

# Memorandum

87100-87103

advice  
file

To : Ted

Date : June 19, 1980

A-80-06-116

From : **FAIR POLITICAL PRACTICES COMMISSION**  
Tom Sobel

Subject: Proposed legislation regarding alteration of voting requirements in disqualification situations

In your memorandum regarding outstanding research assignments, you mention that the Commission expressed interest in exploring possible legislation to alter voting requirements in disqualification situations. The example you gave was a case in which, by statute or ordinance, a seven member board is required to act by absolute majority. In such a case, disqualification of two members means that four out of the five remaining votes will be needed to adopt an item. The Commission is interested in introducing legislation which will permit the majority to be reduced to three in such a case in order to avoid having disqualification act as a "no" vote.

If I understand the argument behind the proposal, it goes like this: In situations in which an absolute number is required to take action, the incapacity to vote is like a refusal to vote "for" and is, therefore, like a "no" vote. To take a concrete case: Suppose a seven member board is considering commencing condemnation proceedings along a waterfront area in which two members of the council possess pecuniary interests requiring disqualification. If the two disqualify themselves, four out of the five other votes will be necessary to pass the measure. If the two council members are opposed to the measure because of their interest and had voted, it would also have taken the votes of four other members to pass it; their disqualification, therefore, puts the same burden on proponents of the measure that, it is assumed, their "interested" participation would have entailed.<sup>1/</sup> It is concluded, therefore, that their disqualification has the same effect as if they had not been disqualified and had voted "no".

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<sup>1/</sup> In the example given, proponents have the same burden even if the council members would have voted "yes", that is, in opposition to their own interests. In both cases the votes of four other members, not including themselves, would be necessary to pass the measure.

I recognize the practical appeal of the argument and I understand that there is a strong consensus that a disqualification does have such an effect. However, it is not clear to me that the effect of a disqualification is necessarily that of a "no" vote. Often it depends upon how one characterizes what is being voted upon. For example, four votes are required for a valid judgment of the Supreme Court. Yet in Santa Rosa City R.R. Co. v. Railway Co. (1896) 112 Cal. 436, the court held that the disqualification of a judge which left the court deadlocked three-three constituted an affirmance of the decision of the court below. The disqualification was, in legal effect, a "yes" vote with respect to that decision, rather than a "no" vote with respect to the particular petition before the court. Many local governing bodies exercise review functions and, therefore, are susceptible to having disqualifications characterized as either "yes" or "no" votes in this way. Although only a few cases in other jurisdictions deal with the legal effect of a disqualification, a few California cases do discuss the related question of the legal effect of an abstention. Taken together, the cases offer a great variety of treatment on the general subject of the failure to vote because of abstention or disqualification, all of which makes it extremely difficult to generalize about what the law is. It is fair to say, however, that the courts have taken roughly three different approaches to the problem:

- 1) To treat the failure to vote as a "yes" vote that counts in determining a majority;
- 2) To simply treat it as a non-vote which does not count in determining a majority;
- 3) To treat the disqualification as a vacancy which may lower the majority required to take action.

Each of these will be discussed in turn.

#### THE "YES" VOTE ALTERNATIVE

Before discussing this alternative, a distinction between the legal effect and the practical effect of a failure to vote must be drawn. The distinction between the two is that the legal effect of a failure to vote refers to how the non-vote is counted; the practical effect, on the other hand, refers simply to the narrowing of the chances for a majority that the non-vote entails. At common law, the rule developed that a passed vote was to be considered either an affirmative vote or a consent to the majority. The first California case to apply

the rule was Martin v. Ballinger (1938) 25 Cal. App. 2d 435. The question was whether an appointment to fill a vacancy on a five member city council was valid when two members voted affirmatively and two abstained. The abstaining members contended that, because they had expressed opposition to the appointment, their abstention should be counted as a "no" vote. The court disagreed, referring to the general rule that:

... when members of a board, present at a meeting, desire to defeat a measure they must vote against it; that inaction on their part will not accomplish their purpose; and that their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members.

25 Cal. App. 2d at 439.

In Dry Creek Valley Ass'n. Inc. v. Board of Supervisors (1977) 67 Cal. App. 3d 839, 843-844, the court upheld an ordinance which counted a passed vote as a "yes" vote as being in accord with the "great bulk of authority" on the subject:

4 McQuillan on Municipal Corporations (rev.ed.1968) section 13.32, page 521, states that: "While it has been said that those present who refuse to vote for a proposition cannot be counted, the general rule is [that they] are regarded as having voted affirmatively, i.e., for the proposition, or to have voted with the majority." (Fns. omitted.) Other holdings to the same effect: "We ... conclude that the rule known as the common-law rule is a proper and efficient rule to adopt, in order that municipal business shall be conducted with a proper regard to the wishes of its citizens. This common-law rule may be stated to be that the legal effect of refusing to vote is an acquiescence in the action taken by the majority of those who do not vote." (Babyak v. Alten (1958) 106 Ohio App. 191 [154 N.E.2d 14, 19]); "We are inclined to the opinion that the proper rule is that those who remain silent shall be deemed to assent to the act of those who do vote." (State ex rel. Young v. Yates (1897) 19 Mont. 239 [47 P. 1004, 1006]); "The rule is that when a quorum of a governing body is present those members who are present and do not vote will be considered as acquiescing with the majority." (Piersen-Trapp Company v. Knippenberg (Ky. App. 1965) 387 S.W.2d 587, 588; Payne v. Petrie (Ky. App. 1967) 419 S.W.2d 761, 763); "We are persuaded that the trial court erred in not holding that a passed vote is to be considered as a vote with the majority, a quorum being present."

