



# Attorney General

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ARIZONA ATTORNEY GENERAL

January 21, 1985

The Honorable William W. Nabours  
Presiding Judge  
Yuma County Superior Court  
168 Second Avenue  
Yuma, Arizona 85364

Re: I85-007 (R85-001)

Dear Judge Nabours:

As a result of the recent resignation of the Clerk of the Yuma County Superior Court, you have asked us to issue an opinion addressing the following two questions:

1. To whom does the clerk of the superior court submit his resignation, and,
2. Who has the authority to appoint a new clerk to complete the term for which the ~~residing~~ clerk was elected?  
*RESIGNING*

For the reasons set forth below, we conclude that the superior court clerk should submit his resignation to the Secretary of State and that the power to appoint an individual to fill the office of superior court clerk until the next election rests with the Governor.

A superior court clerk is an elected officer who holds a four year term. Ariz.Const., art. VI, § 23. His powers and

duties are "as may be provided by law or by rule of the supreme court or superior court." The presiding judge in each county is charged with the responsibility of prescribing the powers and duties of the clerk of the court, in addition to those prescribed by law and the Supreme Court. Rule 1, Uniform Rules of Practice of the Superior Court of Arizona.

Prior to 1982, a superior court clerk was also defined as a "county officer." Laws 1982, Ch. 168, § 1 amended A.R.S. § 11-401 to delete the clerk of the superior court from that statute which listed county officers. Indeed, in Laws 1982, Ch. 168, § 5 the legislature removed a number of statutes pertaining to the duties of superior court clerks from Title 11, which relates to County Officers, and transferred those statutes to Title 12, which relates to the courts. The transfer of those provisions from Title 11 to Title 12 signifies a legislative intent to make the clerk a judicial officer.

With respect to the tendering of a resignation by the clerk of the superior court prior to the end of the term to which the clerk was elected, we must look to A.R.S. § 38-294. That statute provides that resignations of public officers shall be in writing, and made as follows:

2. By state officers . . . to the  
Governor.

\* \* \*

4. By county officers . . . to the  
chairman of the board of supervisors.

\* \* \*

6. In cases not otherwise provided for,  
by filing the resignation in the office  
of the secretary of state.

Clearly, a court clerk of the superior court is no longer a county officer and, therefore, paragraph 4 of A.R.S. § 38-294 is inapplicable. Likewise, no provision designates the clerk of the superior court a "state officer." Therefore, we conclude that paragraph 6 of A.R.S. § 38-294 which requires that the resignation of certain public officers be filed in the

office of the Secretary of State applies to the elected clerk of the superior court.

We can find no specific provision which gives any particular governmental entity the express power to fill the vacancy created when the clerk of the court resigns. Thus, in the absence of an express statutory or constitutional provision relating to the appointment of a particular office, we must look to Ariz.Const., art. V, § 8 (article V) which provides:

When any office shall, from any cause, become vacant, and no mode shall be provided by the Constitution or by law for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment.

Article V is further implemented by A.R.S. § 41-101 which provides that the Governor "shall see that all offices are filled and the duties thereof performed." A.R.S. § 41-101.2. Based upon these provisions, we conclude that it is the Governor who has the power to appoint an individual to fill the office of clerk of the superior court until the next election.

Our conclusion is not inconsistent with the reasoning of the Arizona Supreme Court in Royston v. Pima County, 106 Ariz. 249, 475 P.2d 233 (1970). In that case the clerk of the superior court of Pima County appointed a deputy clerk. The appointment was approved by the presiding judge of the Pima County Superior Court. The clerk then requested the Pima County Board of Supervisors to consent to the appointment and place the new employee on the payroll. When the Board of Supervisors failed to do so, Judge Royston filed a petition for mandamus.

The Supreme Court first looked to A.R.S. § 11-401 which, at that time, listed the clerk as a county officer.<sup>1/</sup> The court then compared that statute with the Arizona Constitution. The court concluded that the office of the

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1. The County Board of Supervisors was authorized at that time by statute generally to "fill by appointment all vacancies occurring in county . . . offices." A.R.S. § 11-251.16.

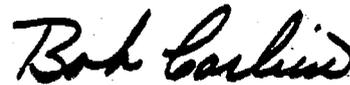
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clerk of the superior court is part of the judicial branch of government and subject to judicial supervision because the office of the clerk of the superior court is established by article VI of the Constitution. Article VI is solely concerned with the judicial branch of government. Based upon that conclusion, the court then held that the Board of Supervisors has only ministerial duty to consent to the appointment of employees employed by the clerk of the superior court unless the Board can clearly show that the clerk acted "unreasonably, arbitrarily, and capriciously" in making the appointment.

Royston does not apply to the issues raised by your recent inquiry because, on its facts, Royston dealt with a deputy clerk who is not elected, unlike the clerk of the superior court. Moreover, the determination of the Supreme Court in Royston that the clerk of the superior court is part of the judicial branch of government is not inconsistent with our opinion. It is uncontroverted that the superior court has the authority to specify the powers and duties of the clerk of the superior court and to exercise general supervision over all court personnel. Ariz.Const., art. VI, § 23; Rule 1 of the Uniform Rules of Practice of the Superior Court of Arizona. However, neither the constitution nor any other provision of law likewise specifically provide for the filling of a vacancy when the superior court clerk resigns. In the absence of any statutory or constitutional provision specifically allowing the superior court to fill a vacancy in the office of superior court clerk, we think that the provisions of article V apply.

The framers of the Arizona Constitution specifically contemplated that, from time to time, offices in any of the three branches of government may become vacant and no mode would be prescribed by the Constitution or statutes for filling the vacancy. In that instance, article V gives the power to fill such a vacancy by appointment to the Governor of the State of Arizona.

Sincerely,



BOB CORBIN  
Attorney General

BC:SMS:kmc