Study J-1080 July 28, 1999

Memorandum 99-47

Trial Court Unification: Election of Judges

The timing of an election for a superior court judgeship is governed by Article VI, Section 16(c), of the state Constitution (hereafter, "Article VI, Section 16(c)"). This provision was recently amended by Proposition 220 (the ballot measure on trial court unification), to read:

> (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.

We have received questions about this provision from the Secretary of State's office and the Legislative Counsel's office. Specifically, suppose a superior court vacancy occurs in 1999, before the March 2000 primary election process begins, but the Governor does not fill it before commencement of the election process. May candidates run for the seat in the March 2000 primary election, or must they wait until 2002 to run for the seat? Does it matter whether the vacancy occurs during the last year of a judge's term, rather than in the middle of the term?

This memorandum discusses those issues and suggests means of addressing them.

SHORT ANSWER

The most probable and reasonable interpretation of Article VI, Section 16(c) is that the provision means what it says: The seat will be filled "at the next general election after the second January 1 following the vacancy," which will be the statewide election in 2002. A plausible argument can be made, however, for filling the seat in the year 2000.

ANALYSIS

Plain Language

In interpreting a constitutional provision, the court's "primary task is to determine the lawmakers' intent." *Delaney v. Superior Court*, 50 Cal. 3d 785, 798, 789 P.2d 934, 268 Cal. Rptr. 753 (1990). To determine intent, the court first examines the words of the constitutional provision. *Id.*

"If the constitutional language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 248 Cal. Rptr. 115 (1988). "[W]e need not look beyond the language of the [Constitution] when its language is unambiguous. *Delaney*, 50 Cal. 3d at 802; *see also id*. at 798, 801; *but see id*. at 822-23 (Broussard, J., concurring) (court interpreting constitutional provision should consider its history and background, as well as its plain language).

Article VI, Section 16(c) expressly states that a "vacancy *shall* be filled by election to a full term at the next general election after the second January 1 following the vacancy …." (Emphasis added.) In our hypothetical, the first January 1 following the vacancy would be January 1, 2000, and the second January 1 following the vacancy would be January 1, 2001. As currently defined, a "general election" is a statewide election held on the first Tuesday after the first Monday of November in each even-numbered year, or on any "regular election date." Elec. Code § 324. A statewide election on a regular election date can occur only in an even-numbered year (unless the Governor calls a special statewide election in an odd-numbered year). Elec. Code §§ 356, 357, 1000, 1001, 1200, 1201. Thus, the "next general election after the second January 1 following the vacancy" would be the 2002 election.

If a provision uses the word "shall," it is usually mandatory, rather than permissive. *Abbett Electric Corp. v. Storek*, 22 Cal. App. 4th 1440, 1469-70, 27 Cal. Rptr. 2d 845, 850-51 (1994); *Rice v. Superior Court*, 136 Cal. App. 3d 81, 86, 185 Cal. Rptr. 853 (1982); *see also People v. Ledesma*, 16 Cal. 4th 90, 102-04, 939 P.2d 1310, 65 Cal. Rptr. 2d 610 (1997) (Mosk, J., dissenting). When, as in Article VI, Section 16 (reproduced in full at Exhibit pp. 1-2), the Legislature has "used both 'shall' and 'may' in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively." *In re*

Richard E., 21 Cal. 3d 349, 353-54, 579 P.2d 495, 146 Cal. Rptr. 604 (1978); *Abbett*, 22 Cal. App. 4th at 1470. Thus, the provision's plain language (the "vacancy *shall* be filled … at the next general election after the second January 1 following the vacancy") mandates that the election be delayed until 2002.

Immediately following the requirement that the vacancy be filled "at the next general election after the second January 1 following the vacancy" is, however, a second requirement: "[T]he Governor *shall* appoint a person to fill the vacancy temporarily until the elected judge's term begins." Article VI, Section 16(c) (emphasis added); *see also* Gov't Code § 12011. The juxtaposition of this second requirement might be construed to imply that the rule for filling a vacancy is different if the Governor fails to make an appointment.