The Dry Creek court expressly declined to decide whether, absent the local regulation which counted the passed vote as a "yes" vote, the common law rule generally requires this result; the court limited itself to holding that the local ordinance was not in contravention of state requirements that an absolute majority of a board of three members or more are required for a valid act.<sup>2/</sup> The court also expressly declined to decide whether such a rule would be effective in the case of a disqualification for interest and, in a footnote, suggested that in such a case, the vote should not be counted in any way.

While Dry Creek reserves the question of the legal effect of a disqualification, other courts have treated the failure to vote because of interest as, in effect, an abstention and applied the common law rule. Thus, in Northwestern Bell Etc. Co. v. Bd. of Com'rs., ND 211 N.W.2d 399, the court followed the common law rule and counted passed votes as "yes" votes. The facts of the case were as follows. The statutes of North Dakota generally require that a majority of all the members of a governing board must concur in the passage of an act. A measure to place a tax on Northwestern Bell's gross revenues was before the five member Board of Commissioners of the City of Fargo, two members of which were employees of Bell. The vote on the measure was two "for", one "against", the two interested commissioners abstaining because of their conflict of interest. Treating the case as one merely involving abstentions, rather than disqualifications, the court applied the common law rule and counted the passed votes as part of the required three member majority on the grounds that unless it did so, the abstentions had the practical effect of "no" votes.<sup>3/</sup>

Although there is some indication in the cases that the courts will not give the "yes" vote effect to a disqualification, the rationale for their giving it to an abstention is exactly the same as that underlying the Commission's concern regarding disqualifications. Disqualifications are different from abstentions in that the abstention is an evasion of a public official's duty while a disqualification is the fulfillment of it. It is for this further reason that other courts have tried other approaches.

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<sup>2/</sup> The court held that the Government Code section which required an absolute majority did not specify how such a majority was to be counted. 67 Cal. App. 3d at 845.

<sup>3/</sup> Curiously, although the court appears to distinguish between disqualification and abstention, it fails to treat the abstention on the grounds of interest as, constructively, a disqualification.

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NOT COUNTING THE DISQUALIFIED  
VOTE IN ANY WAY

Several cases adopt a kind of "tough luck" approach to a disqualification and simply consider a measure which fails to obtain a majority vote as defeated. Annot., Municipal Council-Voting Authority, 63 A.L.R.3d 1075, 1102, citing Livesey v. Scacaucus (1916 N.J. Sup.) 97 A. 950; Quinn v. Sea Isle City (1909) 71 A. 1118; Coles v. Trustees of Williamsburgh (1833) N.Y. 10 Wend. 659.

TREATING DISQUALIFICATION AS  
CREATING A VACANCY

At least one court has treated a disqualification as creating a vacancy and, in that way, as reducing the majority required to act. This is similar to the proposal suggested by the Commission. See City of Alamo Heights v. Gerety (1954) 264 S.W.2d 778. However, the California Supreme Court, in an early case, refused to treat a vacancy as altering the majority required to act. Pimental v. City of San Francisco (1863) 21 Cal. 351.

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Although, as this brief review of the cases indicates, there is no consistent result in dealing with the questions raised by disqualification, the discussion in the cases does reveal several things: First, from the paucity of cases it is clear that the problem raised by disqualification is rarely critical enough to require intervention, at least by the courts; secondly, that in those cases in which the courts have been called upon to deal with the sort of question which concerns the Commission, they have resorted to some fiddling; third--and I think this is the most important lesson to be drawn from the cases, although it is not always explicit in them--that the frame of reference for deciding these questions is application and interpretation of the principle of majority rule. In view of this, I looked at some of the authorities on this and it seems to me that there is an inherent limitation to any sort of proposal to alter voting requirements for any reason, including that of disqualification.

At common law only a majority of the members of a body was necessary for collective action. In California, the codes provide that the common law rule is applicable, except where it is expressly made inapplicable. Thus, the Code of Civil Procedure, the Civil Code and the Penal Code separately provide that:

Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

Code of Civil Procedure §15;  
see also Civil Code §12; Penal  
Code §7, subd. 17.

In any three member body, two members may act for it; in any five member body, three members may act for it; and so forth. At common law it was held that a quorum being thus capable of acting for a public body, it followed that the acts of a majority of the quorum were the acts of the body, People v. Harrington (1883) 63 Cal. 257:

We are not aware of any case in which the contrary has been held and must regard the law as well settled that in a case like this the action of a quorum is the action of the board and that a majority of the quorum present could do any act which a majority of the board if present could do.

Ibid. at 260.

