to address the question.

If Proposition 220 is approved, Section 23(b) of Article VI of the California Constitution will provide, among other things, that "The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court." In order to know what "is not affected" by unification, we need to know how a court will interpret the phrase "term of office of a previously selected municipal court judge."

The word "selected" was deliberately used to encompass both elected and appointed municipal court judges. See California Law Revision Commission, *Trial Court Unification: Constitutional Revision (SCA 3)*, p. 82, comment ("this section ensures the continuation in office of existing municipal and justice court judges in the unified trial court for the duration of their former terms, regardless whether their selection was by appointment or election"). The fact that the language was deliberately drafted to encompass *appointed* municipal court judges is significant because, as will be explained below, it naturally follows that the phrase "term of office" in Section 23(b) be read as meaning "tenure in office." So interpreted, virtually all of the difficult questions surrounding the interpretation of Section 23(b)'s transition language are resolved in a way that promotes the most orderly transition to a unified bench with the

fewest changes in the timing of judicial elections for former municipal court judges (which is the apparent purpose of the provision).

Terms of Appointed Municipal Court Judges

As noted above, including appointed municipal court judges within the scope of Section 23(b)'s transition provision is important because it requires us to give the phrase "term of office" a meaning that makes sense with respect to appointed municipal court judges. Strictly speaking, an appointed municipal court judge does not have a "term of office." Instead, an appointee simply "hold[s] office" for a statutorily defined period of time (i.e., until a successor is elected and qualifies, with an election generally being held in the even-numbered year prior to the end of the predecessor incumbent's "unexpired term"). Gov't Code § 71180(a). See Gov't Code § 71141 ("Judges of the municipal court . . . shall be elected at the general state election next preceding the expiration of the term for which the incumbent has been elected"); Elec. Code § 1001 (setting dates for statewide elections), § 1200 (defining "statewide general election").

Since an appointed municipal court judge technically does not have a "term of office" defined by the California Constitution or by statute, a court construing Section 23(b) will consult analogous caselaw for guidance. In fact, the California Supreme Court has expressly equated a municipal court appointee's "term of office" with his or her "tenure in office." According to the court, "'the term of office of' an appointee to the municipal court 'is for the term of his predecessor, and until his successor is elected and qualifies.'" *Caldwell v. Bruning*, 64 Cal.2d 111, 114 (1966) (quoting *Campbell v. Hite*, 57 Cal.2d 484, 488 (1962)). In other words, the term of office of a municipal court appointee does *not* end with the expiration of the 6-year term of the appointee's predecessor. Instead, it extends until a successor is elected and qualifies.

This conclusion follows from the statutes respecting municipal court appointees. According to Government Code § 71180(a), municipal court vacancies are filled by appointment by the Governor, and "[t]he appointee shall hold office for the remainder of the unexpired term of his predecessor and until his successor is elected and qualifies." In both *Caldwell* and *Campbell*, the court expressly equated an appointee's "term of office" with his or her "tenure in office" under Section 71180(a). *Caldwell*, 64 Cal.2d at 114 ("This construction determines [an appointees'] tenure in office between the end of the fixed terms of their predecessors and the next election") (quoting *Campbell v. Hite*, 57 Cal.2d at 488).

There is spurious dicta in *Lungren v. Davis*, 234 Cal.App.3d 806 (1991), that “[t]he term of office in the municipal court is a fixed term which relates to the office and not to the tenure of the person who holds the office.” *Id.*, 234 Cal.App.3d at 819. *Davis v. Lungren* involved the term of office of *superior* court judges, not municipal court judges, and the language just quoted is found in a paragraph that begins with the observation that “[e]ven less relevant are authorities dealing with municipal court judges.” *Id.* The court then offers a very brief summary of the “less relevant . . . authorities.” In support of its statement that terms of office in the municipal court mean the fixed term and not tenure in office, the court of appeal cites only *Caldwell v. Bruning*. But as noted above, *Caldwell* expressly equates term of office with tenure in office with respect to appointed municipal court judges, so the court of appeal’s reliance on *Caldwell* is plainly insufficient to support the statement. We should not overreact to this type of dicta. *Caldwell* and *Campbell* unambiguously indicate that an appointee’s term of office is the same as his or her tenure in office, and there is no contrary authority on this point.