Under that construction, however, it is not enough to infer that the expressly stated rule for filling a vacancy is inapplicable. One must further infer what rule applies instead, which may not be clear-cut (e.g., If the Governor does not make an appointment before some stage (perhaps the first day for filing nomination papers or the last day for filing a declaration of intention to become a candidate) in the next general election following the vacancy (or perhaps the next general election after the first January 1 following the vacancy), the seat shall be filled at that election, not at the next general election after the second January 1 following the vacancy). The interpretation may thus impinge on the "cardinal rule that 'The constitution is to be interpreted by the language in which it is written, and *courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions*.'" *Delaney*, 50 Cal. 3d at 799 (emphasis added), *quoting People v. Campbell*, 138 Cal. 11, 15, 70 P. 918 (1902); *Ross v. City of Long Beach*, 24 Cal. 2d 258, 260, 148 P.2d 649 (1944).

Silence on Creation of a New Exception

If a court considers the plain language of Article VI, Section 16 determinative, the election in our hypothetical should be in 2002, not 2000. If the court looks beyond the text of Article VI, Section 16, the result should be the same.

"In the case of a constitutional provision adopted by the voters, their intent governs." *Delaney*, 50 Cal. 3d at 798; *see also id.* at 802. "Ballot arguments are accepted sources from which to ascertain the voters' intent." *Id.* at 799; *In re Lance W.*, 37 Cal. 3d 873, 888 n. 8, 210 Cal. Rptr. 631, 694 P.2d 744 (1985); *Penner v. County of Santa Barbara*, 37 Cal. App. 4th 1672, 1677, 44 Cal. Rptr. 2d 606 (1995).

However, the ballot arguments on Proposition 220 do not discuss the timing of superior court elections.

The timing of such elections was discussed in the Commission's recommendation on SCA 3 (the predecessor of Proposition 220), as well as in its recommendation on implementing legislation for Proposition 220 and in several staff memorandums. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 79-81, 340-41, 345-46 (1998); *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1. 6-7, 40-41, 78-80 (1994); Memorandum 98-33, Memorandum 94-7, Memorandum 93-62. These materials do not directly address the question at hand: Whether the rule governing the timing of an election to fill a superior court vacancy (the vacancy "shall be filled by election to a full term at the next general election after the second January 1 following the vacancy") is subject to an exception if the Governor does not make an appointment by a certain stage of the next general election following the vacancy, or the next general election after the first January 1 following the vacancy.

Quite frankly, to the best of our recollection it never occurred to the staff, the Commission, or its consultant that the rule might be construed to mean anything other than what it says outright: The election shall be "at the next general election after the second January 1 following the vacancy …." This assumption permeates our materials. (*See, e.g.*, *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports, p. 80 ("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"); Memorandum 94-7 ("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."))

We did recognize and preserve preexisting case law interpreting Article VI, Section 16(c), including "the rule that a new 'vacancy' does not occur for purposes of the section on resignation or death of a temporary appointee, [and] the rule that a scheduled election is not postponed by a temporary appointment to fill a vacancy if a person has qualified as a candidate for election to the office." *Stanton v. Panish*, 28 Cal. 3d 107, 115-16, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980); *Pollack v. Hamm*, 3 Cal. 3d 264, 272-73, 475 P.2d 213, 90 Cal. Rptr. 181 (1970); *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports at 80. In light of our consideration of these and other details of election timing, our failure to even discuss, much less recognize, an exception for failure

to fill a vacancy before commencement of "the next general election following the vacancy" or "the next general election after the first January 1 following the vacancy" indicates that no such exception was intended.