See also People v. Hecht (1895) 105 Cal. 621, 628. At common law, then, the least number of members of a decision making body that could take action on behalf of the body was a majority of a quorum. However, a quorum had to be present to conduct business. It appears from the cases that the majoritarian principle embodied in the common law rule is "fundamental". Cases treat the principle as a "general rule" of government, People v. Coghill (1874) 47 Cal. 361; sometimes, as in the reapportionment decisions, it is treated as a constitutional principle. See Reynolds v. Sims (1964) 377 U.S. 533, 536. The rule of necessity itself embodies a majoritarian principle in that it requires a body to be reconstituted when its membership falls below a quorum.<sup>4/</sup> The footnote in Woodland Hills may well be read to the same effect since it appears to reject the argument that disqualification of an entire body is permissible under the Political Reform Act. If the majoritarian principle is as fundamental as I think it to be, any proposal which alters voting requirements so that less than a regular quorum may act for the body is probably not constitutional.<sup>5/</sup>

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<sup>4/</sup> See, for example, Nesbitt v. Bolz (1939) 13 Cal. 2d 677, in which the Supreme Court permitted two members of a five member board to fill the remaining vacancies so that the board could act.

<sup>5/</sup> Indeed, the California Constitution requires both the joint decision making authorities, the legislative and the judicial, to act by majority vote. Cal. Const. Art. IV §8; Art. VI §2.

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As I understand the proposal originally suggested to remedy the "no" vote problem, it would have such unlimited application as to be unconstitutional. It would permit calculation of the majority required to pass a measure to be based upon the remaining number of non-disqualified members even when the number of such non-disqualified members falls below the number ordinarily required to constitute a quorum. In my judgment, any proposal which attempts this would be unconstitutional.

Besides the constitutional problem, some of the other policy problems inherent in the proposal to alter voting requirements may be insuperable as well. As I understand it, the Commission's concern is focused on only those situations in which absolute or super-majorities are required for action.<sup>6/</sup> In such cases, however, lowering the majority requirements would entail persuading the Legislature to lower majorities in cases in which it has already decided to require higher ones. To take an example, if certain land use decisions require super-majorities, it is presumably because of the nature of the interests to be protected; to treat a disqualification as reducing the protection that such a majority ordinarily provides, seems to be a very difficult policy hurdle. Moreover, a solution which lowers the burden on proponents in cases of a disqualification turns the disqualification into a kind of phantom "yes" vote because it reduces the number of "yes" votes otherwise required to take action.

TMS:cjb

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<sup>6/</sup> As the discussion of the common law approach indicates, there is really no need to alter voting requirements when the common law controls since all that is required to take action is the majority of a quorum.

# Memorandum

To : Commissioners Houston, Lapan,  
McAndrews, Metzger and Quinn

Date : July 24, 1980

From : FAIR POLITICAL PRACTICES COMMISSION

Thomas M. Sobel

Subject: Proposed legislation to alter voting requirements in  
the case of disqualification

## I.

### DESCRIPTION OF THE "DISQUALIFICATION EFFECT"

The Commission has expressed interest in considering legislation to deal with the apparently increased burden on proponents of measures in the event of a disqualification. The problem the Commission is concerned with arises in connection with procedures in which either an absolute or a super-majority is required for a joint body to act; in some cases, by reducing the number of members available to vote for a proposal, disqualification appears to act as if it were, in effect, a "no" vote. To take an example: if a seven member board is required to act by absolute majority, disqualification of two members means that the vote of four of the remaining five members would be required to take action. As a practical matter, this appears to increase the burden on the proponents of any particular action, although given most possible voting combinations it will have no effect upon the decision at all.<sup>1/</sup> Generally speaking, however, the burden on proponents appears to be increased by a disqualification in a statistical sense: as the number

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<sup>1/</sup> For example, if all the votes would have been "yes" or "no" votes, no amount of permissible disqualification would have an effect on the burden borne by proponents of specific action. Indeed, for a five member board with a single disqualification in only one of the possible combination of votes can it be said that a disqualification could affect the vote in any way. As the number of disqualifications rises, the number of cases in which the so-called disqualification affect might appear will increase, but, as will be discussed below, the rule of necessity limits the number of disqualifications that can be required in the first place. Therefore, the "disqualification effect" can be said to exist in only a small class of cases. See chart, p. \_\_\_\_.

of possible votes decreases, the more urgent is the need to obtain every available vote. Although the mathematical argument may be applied to every joint authority, it appears to apply most keenly to those which must act by an absolute majority. This is so because, absent an absolute or super-majority requirement, both the common-law and the Codes<sup>2/</sup> provide that a majority of a quorum can act for a joint authority. Thus, a common-law joint authority can absorb more disqualifications, so to speak,<sup>3/</sup> and it will never require a unanimous vote for actions.

In those cases in which disqualification is perceived to have an effect upon the vote, it sometimes appears as if the disqualification acts as though the official's interest is advanced precisely because of his disqualification. To take an example, suppose a five member board is considering a proposal which could materially affect one of its members, and the board is deadlocked two-two. If the member, who is disqualified because of his interest, would have stood to lose by virtue of the proposal, his inability to vote operates as if he had voted "no." If we assume that he would have voted "no" in order to protect his interest, his disqualification appears to tend toward the same result. On the other hand, if we assume he would have voted "yes," his disqualification does not appear to advance his pecuniary interest in the way outlined above.

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<sup>2/</sup> See, e.g., Code of Civil Procedure Section 15:

Words giving a joint authority to three or more officers or persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. See also, Civil Code Section 12; Penal Code Section 7, subsection 17.

<sup>3/</sup> In one sense, one may characterize this common-law approach as one that "automatically" alters voting requirements in cases of disqualification; but the common-law approach is not so much one that "alters" voting requirements as one that simply adheres to the principle of majority rule. The fact that the common-law permits a majority of a majority to act for a body (that is, a numerical minority) does not violate the principal of majority rule. This is so because the principle is derived less from strict mathematical notions than from those of representativeness. A quorum must always be present to conduct business: that is, a representative majority. A majority of the quorum can bind the Board without doing violence to this majoritarian representative principle.