Equating an appointee’s “term of office” for purposes of Section 23(b) with his or her “tenure in office” as defined by Government Code § 71180 is strongly supported by Proposition 220’s expressly stated intent that there be an “orderly transition” to a unified bench. Proposition 220, § 23(a). Construing “term of office” to mean “tenure in office” results in there being no gap between an appointee’s service on the court and a successor’s election to office (whenever that election and succession occurs). In addition, a municipal court appointee will serve just as long on the unified bench as he or she would have had the court not unified, which best approximates the goal of ensuring that a previously appointed municipal court judge’s term “not [be] affected by taking office as a judge of the superior court.”

By contrast, if “term of office” in Section 23(b) were interpreted to mean simply the end of the predecessor incumbent’s fixed term, there could be situations where the appointee’s term would end *before* an election could be held to select a successor creating an empty seat on the court, which is contrary to the existing practice in both the superior and municipal courts. This would create a difficult legal question of whether the expiration of the appointee’s term creates a vacancy to be filled by the Governor. In these circumstances, the transition would be anything but “orderly.”

In order to promote an “orderly transition”, and consistent with the approach taken by the California Supreme Court in *Caldwell v. Bruning* and *Campbell v. Hite*, a court is most likely to interpret Section 23(b)’s reference to the “term of office of a previously selected municipal court judge” as meaning the “tenure in office” of a previously

appointed municipal court judge under existing statutes governing municipal court appointees. That tenure will last until a successor is elected at the next appropriate general election (which will occur either in the year preceding expiration of the incumbent's term or, if there is not enough time for such an election because of the timing of a vote to unify, at the next available general election).

If a court so construes "term of office" as used in Section 23(b), as I think most likely, any legislation that either shortens or lengthens that time will properly be held unconstitutional because it "affect[s]" the term of office. It is significant, in this regard, that Section 23(b) on its face was intended to act as a *limit* on the State's power in order to protect appointed and elected municipal court judges and to protect the people's interest in regular elections of trial court judges. To repeat it in full, the relevant portion of Section 23(b) provides that "The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court." This language does not contemplate a grant of authority to the Legislature to draft implementing statutes, and it would undermine the limiting nature of this provision if the Legislature could redefine "term of office" by statute.

Terms of Previously Elected Municipal Court Judges

The situation with respect to previously elected municipal court judges will be resolved by courts in essentially the same way. An elected municipal court judge has a term of office defined by Section 71145 as follows: "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." As with municipal court appointees, the tenure in office of an elected municipal court judge may extend beyond expiration of the judge's term. Section 71145 provides as follows: "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."

The only issue in this context is whether "term of office" as used in Section 23(b) means the 6-year "term of office" as defined in Section 71145 or means the previously elected judge's "tenure in office." Under the "tenure in office" approach, a previously elected municipal court judge would "hold office until their successors are elected and qualify," which is precisely the same situation with respect to appointed municipal court judges. If, as I argue above, "term of office" in Section 23(b) means "tenure in office" as applied to appointed municipal court judges, then the most consistent reading would be that "term of office" means "tenure in office" as applied to previously elected municipal

court judges. As noted above, this interpretation would help ensure an “orderly transition” to a unified bench and would avoid any gaps created by awkwardly timed unification votes. The fact that “term of office” will be defined differently for purposes of Section 23(b) than for purposes of Government Code § 71145 is neither troublesome nor surprising since the whole purpose of the transition provision is to bridge the gap between the municipal court election system and the superior court election system which, with respect to terms of office, are quite different.

Conclusion

For these reasons, I think it is unnecessary and unproductive to draft any further implementing legislation which attempts to define more precisely what “term of office” means in Section 23(b). It is an issue that can easily be resolved by the courts without further assistance, and probably will be resolved as indicated above. Moreover, the issue will almost certainly be the subject of litigation even if the Legislature enacts a more precise or different definition; therefore, attempting to be more precise with implementing legislation will not significantly clarify matters and will not avoid the necessity for litigation and an authoritative interpretation of Section 23(b) (indeed, implementing legislation may be more likely to trigger litigation than simply leaving the provision to stand on its own). The best course here is to leave this issue to be resolved by the courts on a case-by-case basis, if need be, where the courts can balance the different interests in light of particular circumstances that probably cannot be anticipated by the Legislature in attempting to draft implementing legislation (because the combination of circumstances involving appointments, elections, vacancies and votes to unify are extremely numerous and probably not entirely foreseeable).

Sincerely,

A handwritten signature in black ink, appearing to read "J. Clark Kelso", with a long, sweeping horizontal line extending to the right.

J. Clark Kelso