Policy Considerations Balanced in the Process of Enactment

Suffrage is a fundamental right and every reasonable presumption and interpretation is to be indulged in favor of exercise of this right. *Stanton*, 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; *see also Pollack*, 3 Cal. 3d at 272-73; *Lungren v. Davis*, 234 Cal. App. 3d 806, 819-20, 825-26, 285 Cal. Rptr. 777 (1991). In light of this "repeatedly reaffirmed policy favoring the electorate," as well as the danger of complicating the debate over trial court unification with an unnecessary issue, the staff twice recommended against the proposal to amend Article VI, Section 16(c) to delay the date of an election to fill a superior court vacancy. (Memorandum 94-7, p. 8; Memorandum 93-62, pp. 2-3.) "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." (Memorandum 94-7, p. 9.)

The Commission rejected the staff's recommendation and instead endorsed the Judicial Council's recommendation that Article VI, Section 16(c) be amended to postpone the election until "the next general election after the third January 1 following the vacancy …." *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports at 6-7, 40-41, 78-80. The Commission's report explained that this would represent "a middle ground between the system … applicable to superior court judges … (election at the first general election following the first January 1 after the vacancy occurs) and the system … applicable to municipal and justice court judges by statute." *Id.* at 80. The report also emphasized that the approach would improve the quality of judicial appointees:

> The compromise position would avoid thrusting a person who accepts a unified court judicial appointment into an immediate countywide election campaign. … An election only a few months after appointment usually is too short a time in which to become known to the bar and the public. The fact that an appointed judge would have to stand for election so quickly has been an

> impediment to attracting the best qualified candidates to serve as trial court judges.
>
> Voters should have an opportunity to make a determination based on a judge's record. The Commission agrees with the 1993 Judicial Council Report and recommends that a judicial vacancy in the unified court be filled by appointment, with an election held at the next general election after the third January 1 following the vacancy. Benefits of this change may also 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.

Id. at 41.

The ballot pamphlet on Proposition 220 also reflects concern for recruiting top notch judges. The rebuttal to the argument against the measure specifically points out that "Proposition 220 ensures the highest standards for the future appointment of all judges." This is highly significant, because it demonstrates the intent of the voters, which is paramount in interpreting a ballot measure approved by the electorate. *Delaney*, 50 Cal. 3d at 798, 802.

Thus, the voters' decision to amend Article VI, Section 16 to postpone the election until "the next general election after the second January 1 following the vacancy" represents a balancing of the right of suffrage against the interest in obtaining top quality judges. It reflects a determination that the right of suffrage is not always foremost but must yield to a certain extent to encourage excellent judicial appointments.

On initial consideration, one might conclude that if the Governor does not make an appointment before commencement of "the next general election after the first January 1 following the vacancy," the interest in encouraging excellent appointments is inapplicable and the right of suffrage need not yield. Because there is no appointee who needs to establish a track record for the voters to evaluate, there is no need to delay the election until "the next general election after the second January 1 following the vacancy."

This analysis overlooks key considerations. To obtain top appointees, the Governor needs time to solicit applications and review qualifications. After selecting a candidate, the Governor must submit the candidate's name to the State Bar Commission on Judicial Nominees Evaluation, which evaluates the candidate using a thorough process that may take up to 90 days to complete. (Gov't Code § 12011.5). The Governor cannot make an appointment until the

Commission provides its evaluation or the 90-day period elapses. *Id.* These steps are invaluable in "ensur[ing] the highest standards for the future appointment of all judges," as promised in the ballot pamphlet.

Perhaps just as importantly, a top practitioner may be willing to accept an appointment and run as a sitting judge, but unwilling to risk running as a mere candidate for an open seat. If the interval between the occurrence of a vacancy and commencement of the election process is short, the Governor may not have sufficient time to make an appointment. This may discourage a talented individual from seeking the seat, and thus deprive the public of the benefits of having such a person serve.