#### SCOPE OF THE PROBLEM

Before considering whether there is any solution to the sort of problem in which disqualification appears to advance the disqualified official's interest, it is worthwhile considering how pervasive a problem it really is. There are a number of ways to assess the scope of such a problem. One is to determine how often it has required a judicial solution; the other, suggested earlier in this memorandum, is to look more closely at possible voting combinations to see in how many cases the effect the Commission is concerned with may be perceived to operate. With regard to the first index, a review of applicable case law reveals a paucity of cases giving rise to a variety of solutions. Assuming the truth of Tocqueville's dictum that sooner or later every problem in America becomes a legal one, from the small number of cases one can guess that the problem is not a pressing one. It is also fair to conclude from the number of solutions to the problem that there is no doctrinal agreement on the legal effect, if any, of a disqualification or the best way to remedy whatever effect there is.

#### A. COURT CASES

The courts have taken roughly three different approaches to the problem:

- 1) To treat the failure to vote as a "yes" vote that counts in determining a majority;
- 2) To simply treat it as a non-vote which does not count in determining a majority;
- 3) To treat the disqualification as a vacancy which may lower the majority required to take action.

Each of these will be discussed in turn.

#### 1. The "Yes" Vote Alternative

Before discussing this alternative, a distinction between the legal and the practical effect of a failure to vote must be drawn. The distinction between the two is that the legal effect of a failure to vote refers to how the non-vote is counted; the practical effect, on the other hand, refers simply to the narrowing of the chances for a majority that the non-vote entails. At common law, the rule developed

that a passed vote was to be considered either an affirmative vote or a consent to the majority. The first California case to apply the rule was Martin v. Ballinger (1938) 25 Cal. App. 2d 435. The question was whether an appointment to fill a vacancy on a five member city council was valid when two members voted affirmatively and two abstained. The abstaining members contended that, because they had expressed opposition to the appointment, their abstention should be counted as a "no" vote. The court disagreed, referring to the general rule that:

. . . when members of a board, present at a meeting, desire to defeat a measure they must vote against it; that inaction on their part will not accomplish their purpose; and that their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members.

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(Ky. App. 1965) 387 S.W. 2d 587, 588; Payne v. Petrie (Ky. App. 1967) 419 S.W. 2d 761, 763); "We are persuaded that the trial court erred in not holding that a passed vote is to be considered as a vote with the majority, a quorum being present."

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While Dry Creek reserves the question of the legal effect of a disqualification, other courts have treated the failure to vote because of interest as, in effect, an abstention and applied the common law rule. Thus, in Northwestern Bell Etc. Co. v. Bd. of Com'rs., N.D. 211 N.W. 2d 399, the court followed the common law rule and counted passed votes as "yes" votes. The facts of the case were as follows. The statutes of North Dakota generally require that a majority of all the members of a governing board must concur in the passage of an act. A measure to place a tax on Northwestern Bell's gross revenues was before the five member Board of Commissioners of the City of Fargo, two members of which were employees of Bell. The vote on the measure was two "for", one "against", the two interested commissioners abstaining because of their conflict of interest. Treating the case as one merely involving abstentions, rather than disqualifications, the court applied the common law rule and counted the passed votes as part of the required three member majority on the grounds that unless it did so, the abstentions had the practical effect of "no" votes.<sup>5/</sup>

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<sup>4/</sup> The court held that the Government Code section which required an absolute majority did not specify how such a majority was to be counted. 67 Cal. App. 3d at 845.

<sup>5/</sup> Curiously, although the court appears to distinguish between disqualification and abstention, it fails to treat the abstention on the grounds of interest as, constructively, a disqualification.

Although there is some indication in the cases that the courts will not give the "yes" vote effect to a disqualification, the rationale for their giving it to an abstention is exactly the same as that underlying the Commission's concern regarding disqualifications. Disqualifications are different from abstentions in that the abstention is an evasion of a public official's duty while a disqualification is the fulfillment of it. It is for this further reason that other courts have tried other approaches.

## 2. Not Counting the Disqualified Vote in Any Way

Several cases adopt a kind of "tough luck" approach to a disqualification and simply consider a measure which fails to obtain a majority as defeated. Annot., Municipal Council-Voting Authority, 63 A.L.R. 3d 1075, 1102, citing Livesey v. Scacaucus (1916 N.J. Sup.) 97 A. 950; Quinn v. Sea Isle City (1909) 71 A. 1118; Coles v. Trustees of Williamsburgh (1833) N.Y. 10 Wend. 659.

## 3. Treating Disqualification as Creating a Vacancy

At least one court has treated a disqualification as creating a vacancy and, in that way, as reducing the majority required to act. See City of Alamo Heights v. Gerety (1954) 264 S.W. 2d 778. However, the California Supreme Court, in an early case, refused to treat a vacancy as altering the majority required to act. Pimental v. City of San Francisco (1863) 21 Cal. 351.

