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Robert R. Corbin

May 27, 1987

Mr. James Colter, Executive Assistant
Office of the Governor
State Capitol - 9th Floor
Phoenix, Arizona 85007

Re: I87-071 (R87-082)

Dear Mr. Colter:

You have asked whether lists of nominees submitted for four superior court vacancies comply with the provisions of Ariz. Const., art. VI, § 37. You specifically ask whether a nominee may lawfully be placed on more than one list. You also inquire whether a three-nominee list containing one or more of the nominees who appear on a previously-submitted list is invalid for the reason that a nominee's potential appointment to the prior but not-yet-filled vacancy could result in a list of less than three available candidates at the time the Governor makes an appointment from that list.

We conclude that the Arizona Constitution does not prohibit nomination of a person to more than one superior court vacancy. When multiple vacancies are to be filled at one time, each list must meet the constitutional number and political party representation requirements at the time the Governor makes his appointment.

The requirements for submission of nominees for superior court vacancies are set out in Ariz. Const., art. VI, § 37, in pertinent part, as follows:

Within sixty days from the occurrence of a vacancy . . . the commission on trial court appointments . . . shall submit to the Governor the names of not less than three persons nominated by it to fill such vacancy, no more than two of whom shall be members of the same political party unless there are more than four such nominees, in which event not more than sixty per centum of such nominees shall be members of the same political party.

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Constitutional provisions must be interpreted with an eye to syntax, history, initial principle and extension of fundamental principles. United States v. Superior Court In and For Maricopa County, 144 Ariz. 265, 697 P.2d 658 (1985). They must be construed to give effect to the intent and purpose of the framers and people who adopted it, and language in measures adopted by a vote of the people is to be interpreted as generally understood and used by the people. McElhaney Cattle Company v. Smith, 132 Ariz. 286, 645 P.2d 801 (1982). The requirements of Ariz. Const., art. VI, § 37 are clear. For each vacancy the Commission must submit a list of at least three nominees and each list shall meet the political party representation requirements. Nothing in the plain language of the provision prevents the Commission from nominating a person for more than one vacancy, so long as the Governor is left with a valid list containing at least three available nominees at the time of appointment.

In Ariz. Atty. Gen. Op. I87-040, we were asked if one list of four nominees could be submitted for two superior court vacancies. We concluded that Ariz. Const., art. VI, § 37 required submission of separate lists containing a minimum of three names for each vacancy. In reaching this conclusion, we interpreted the intent of the people who enacted this constitutional provision, stating:

The constitution contemplates that the governor's selection will result in, at most, 33.3% of the nominees taking office, and the percentage may be reduced if additional names are submitted to him. If the Governor must select two of only four nominees, rather than two of six nominees, he must place 50% of the Commission's selections in office.

We do not believe the constitution confers upon the Commission this amount of power in dictating who shall serve as judges.

Ariz. Atty. Gen. Op. I87-040.

In that opinion, we considered a different question from the one you now ask. The Constitution expressly requires one list for each vacancy. No more than 33.3% of the nominees on any single list for any single vacancy may be selected by the

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Governor. Our prior opinion should not be read to require a number of different nominees equal to at least three times the number of vacancies in existence at a given time. The Constitutional provision was written in terms of a single individual vacancy. We, therefore, consider each list for each vacancy individually and sequentially.

We find nothing in the constitution or the Publicity Pamphlet distributed to voters for review prior to enacting art. VI, § 37, that prohibits submission of a candidate for more than one vacancy as long as the Governor has a choice of at least three nominees each time he selects a judge. This is not to suggest that the Commission is restricted to three names per list. Art. VI, § 37 specifically provides for the appropriate party representation when more than four nominees are included on a single list.

Turning now to the lists of nominations that are now pending the Governor's selection, they are as follows^{1/}:

	1	2	3	4
1.				Aspey
2.				Grimwood
3.			Hall	Hall
4.	Hotham	Hotham		
5.	Hyder	Hyder		Hyder
6.		Nelson		
7.		Parks	Parks	Parks
8.	Ronan	Ronan		Ronan
9.		Topf		
10.	Wilkinson	Wilkinson	Wilkinson	Wilkinson

Based on the preceding discussion, each list, prior to any selection, complies with our interpretation of art. VI, § 37. Each list is valid as submitted, assuming party representation is as required, because each list contains at least three nominees from which the Governor may appoint a judge.

We recognize that a potential problem exists with regard to list 3. If the second or third nominee is selected from list 1 or 2, the Governor will not have three available candidates from which to choose as required by the constitution. If the Commission submits a list containing

^{1/}Lists 1 and 2 were submitted to the Governor on April 1, 1987. Lists 3 and 4 were submitted on April 24, 1987.

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nominees who appear on lists which are pending the Governor's consideration, it should submit a sufficient number of additional nominees to assure that this list will not be invalidated if the Governor makes appointments from the prior lists.

If, however, the Commission fails to provide these additional nominees, and one or more of the nominees on a three-person list becomes unavailable for appointment because of previous appointment, the list ceases to comply with art. VI, § 37. If this occurs prior to the running of the 60 days from the occurrence of the vacancy, the list would have to be brought back into compliance within the 60 days by the Commission before an appointment is made. If the time limits run and the Commission has not provided the Governor with a valid list, then the Governor may select any qualified person, including a nominee who remains on the list, if that person is acceptable to him, pursuant to the following provision of art. VI, § 37:

If such commission shall not, within sixty days after such vacancy occurs, submit the names of nominees as hereinabove provided, the Governor shall have the power to appoint any qualified person to fill such vacancy at any time thereafter prior to the time the names of three or more nominees to fill such vacancy shall be submitted to the Governor as hereinabove provided.

We conclude that nominees for superior court vacancies may be submitted to the Governor more than once as long as the list for each vacancy contains available candidates complying with the number and political party representation requirements at the time the Governor makes the appointment. Accordingly, the lists submitted for the four vacancies comply with Ariz. Const., art. VI, § 37, unless and until fewer than three nominees remain available on any single list or party representation ratios of the remaining available nominees no longer comply with art. VI, § 37.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:JGF:gm