By postponing the election to fill a vacancy until "the next general election after the second January 1 following the vacancy," the recent amendment of Article VI, Section 16(c) promotes careful appointments of top recruits, not hasty appointments from a limited pool of applicants. Although court decisions rendered before the amendment emphasize the right of suffrage, a court interpreting the current provision probably would place substantial weight on the countervailing interest in "ensur[ing] the highest standards for the future appointment of all judges." It is therefore unlikely — but not inconceivable — that a court would find the interest in a prompt election so compelling as to override the plain language stating that the vacancy is to be filled at "the next general election after the second January 1 following the vacancy." As the Third District Court of Appeal recently stated, the "canon of construction calling for narrow restriction on the rights of voters does not allow rewriting of language and does not compel adopting an interpretation which is … contrary to the will of the People." *Schweisinger v. Jones*, 68 Cal. App. 4th 1320, 1329, 81 Cal. Rptr. 2d 183 (1998).

Case Law and History of the Provision

Cases interpreting Article VI, Section 16(c) provide conflicting and inconclusive guidance on whether the timing of an election to fill a superior court vacancy depends on whether the Governor makes an appointment by a certain stage of a particular election cycle following the vacancy. There are, to our knowledge, no cases construing the provision as amended by Proposition 220.

Understanding the cases that predate Proposition 220 requires some historical background. In *Beardon v. Collins,* 220 Cal. 759, 3432 P.2d 604 (1934), a superior court judge died in the final year of his term, before commencement of the

election process. The petitioner contended that the election to fill this vacancy should be delayed for two years under former Article VI, Section 8 of the state Constitution (the predecessor of Article VI, Section 16(c)), which provided:

> The term of office of judges of the superior courts shall be six years from and after the first Monday of January after the first day of January next succeeding their election. A vacancy in such office shall be filled at the next succeeding general state election after the first day of April next succeeding the accrual of such vacancy by the election of a judge for a full term to commence on the first Monday of January after the first day of January next succeeding his election. The governor shall appoint a person to hold such vacant office until the commencement of such term.

Although this provision stated without qualification that a superior court vacancy was to be filled "at the next succeeding general state election after the first day of April next succeeding the accrual of such vacancy," a 4-3 majority of determined that "the provision does not contemplate a deferred election in a year when the general law provides for a regular election to fill the new term to begin the following year." *Id.* at 761-62. "[W]hen a term is expiring at the close of the year of a general election, the occurring of a vacancy at any time in such year is a false quantity," except that a temporary appointment may be made until the end of the term. *Id.* at 762.

In reaching this conclusion, the Court pointed out that the petitioner seeking to delay the election was not an appointee and thus necessarily was arguing that the election must be delayed "even though the Governor might choose not to appoint any person to fill said vacancy …." *Id.* at 761. The Court did not, however, limit its conclusion to that context: "[T]he election of a successor to Judge Cabaniss shall proceed in the same manner as though no vacancy in the office has occurred and … *any appointee named by the Governor hereafter shall hold office only for the remainder of the present unexpired term* …." *Id.* at 762 (emphasis added).

Justice Shenk authored the *Beardon* dissent, maintaining that the election should be delayed because: "There can be no escape from the conclusion that section 8 of article VI of the Constitution in plain and unambiguous language provides that a vacancy in the office of superior judge shall be filled by election at the general election occurring after the first day of April next succeeding the

accrual of the vacancy ….” *Id.* at 762-63 (Shenk, J., dissenting). He further explained:

> It might well be argued that if a vacancy occurred at a time when the machinery of election, under the Constitution and statutes providing for elections, had already occupied the field and the electorate were then in process of election for the forthcoming full term, or the full term about to commence had already been filled by an election, in such event the election might proceed, or the position be deemed filled by the election; but we have no such case before us. On the contrary, we are confronted with a state of facts which renders the plain meaning of the Constitution directly applicable with no results leading to absurdity or even inconvenience.

Id. at 764.

Twelve years later, writing on behalf of a majority, Justice Shenk again asserted that former Article VI, Section 8 was “plain, explicit and free from ambiguity.” *French v. Jordan*, 28 Cal. 3d 765, 767, 172 P.2d 46 (1946). Pointing out that the *Beardon* result “is not controlling on the facts presently before the court,” he pronounced that “insofar as it is inconsistent with the conclusion herein that case is overruled.” *Id.* at 770. Despite the cautiousness of this statement about overruling *Beardon*, it has been said that Justice Shenk’s majority opinion in *French* essentially amounted to “adoption *in toto*” of the views expressed in his *Beardon* dissent. *See French*, 28 Cal. 3d at 772 (Spence, J., concurring); *see also Barber v. Blue*, 65 Cal. 2d 185, 417 P.2d 401, 52 Cal. Rptr. 865 (1966).