### B.

#### DISQUALIFICATION EFFECT

The preceding survey of the law seems to indicate that there is little focus on disqualification as a problem and no consensus about how to treat it. It is also possible to measure the scope of the "disqualification effect" by considering voting combinations. The following charts demonstrates the "effect" of one or two disqualifications on a five member board:

ONE DISQUALIFICATION

POSSIBLE VOTES		RESULT IF A "YES" VOTE IS DISQUALIFIED	RESULT IF A "NO" VOTE DISQUALIFIED
"YES"	"NO"		
5	0	No difference	--
4	1	No difference	No difference
3	2	Tie Vote (no action)	No difference
2	3	No difference	No difference
1	4	No difference	No difference
0	5	---	No difference

Thus, in only one possible case does a disqualification affect the outcome by resulting in no action in a situation in which an official would have voted "yes," but for his disqualification.

TWO DISQUALIFICATIONS

POSSIBLE VOTES		TWO "YES" VOTES DISQUALIFIED	ONE "YES" VOTE; ONE "NO" VOTE	TWO "NO" VOTES
"YES"	"NO"			
5	0	No difference	--	--
4	1	No action	No difference	--
3	2	No action	No action	No difference
2	3	No difference	No difference	No difference
1	4	--	No difference	No difference
0	5	--	--	No difference

Thus, in only three cases would the disqualification have any effect on the outcome of the vote by resulting in no action in a situation in which an official or officials would have voted "yes," but for his disqualification.

If one looks further at cases in which a disqualification might have an effect, one can tell whether the disqualification appears to "advance" the pecuniary interest of the disqualified member. In the case of a single disqualification, only a 3-2 "yes" vote will be affected. If the member's interest were to be enhanced by the proposed action and he would have voted "yes," the disqualification appears to prevent a biased result. With respect to two disqualifications, there are a larger number of cases to analyze. In a 4-1 vote, if two members who would have voted "yes" on a proposal which would enhance their financial interests are disqualified, disqualification appears to prevent a biased result. This is equally the case in a 3-2 vote if the two disqualified members would have voted "yes." In the case of a 3-2 vote, when one disqualified member would have voted "yes" and the other "no," and the "yes" vote would have tended to enhance the "yes-voting" member's interest, disqualification appears to prevent a biased result. Disqualification of the "no-voting" member does not have to be independently considered because one less "no" vote does not alter the result. Thus, in none of the cases analyzed does the disqualification have the <sup>6/</sup>effect of enhancing the interest of the disqualified member.

## II DISCUSSION OF SOLUTIONS

From the authorities as well as the voting survey for a five member board, it seems clear that the "disqualification effect" about which the Commission is concerned does not appear often. To the extent that it does, however, the Commission may wish to propose some legislation to deal with it. Research has revealed that any proposed legislation solution would probably have to be confined rather sharply to those situations in which the number of disqualifications does not reduce the board to less than a quorum. Although

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<sup>6/</sup> It is not entirely clear that an analysis of how one would have voted is relevant to disqualification issues. The point of disqualification is to eliminate the tension between the pure public interest the official is supposed to serve and his private interests - regardless of how he might actually have resolved that tension. If one were to draw a theoretical difference between decisions which do not advance financial interests and those that do, no point would be served by disqualification that could not also be served by requiring an official to vote against his interest.

it is difficult to discover any direct authority on the subject, it seems that the common law requirement that a quorum be present to conduct business is considered fundamental. Cases treat the majoritarian principle contained in the quorum requirement as a "general rule" of government. People v. Coghill (1974) 47 Cal. 361. The rule of necessity itself embodies a majoritarian principle in that it requires a body to be reconstituted when its membership falls below a quorum.<sup>7/</sup> The footnote in Woodland Hills may well be read to the same effect since it appears to reject the argument that disqualification of most of an entire body is permissible under the Political Reform Act. If the majoritarian principle is as fundamental as I think it to be, any proposal which alters voting requirements so that less than a regular quorum may act for the body is probably not constitutional.<sup>8/</sup>

As I understand the proposal originally suggested to remedy the "disqualification effect," it would have such unlimited application as to be unconstitutional. It would permit calculation of the majority required to pass a measure to be based upon the remaining number of non-disqualified members even when the number of such non-disqualified members falls below the number ordinarily required to constitute a quorum. In my judgment, any proposal which attempts this would be unconstitutional.

Even when limited to situations where there is a quorum, some of the other policy problems inherent in the proposal to alter voting requirements may be insuperable as well. As I understand it, the Commission's concern is focused on only those situations in which absolute or super-majorities are required for action. In such cases, however, lowering the majority requirements would entail persuading the Legislature to lower majorities in cases in which it has already decided to require higher ones. To take an example, if certain land use decisions require super-majorities, it is presumably because of the nature of the interests to be protected; to treat a disqualification as reducing the protection that such a majority ordinarily provides, seems to be a very

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<sup>7/</sup> See, for example, Nesbitt v. Bolz (1939) 13 Cal. 2d 677, in which the Supreme Court permitted two members of a five member board to fill the remaining vacancies so that the board could act.

<sup>8/</sup> Indeed, the California Constitution requires both the joint decision-making authorities, the legislative and the judicial, to act by majority vote. Cal. Const. Art. IV, Section 8; Art. VI, Section 2.

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difficult policy hurdle. Moreover, a solution which lowers the burden on proponents in cases of a disqualification turns the disqualification into a kind of phantom "yes" vote because it reduces the number of "yes" votes otherwise required to take action.

