

REPRINT OF COUNTY OF NEVADA LEGAL OPINION

MEMORANDUM

DATE: October 17, 1999
TO: Bruce Bolinger
County Clerk-Recorder
FROM: James G. Flageollet
County Counsel

SUBJECT: *RECALL ELECTION*

BACKGROUND:

The proponents of the recall effort sought to recall two judicial officers, the Honorable Ersel Edwards¹ and the Honorable John Darlington.

Prior to the gathering of signatures, in reliance on the Secretary of State's handbook on recall, you advised the proponents that, should the recall be successful, successors to the above-referenced judicial offices would be selected by election.

Subsequent to submittal of the recall petitions, you had occasion to revisit the selection process issue. You were then advised that the California Constitution may preclude the election of a successor to a recalled superior court office.

You have requested an opinion from the Secretary of State. Pending receipt of such, you have asked that I review the issue.

QUESTION PRESENTED:

Should a superior court judge be recalled, is his/her successor elected or appointed by the Governor?

ANSWER:

The law is unclear. However, giving due regard to harmonizing the various constitutional and statutory provisions and other principles of statutory construction it is my opinion that the better reasoned position is that a successor to a recalled superior court judge is elected.

¹ Since the petition to recall Judge Edwards from the Municipal Court office has been certified as insufficient, this memo will not discuss the impact of either trial court consolidation or S.C.A.4 (see Cal. Const. Art. 6 sec. 23). should such be approved by the voters.

ANALYSIS:

Elections Code section 11041 (a) provides that the contents of a recall petition shall include:

“(1) A request that an election be called to elect a successor to the officer. However, if the officer is a justice of the Supreme Court or of a court of appeal, as specified in subdivision (a) of Section 16 of Article VI of the California Constitution, the request shall be that the Governor appoint a successor to the officer.”

That section appears to require, except for Supreme Court and Court of Appeal justices, that successors to a recalled officer shall be elected. You apparently based your initial advice on that code section.

Subsequently, you were advised of California Constitution Article 6, section 16(c), which provides:

“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.”

These two apparently irreconcilable provisions may be capable of explanation by analysis of the term “vacancy”. The California Constitution does not include a definition of the term “vacancy”. However, the Government Code does define the events causing vacancy.

Government Code section 17770 includes a fairly exhaustive list of events causing a vacancy in office prior to expiration of a term. Identified events include death, resignation and ceasing to be an inhabitant of the State. Removal by recall is not identified in Government Code section 1770 as an event causing a vacancy. However, subdivision (d) does identify “removal from office” as such an event.

It is my opinion that “removal from office” is a specific term of art which defines the methods (e.g. impeachment; accusation) for removal from office commencing at Government Code section 3000.

I acknowledge that both the Constitution (see Cal. Const. Art. 2, sec. 13) and the Elections Code (see Elections Code sec. 11384) in the context of recall use the term “remove from office”. However, the term as used therein specifically refers to the constitutional right of recall and the statutory implementation of such as opposed to the more specific “for cause” reasons identified by Government Code section 3000 et seq., entitled “removal from office”. The right of the electorate to remove by recall is a specific process so distinct from the “removal of office” process, identified by Government Code section 3000, that it is likely that the legislature would have specifically included “recall” as an event causing vacancy, had it intended such.

To give meaning to the provisions of Elections Code section 11041 (a)(1) (only Supreme Court/Court of Appeal justices are appointed), it is my opinion that the legislature was aware of the above referenced Constitutional and Government Code provisions and did not consider removal by recall to constitute a “vacancy”, as that term is intended by the Constitution. The alternative is to find that the legislature enacted an unconstitutional statute.

In addition to the foregoing the term of office for the superior court office may present an issue. The Constitution provides for a term of six years. A vacancy in the term is filled by election to a full term, however, the Governor makes an appointment to fill the vacancy

temporarily. (See Cal. Const. Art. 6, sec. 16[c].) On the other hand, Elections Code section 11385 provides that if the officer is recalled, the successor shall be elected to fill the unexpired term. The only logical explanation appears to be the conclusion that the elector's constitutional right to recall and the implementing statutes do not constitute a "vacancy", as that term is used in California Constitution Article 6, section 16.

What does the foregoing mean?

It would appear that your initial advice and the recall proponents adherence to such was the safest course. If the Elections Code, in fact, does not allow a successor to be elected to a superior court office the proponents suffer no prejudice (i.e. the recall occurs and the election provision of the statute is unconstitutional). However, if a successor is to be elected pursuant to the Elections Code the proponents, by following your initial advice and requesting an election, have facilitated such.

Of course, the resolution of the issue becomes moot if the recall petition is deemed insufficient. Nomination papers and declarations of candidacy are not filed before the order of election is issued (see Elections Code section 11381).

Should the petition for the superior court position be deemed sufficient, I will be pleased to, in conjunction with the Secretary of State's office, revisit this complex issue in a timely manner.*

*Note: This document was re-keyed by San Bernardino County from a facsimile copy of a Memorandum from James G. Flageollet, County Counsel to Bruce Bolinger, County Clerk-Recorder, both of Nevada County.