In 1952, the Constitution was revised “to address the *Beardon-French* problem.” *Lungren*, 234 Cal. App. 3d at 814. “It was provided that an election to fill a vacancy should be held in the next election year after the January 1 after the vacancy occurs, ‘except that if the term of an incumbent, elective or appointive, is expiring at the close of the year of a general state election and a vacancy accrues after the commencement of that year and prior to the commencement of the ensuing term, the election to fill the office for the ensuing full term shall be held in the closing year of the expiring term in the same manner and with the same effect as though such vacancy had not accrued.’” *Id.* In other words, the Constitution was amended to make express the exception that the Court implied in *Beardon*. *See Barber* , 65 Cal. 2d at 190-91.

In 1966, however, the Constitution was again amended. Former Article VI, Section 8 became Article VI, Section 16, which was in all relevant aspects the

same as the current provision before it was amended by Proposition 220. The express exception for the *Beardon* situation was deleted. The effect of this revision was to "eliminate the requirement that an election be held during the last year of an incumbent's term if a vacancy accrues during that year, and to assure that the appointee will not have to stand for election until the general election two years hence." *Anderson v. Phillips*, 13 Cal. 3d 733, 739, 532 P.2d 1247, 119 Cal. Rptr. 879 (1975) (footnote omitted).

In *Fields v. Eu*, 18 Cal. 3d 322, 326, 556 P.2d 729, 134 Cal. Rptr. 367 (1976), the Court described the process of filling a superior court vacancy at length:

> [S]ubdivision (c) [of Article VI, Section 16] 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.
>
> Under our constitutional scheme, therefore, *the timing of the election to fill a superior court vacancy depends strictly on the date the vacancy occurs.*

(Emphasis added.) Under *Fields*, the critical factor is when a *vacancy* occurs. Whether and when an *appointment* occurs has no impact on the timing of the election, which "depends strictly on the date the vacancy occurs."

Other cases also focus on "the date the vacancy occurs," not a subsequent appointment, in determining the timing of an election to fill a superior court vacancy. For example, in *Pollack*, 3 Cal. 3d at 272-73, the court concluded that resignation or death of a temporary appointee does not affect the timing of a superior court election. A superior court vacancy occurs when an elected incumbent dies or resigns, and "continues to exist until the commencement of the elected judge's term although it may be temporarily filled." *Id.* at 272. The timing of the next election depends on the date of this vacancy, not on an appointee's departure. *Id.* at 272-73; *see also Lungren v. Davis*, 234 Cal. App. 3d at 824 ("A vacancy cannot be equated with an appointee's tenure").

In *Stanton*, the Court considered the situation prophesied in Justice Shenk's *Beardon* dissent: A vacancy occurring "at a time when the machinery of election, under the Constitution and statutes providing for elections, had already occupied the field and the electorate were then in process of election for the forthcoming full term." 220 Cal. at 764 (Shenk, J. dissenting). Specifically, a superior court judge had retired in the last year of his term, after the primary election had been conducted and the petitioner and another candidate had qualified for the November runoff. The county registrar-recorder gave notice that the office would not appear on the November ballot, because Article VI, Section 16(c) required that the vacancy be filled "at the next general election after the January 1 following the vacancy." The petitioner challenged this determination, arguing that the November runoff should proceed.