Within the quorum limitation, then, the following legislation would eliminate the disqualification effect:

Whenever, according to any provision of these Codes, joint authority\* is conferred upon a majority of all the members of any board, commission or agency, in the case of disqualification of any member, the calculation of the majority required to act shall be based upon the number of remaining non-disqualified members; provided that in no event shall less than a majority of the members of any board, commission or agency be permitted to take any action.

\*See footnote 2 for definition of joint authority.

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# Memorandum

To : Commissioners Houston, Lapan, McAndrews,  
Metzger and Quinn

Date : Oct. 28, 1980

From : **FAIR POLITICAL PRACTICES COMMISSION**  
Ted Prim

Subject: Altering Voting Requirements

Attached is a memo from Bob Stern and Tom Sobel regarding proposed legislation to alter voting requirements in the case of disqualification (previously forwarded to you on October 2).

I think the Commission should have a brief discussion on this memo at the November meeting so that the staff will know if further research is needed. In addition, if you would like to hear from witnesses at a subsequent Commission meeting, I would be interested in any suggestions you might have.

# Memorandum

To : Commissioners Houston, Lapan, McAndrews,  
Metzger and Quinn

Date : Sept. 30, 1980

From : **FAIR POLITICAL PRACTICES COMMISSION**  
Tom Sobel and Robert M. Stern <sup>4</sup>

Subject: Proposed Legislation to Alter Voting Requirements in the  
Case of Disqualification

## I.

### DESCRIPTION OF THE "DISQUALIFICATION EFFECT"

The Commission has expressed interest in considering legislation to deal with the apparently increased burden on proponents of legislative proposals in the event of disqualification.

The problem with which the Commission is concerned arises in connection with procedures in which either an absolute or a super-majority is required for a legislative body to act. (An absolute majority means that if there are five members of the legislative body at least three must vote for the measure, even if only three members are present. A super-majority means that more than a majority of the members must vote. For example in the California State Legislature at least two-thirds of the members must vote for the budget.)

In some cases by reducing the number of members available to vote for a proposal, disqualification appears to act as if it were a "no" vote. To take an example, if a five member board is required to act by absolute majority (three votes) disqualification of two members means that the vote of all three of the remaining members would be required to take action. As a practical matter and in a statistical sense, this appears to increase the burden on the proponents of any particular action, since as the number of possible votes decreases, the more urgent is the need to obtain every available vote. (However, as the chart on page three indicates, given the possible voting combinations, the disqualification may have no effect upon the decision at all.)

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### VOTING REQUIREMENTS IN CALIFORNIA

In California, city, county and state legislative bodies require either an absolute or super-majority in order to pass ordinances or bills. In the California legislature in order to pass most bills, it takes a majority of the membership, 41 out of 80 members in the Assembly and 21 out of 40 members in the Senate. On budget items, appropriations, Political Reform Act amendments and urgency bills, the vote must be a super-majority - at least two-thirds of the membership (54 in the Assembly and 27 in the Senate). These required majorities must be reached no matter how many members are present or disqualified. California Constitution Article IV, Sections 8 and 12. Similarly, all general law cities and all counties require an absolute majority of the council or board to pass ordinances. Government Code Sections 36936 and 25005.

In contrast, some legislative bodies outside California merely require a simple majority provided that a quorum is present. Congress is the most obvious example. According to the House parliamentarian, a vote is valid even if a quorum is not voting as long as a quorum is present; for example, in the 435 member House a 25-18 vote is valid if 218 members are present. Therefore, a disqualification does not have as great an impact on the proponents as a disqualification would have in California.

There are some exceptions in California to the requirement that an absolute majority must vote affirmatively in order to pass a legislative measure. In 1977, Health and Safety Code Section 33366 was amended as follows:

If the planning commission or the project area committee has recommended against the approval of the redevelopment plan, the legislative body may adopt such a plan by a two-thirds vote of its entire membership eligible and qualified to vote on such a plan.

If the planning commission or the project area committee has recommended approval or failed to make any recommendation within the time allowed, the legislative body may adopt the redevelopment plan by a majority vote of the entire membership eligible and qualified to vote on such plan.

(Amendment added in 1977)

Joseph Coombes, a private attorney who sponsored this amendment to the Health and Safety Code, indicated to us that Section 33366 was amended precisely because of the Political

Reform Act's disqualification provisions. He had been aware of a situation where one member of the legislative body was disqualified on a vote where the legislative body was attempting to overturn a recommendation of the planning commission on a redevelopment plan. In that instance because one member was disqualified and a two-thirds vote was necessary, all four of the remaining members had to unanimously vote to overturn the plan. This amendment was an attempt by Coombes to reduce the number of votes needed for adoption of redevelopment plans if there was a conflict of interest. Coombes stated that he had not based his language on any other existing statute.

SCOPE OF PROBLEM

A possible way to measure the scope of the "disqualification effect" is by considering voting combinations. The following charts demonstrate the "effect" of one or two disqualifications on a five member board:

ONE DISQUALIFICATION

POSSIBLE VOTES		RESULT IF A "YES" VOTE IS DISQUALIFIED	RESULT IF A "NO" VOTE DISQUALIFIED
<u>"YES"</u>	<u>"NO"</u>		
5	0	No difference	--
4	1	No difference	No difference
3	2	Tie Vote (no action)	No difference
2	3	No difference	Tie Vote
1	4	No difference	No difference
0	5	--	No difference

Thus, in only one possible case does a disqualification affect the outcome by resulting in no action in a situation in which an official would have voted "yes," but for his disqualification.

