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September 12, 1988

The Honorable Jay Natoli  
Judge of the Superior Court  
Navajo County Superior Court  
P.O. Box 668  
Holbrook, Arizona 86025

Re: I88-097 (R88-092)

Dear Judge Natoli:

You have asked whether the newly created office of Superior Court Judge for Division Three, Navajo County, must be included on the November 8, 1988 general election ballot,<sup>1</sup> and, if so, what procedures must candidates follow to have their names placed on the ballot. We conclude that this office must be included on the November 8, 1988 general election ballot and that candidates seeking to have their names placed on that ballot must do so by following A.R.S. § 16-341. People may sign these nomination petitions regardless of their party affiliation and even though they may have voted in the primary election. We discuss each of your specific questions separately.

You first ask whether the office of Navajo County Superior Court Judge, Division Three, must be filled by election at the November 8, 1988 general election or at the November 6, 1990 general election. We conclude that this office must be included on the 1988 general election ballot.

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<sup>1</sup>The Navajo County Board of Supervisors on April 25, 1988, petitioned the Governor to permanently create a new Division Three. Subsequent to the Governor's approval of the petition, the Governor made an appointment to fill the position of Superior Court Judge for this division on July 5, 1988.

The Honorable Jay Natoli  
I88-097  
September 12, 1988  
Page 2

Counties having a population of less than one hundred fifty thousand persons are to elect their superior court judges at the general election.<sup>2</sup> Ariz. Const. art. VI, § 12. Each of these judges then holds office for "a regular term of four years . . . from and after the first Monday in January next succeeding their election, and until their successors are elected and qualify." Ariz. Const. art. VI, § 12. The only exception to this four-year elected judicial term of office occurs when a judge is elected to serve for the remainder of an unexpired term following a vacancy and appointment to fill that vacancy. Ariz. Const. art. VI, § 12.

When a new division is created, a vacancy exists in the office of superior court judge for that division. The method for filling vacancies in the office of judge of the superior court in counties having a population of less than one hundred fifty thousand persons is set forth in Ariz. Const. art. VI, § 12 as follows:

The Governor shall fill any vacancy in such counties by appointing a person to serve until the election and qualification of a successor. At the next succeeding general election following the appointment of a person to fill a vacancy, a judge shall be elected to serve for the remainder of the unexpired term.

(Emphasis added). We have previously recognized that a gubernatorial appointment to fill the vacancy must precede the election of a successor and that the timing of this appointment will determine when the "next succeeding general election following the appointment" will, in fact, occur. Ariz. Atty. Gen. Op. I88-068. In the case of the recent creation of the Navajo County Superior Court's Division Three, the requisite appointment to fill the vacancy was made on July 5, 1988. The "next succeeding general election" following that appointment will occur on November 8, 1988.

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<sup>2</sup>Such counties may choose to select judges by the merit selection process utilized by counties with larger populations. Ariz. Const. art. VI, § 40. Navajo County has not exercised this option.

The Honorable Jay Natoli  
I88-097  
September 12, 1988  
Page 3

You next ask whether A.R.S. § 16-341 would be used to place the names of judicial candidates on the November 8 ballot. The nomination-other-than-by-primary provisions of A.R.S. § 16-341 provide the only means for placing the names of these candidates on the general election ballot. Because the appointment to fill this vacancy did not occur until July 5, 1988, there was not sufficient time to include this office on the primary election ballot. A.R.S. § 16-202 states that the offices to be nominated at the primary election are designated at least one hundred twenty days before the date of the primary election (May 16, 1988). In addition, this appointment occurred after the June 30, 1988 deadlines for candidates to file their nomination papers and petitions required for access to the primary election ballot. A.R.S. §§ 16-311(A) and 16-314(A). Therefore, the only means for placing the name of a candidate for this office on the general election ballot is provided by A.R.S. § 16-341.

Finally you ask whether anyone may sign nominating petitions without regard to party affiliation and whether they voted in the September 13, 1988 primary election. A person may sign an A.R.S. § 16-341 petition for a candidate for a judicial office that was not on the primary ballot even though he voted in the primary election and regardless of his party affiliation.

A.R.S. § 16-341(C) provides, in part:

The petition shall be signed only by voters  
. . . who have not voted at the primary  
election.

The Arizona Supreme Court, however, has reviewed the constitutionality of this statute and held as follows:

Therefore, we find that A.R.S. § 16-341(C) is unconstitutional only to the extent that it prevents voters whose primary ballot did not give them an opportunity to vote for a particular office from signing a candidate's nominating petition for that office after the primary.

Kromko v. State, 132 Ariz. 161, 164, 644 P.2d 897, 900 (1982) (emphasis added). Because the voters had no opportunity to vote at the primary for the particular judicial office in question, they may sign a nomination petition even though they voted at the primary.

The Honorable Jay Natoli  
I88-097  
September 12, 1988  
Page 4

A.R.S. § 16-314 relating to partisan nomination petitions requires the petition signer to be a member of the party nominating a candidate. However, there is no similar restriction in the applicable statute, A.R.S. § 16-341.

We conclude that the office of Judge of Division Three of the Navajo County Superior Court must appear on the November 8, 1988 general election ballot. Candidates for the office must file petitions pursuant to A.R.S. § 16-341 which may be signed by members of any or no political party even though they voted in the primary election.

Sincerely,



BOB CORBIN  
Attorney General

BC:LTH:chp



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