The Court agreed, concluding that the 1966 revision was not "inten[ded] to deprive the electorate of an opportunity to fill the office in situations in which the vacancy accrued after the date on which a candidate for the office had qualified for inclusion on the ballot." 18 Cal. 3d at 113-14. Instead of limiting itself to this narrow conclusion, the Court's opinion also includes broader language suggesting that if a vacancy occurs in the year that a superior court judge is up for election, the election will be canceled only if two requirements are met: (1) a vacancy occurs and (2) the Governor makes an appointment before a candidate qualifies. The key passage states:

> [T]he history of section 16(c) demonstrates that when a vacancy occurs in the last year of the term of an incumbent superior court judge at a time when the full elective process can be conducted, an election for the office shall be held except in those cases in which the vacancy arises *and an appointee assumes the office* prior to the qualification of one or more persons as candidates for that office. This history … confirms that the purpose of the drafters of the second sentence of section 16(c) was not to cause an already scheduled election to be canceled. The provision was intended *only* to relieve an appointee to a vacancy arising early in the last year of an incumbent's term, and who assumes office before other potential candidates have qualified, from the burden of standing for election immediately thereafter.

Stanton, 28 Cal. 3d at 113 (emphasis added).

One could attempt to argue that the Legislature and voters implicitly adopted this interpretation of Article VI, Section 16(c) when they approved Proposition

220 without expressly controverting it. In fact, the Commission's Comment to the proposed amendment of Article VI, Section 16(c) in SCA 3 (the predecessor of Proposition 220) states that the amendment is a middleground between the former system for superior court judges and the former system for municipal court judges, and "is not intended otherwise to affect existing interpretations of the meaning of the section." *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports, p. 80.

Importantly, however, *Stanton*'s the reference to whether "an appointee assumes the office" is dictum, because the vacancy in *Stanton* did not occur until *after* several candidates had qualified for election and the primary had been conducted. *Id.* at 111. The Court did not have to address the situation where a vacancy arises before a candidate qualifies, but the Governor does not make an appointment before that time. The Court's statement about whether "an appointee assumes the office" was thus unnecessary to its decision.

If the Legislature amends a provision without overturning an appellate court's interpretation of the provision, the Legislature may be presumed to acquiesce in the *holding* of the appellate court. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1155-56, 805 P.2d 873, 278 Cal. Rptr. 614 (1991). This does not mean that the Legislature has implicitly endorsed every aspect of the appellate decision. "To acknowledge that the Legislature has not altered the *holdings* in specific prior cases does not imply that it has approved the broad *language* in those decisions." *Id.* at 1157 (emphasis in original).

Thus, by amending Article VI, Section 16(c) in Proposition 220, the Legislature and the voters did not implicitly endorse the dictum in *Stanton* stating that a superior court election will be delayed only if a "vacancy arises *and an appointee assumes the office* prior to the qualification of one or more persons as candidates for that office." Rather, they ratified the holding expressly referenced in the Commission's Comment on the proposed amendment in SCA 3: If a superior court vacancy arises after a person has qualified as a candidate for election to the office, the scheduled election is not postponed by a temporary appointment to fill the vacancy. *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports, p. 80.

Even if the approval of Proposition 220 were considered a ratification of preexisting dicta construing Article VI, Section 16(c), statements in cases such as *Fields*,, *Anderson* , and *Pollack* contradict the dictum in *Stanton*. As explained above, those cases focus on when a vacancy occurs, not whether and when the

Governor makes an appointment, in determining the timing of an election to fill a superior court vacancy. They are consistent with the plain language of Article VI, Section 16(c), the Commission's memoranda and other materials assuming that the provision means what it says, and the ballot argument that Proposition 220 "ensures the highest standards for the future appointment of all judges." As revised by Proposition 220, Article VI, Section 16(c) strikes a balance between the policy favoring superior court elections and the competing interest in obtaining excellent superior court appointees. Inferring an exception not expressed in the provision nor supported by the legislative history would disrupt that balance. Although *Stanton* provides fodder for a contrary argument, a court interpreting Article VI, Section 16(c) should conclude that if a superior court vacancy arises in 1999, whether in the last year of a judge's term or otherwise, the election to fill the vacancy shall be "at the next general election after the second January 1 following the vacancy" (i.e., the 2002 election), unless the vacancy arises after a person has qualified as a candidate for election to the office.