TWO DISQUALIFICATIONS

POSSIBLE VOTES		TWO "YES" VOTES DISQUALIFIED	ONE "YES" VOTE; ONE "NO" VOTE	TWO "NO" VOTES
<u>"YES"</u>	<u>"NO"</u>			
5	0	No difference	--	--
4	1	No action	No difference	--
3	2	No action	No action	No difference
2	3	No difference	No difference	No difference
1	4	--	No difference	No difference
0	5	--	--	No difference

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Thus, in three cases would the disqualification have any effect on the outcome of the vote by resulting in no action in a situation in which an official or officials would have voted "yes," but for his disqualification.

These charts may be somewhat misleading since a typical legislative body will have few 5-0 votes on controversial matters. Thus, when one or two members are disqualified the percentage in which disqualification changes the result may be far higher than the chart indicates.

Another way to examine the question is to determine the percentage needed to pass a measure if there is a disqualification. If it takes three out of five to pass a measure, the proponents must convince sixty percent of the members to vote yes. Disqualify one member and the percentage rises to seventy-five. Disqualify two, and the percentage needed is one hundred.

If one looks further at cases in which a disqualification might have an effect, one can tell whether the disqualification appears to "advance" the pecuniary interest of the disqualified member. In the case of a single disqualification, only a 3-2 "yes" vote will be affected. If the member's interest were to be enhanced by the proposed action and he would have voted "yes," the disqualification appears to prevent a biased result. With respect to two disqualifications, there are a larger number of cases to analyze. In a 4-1 vote, if two members who would have voted "yes" on a proposal which would enhance their financial interests are disqualified, disqualification appears to prevent a biased result. This is equally the case in a 3-2 vote if the two disqualified members would have voted "yes" and the other "no," and the "yes" vote would have tended to enhance the "yes-voting" member's interest, disqualification appears to prevent a biased result. Disqualification of the "no-voting" member does not have to be independently considered because one less "no" vote does not alter the result.

On the other hand, in some cases in which disqualification is perceived to have an effect upon the vote, it may appear as if the disqualification acts as though the official's interest is advanced precisely because of the disqualification. To take an example, suppose a five member board is considering a proposal which could materially affect one of its members, and the board is deadlocked two-two. If the member, who is disqualified because of his interest, would have stood to lose by virtue of the proposal, his inability to vote operates as if he had voted "no." If we assume that he would have voted "no" in order to protect his interest, his disqualification appears to tend toward the same result. On the other hand, if we assume he would have

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voted "yes," against his interests, his disqualification appears to advance his pecuniary interest just as if he had been voting "no." Thus, in those cases where it is clear that the vote will be against the member's interest (i.e., voting yes on the only rent control proposal by a member with vast apartment holdings), it seems particularly unfair to the proponents not only to disqualify the member from voting but also to fail to reduce the number needed to pass the measure.

## II.

### DISCUSSION OF SOLUTIONS

From the authorities as well as the voting survey for a five member board, it seems clear that the "disqualification effect" about which the Commission is concerned does not appear often. To the extent that it does, however, the Commission may wish to propose some legislation to deal with it. Research has revealed that any proposed legislation solution would probably have to be confined to those situations in which the number of disqualifications does not reduce the legislative body to less than a quorum. Although it is difficult to discover any direct authority on the subject, it seems that the common law requirement that a quorum be present to conduct business is considered fundamental. Cases treat the majoritarian principle contained in the quorum requirement as a "general rule" of government. People v. Coghill (1974) 47 Cal. 361. The rule of necessity itself embodies a majoritarian principle in that it requires a body to be reconstituted when its membership falls below a quorum.<sup>1/</sup> The footnote in Woodland Hills may well be read to the same effect since it appears to reject the argument that disqualification of most of an entire body is permissible under the Political Reform Act. Thus, any proposal which alters voting requirements so that less than a regular quorum may act for the body is probably not constitutional.

Within the quorum limitation, then, the following legislation would eliminate the disqualification effect:

In the case of disqualification of any member of a legislative body, the calculation of the majority required to act shall be based upon the number of remaining non-disqualified members; provided that in no event shall there be less than a quorum of the members participating in the action.

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<sup>1/</sup> See, for example, Nesbitt v. Bolz (1939) 13 Cal. 2d 677, in which the Supreme Court permitted two members of a five member board to fill the remaining vacancies so that the board could act

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The proposal would require that a quorum participate in the decision and would still require a majority of those voting to take an action.

Thus, in an odd-numbered board which required an absolute majority, the disqualification of one member would not affect the number of votes needed (five member board requires three votes to act; four member board also requires three). There are very few governmental entities which do not have odd-numbered boards. Typically, boards of supervisors number five as do general law cities. Similarly, all legislative committees have odd-numbered panels.

A different result occurs when two members are disqualified. On a five member board, the votes needed to take action would be from three (100% of those voting) to two (66 2/3's% of those voting), a still higher percentage than if the full five member board were all voting (60%). On a seven member board, the percentage increases from 57% to 60%; on a nine member board 55% to 57% and so forth. In each instance, while the proposal lowers the percentage of the entire membership needed to pass a measure, the percentage of those actually voting is higher.