PRACTICAL IMPLICATIONS

If, for some reason, Article VI, Section 16(c) is interpreted differently, such that the election to fill a superior court vacancy arising in 1999 will be delayed until 2002 only if an appointment is made before a certain stage of the election process, there are immediate practical implications.

The upcoming primary election is scheduled for March 7, 2000. Nomination documents must be made available "on the 113th day prior to the direct primary election" (Elec. Code § 8020), which would be on November 15, 1999. If the first day for filing nomination documents is considered the critical date, then the Governor must make an appointment by November 15 or the election will proceed in 2000. If the critical stage of the election is the last day for filing a declaration of intention to become a candidate, the cutoff date would be even earlier, on November 10, 1999 (Elec. Code § 8022).

To make an appointment, the Governor must first submit the candidate's name to the State Bar Commission on Judicial Nominees Evaluation. Under Government Code Section 12011.5(k),

> (k) *No candidate for judicial office may be appointed until the State Bar [i.e., the Commission on Judicial Nominees Evaluation] has reported to the Governor pursuant to this section, or until 90 days have elapsed*

> *after submission of the candidate's name to the State Bar, whichever occurs earlier*. The requirement of this subdivision shall not apply to any vacancy in judicial office occurring within the 90 days preceding the expiration of the Governor's term of office, provided, however, that with respect to those vacancies and with respect to nominations pursuant to subdivision (d) of Section 16 of Article VI of the Constitution, the Governor shall be required to submit any candidate's name to the State Bar in order to provide it an opportunity, if time permits, to make an evaluation.

(Emphasis added.) If this provision is interpreted according to its plain language, the Governor must submit the candidate's name to the Commission on Judicial Nominees Evaluation at least 90 days before making the appointment, unless he is confident that the Commission will render its evaluation of the candidate in less than 90 days. That corresponds to August 17, 1999 (if the critical date is the first day for filing nomination documents) or August 12, 1999 (if the critical date is the last day for filing a declaration of intention to become a candidate).

Significantly, the 90-day requirement of Government Code Section 12011.5 (k) is subject to an exception for "any vacancy in judicial office occurring within the 90 days preceding the expiration of the Governor's term of office." With respect to such vacancies, the Governor must still submit the candidate's name to the State Bar so it can evaluate the candidate if time permits, but the Governor need not wait for the State Bar to act, or any time period to elapse, before making an appointment.

The provision does not include a comparable exception for a superior court vacancy occurring within the 90 days preceding commencement of a general election. An exception along these lines would seem in order, however, if Article VI, Section 16(c) is interpreted such that a vacancy delays a superior court election only if an appointment is made before commencement of the election process. The lack of such an exception is another indication that Article VI, Section 16(c) was not intended to be interpreted in that manner.

RECOMMENDATION

The plain language and proper construction of Article VI, Section 16(c) seem relatively clear. Attempting to provide further clarity, as by enacting a statute interpreting the provision, may inadvertently introduce new ambiguities or problems. The danger of unintended consequences is particularly acute in the

area of judicial elections, which has been fraught with complicated and unusual fact situations leading to extensive litigation. As Professor Kelso commented when we considered another issue relating to judicial elections, "the combination of circumstances involving appointments, elections, vacancies and votes to unify are extremely numerous and probably not entirely foreseeable." (Memorandum 98-33, Exhibit p. 16.) The issue at hand is a perfect example of such an unforeseen situation.

Ultimately, the proper interpretation of Article VI, Section 16(c) is for the courts to decide. At this point, further action by the Commission seems unnecessary and unproductive. **We would leave it to the courts to ascertain and effectuate the intent of the constitutional provision as concrete issues arise.**

Respectfully submitted,

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Exhibit

CALIFORNIA CONSTITUTION ARTICLE VI, SECTION 16

Sec. 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.

(b)(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 in 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.

(d) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.

The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first

general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.

Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make this system of selection applicable to judges of superior courts.