For an even-numbered body, such as the Assembly and Senate floors, one disqualification operates differently under the proposal. One disqualification would result in reducing the number of votes needed by one. However, two disqualifications would not mean a reduction.

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## APPENDIX

At common law, the rule developed that an abstention was to be considered either an affirmative vote or a consent to a majority. The first California case to apply the rule was Martin v. Ballinger (1938) 25 Cal. App. 2d 435. The question was whether an appointment to fill a vacancy on a five member city council was valid when two members voted affirmatively and two abstained. The abstaining members contended that, because they had expressed opposition to the appointment, their abstention should be counted as a "no" vote. The court disagreed, referring to the general rule that:

. . . when members of a board, present at a meeting, desire to defeat a measure they must vote against it; that inaction on their part will not accomplish their purpose; and that their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members.

25 Cal. App. 2d at 439.

In Dry Creek Valley Association, Inc. v. Board of Supervisors (1977) 67 Cal. App. 3d 839, 843-844, the court upheld a county ordinance which counted an abstention as a "yes" vote as being in accord with the "great bulk of authority" on the subject:

4 McQuillan on Municipal Corporations (rev. ed. 1968) section 13.32, page 521, states that: "While it has been said that those present who refuse to vote for a proposition cannot be counted, the general rule is [that they] are regarded as having voted affirmatively, i.e., for the proposition, or to have voted with the majority. (Fns. omitted.) Other holdings to the same effect: "We ... conclude that the rule known as the common-law rule is a proper and efficient rule to adopt, in order that municipal business shall be conducted with a regard to the wishes of its citizens. This common-law rule may be stated to be that the legal effect of refusing to vote in an acquiescence in the action taken by the majority of those who do not vote." (Babyak v. Alten (1958) 106 Ohio App. 191 [154 N.E. 2d 14, 19]); "We are included to the opinion that the proper rule is that those who remain silent shall be deemed to assent to the action of those who do vote." (State ex rel. Young

v. Yates (1897) 19 Mont. 293 [47 P. 1004, 1006]; "The rule is that when a quorum of a governing body is present those members who are present and who do not vote will be considered as acquiescing with the majority." (Piersen-Trapp Company v. Knippenberg (Ky. App. 1965) 387 S.W. 2d 587, 588; Payne v. Petrie (ky. App. 1967) 419 S.W. 2d 761, 763); "We are persuaded that the trial court erred in not holding that a passed vote is to be considered as a vote with the majority, a quorum being present."

The Dry Creek court expressly declined to decide whether, absent the local regulation which counted the passed vote as a "yes" vote, the common-law rule generally requires this result: the court limited itself to holding that the local ordinance was not in contravention of state requirements that an absolute majority of a board of three members or more are required for a valid act.<sup>1/</sup> The court also expressly declined to decide whether such a rule would be effective in the case of a disqualification for interest and, in a footnote, suggested that in such a case, the vote should not be counted in any way.

While Dry Creek reserves the question of the legal effect of a disqualification, other courts have treated the failure to vote because of interest as, in effect, an abstention and applied the common-law rule. Thus, in Northwestern Bell Etc. Co. v. Bd. of Com'rs. N.D. 211 N.W. 2d 399, the court followed the common-law rule and counted passed votes as "yes" votes. The facts of the cases were as follows. The statutes of North Dakota generally require that a majority of all the members of a governing board must concur in the passage of an act. A measure to place a tax on Northwestern Bell's gross revenues was before the five member Board of Commissioners of the City of Fargo, two members of which were employees of Bell. The vote on the measure was two "for", and one "against", the two interested commissioners abstaining because of their conflict of interest. Treating the case as one merely involving abstentions, rather than disqualifications, the court applied the common-law rule and counted the abstentions as part of the required three member majority on the grounds that unless it did so, the abstentions had the practical effect of "no" votes.<sup>2/</sup>

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<sup>1/</sup> The court held that the Government Code Section which required an absolute majority did not specify how such a majority was to be counted. 67 Cal. App. 3d at 845.

<sup>2/</sup> Curiously, although the court appears to distinguish between disqualification and abstention, it fails to treat the abstention on the grounds of interest as, constructively, a disqualification.

Although there is some indication in the cases that the courts will not give the "yes" vote effect to a disqualification, the rationale for their giving it to an abstention is exactly the same as that underlying the Commission's concern regarding disqualifications. Disqualifications are different from abstentions in that the abstention is considered to be an evasion of a public official's duty while a disqualification is the fulfillment of it. It is for this further reason that other courts have tried other approaches.

#### Not Counting the Disqualified Vote in Any Way:

Several cases adopt a kind of "tough luck" approach to a disqualification and simply consider a measure which fails to obtain a majority as defeated. Annot., Municipal Council-Voting Authority, 63 A.L.R. 3d 1075, 1102, citing Livesey v. Scataucus (1916 N.J. Sup.) 97 A. 950; Quinn v. Sea Isle City (1909) 71 A. 1118; Coles v. Trustees of Williamsburgh (1833) N.Y. 10 Wend. 659.

#### Treating Disqualification as Creating a Vacancy:

At least one court has treated a disqualification as creating a vacancy and, in that way, as reducing the majority required to act. See City of Alamo Heights v. Gerety (1954) 264 S.W. 2d 778. However, the California Supreme Court, in an early case, refused to treat a vacancy as altering the majority required to act. Pimental v. City of San Francisco (1863) 21 Cal. 351.