

CENSUS:
CIRCUIT COURT
REPORTERS:

For the purpose of determining the salary of a circuit court reporter, the 1950 decennial census of the United States becomes official on the date the announcement of the population of the area comprising a judicial circuit is made by the District Supervisor of the census within the area which comprises the judicial circuit.

November 2, 1950.

Honorable Carl F. Sapp,
Prosecuting Attorney
Boone County,
Columbia, Missouri.



Dear Sir:

This will acknowledge receipt of your recent request for an official opinion from this office. You thus state your request:

"The question has arisen as to whether the Circuit Court Reporter of this county is entitled to a salary increase. Section 13341 of the Revised Statutes of Missouri, as amended in 1946, provides that the salary for Circuit Court Reporters shall be \$3,500.00 per year in circuits of over 60,000 population. The 1950 census figures, as announced in May, 1950, show that the population of Boone County is 48,171, and Callaway County, 23,171, or a total of 71,342 for the 34th judicial circuit.

* * * *

"Section 1.10 of Senate Bill 1001 provides that salary increases for county officers, deputies and assistants shall begin January 1, 1951. However, it is the contention of the court reporter, and I am of the same opinion, that this section does not include the court reporter for his is not an officer, nor is he a deputy, nor is he an assistant.

"In the case of State ex rel. Scobee v. Meriwether, 355 Mo. 1217, 200 S.W. 2d. 345, the Court held that the court reporter is not a public officer but an employee, and, therefore, was entitled to an immediate increase in salary under House Bill No. 293 of the 63rd General Assembly on the effective date of that law.

"Your office is earnestly requested to give me an opinion on this matter for the purpose of getting the court reporter his raise in salary from \$3,100.00 to \$3,500.00, effective as of June 1, 1950."

Prior to the enactment of Senate Revision Bill No. 1001, of the 65th General Assembly, there was no statutory provision, either federal or state, which designated the time when the result of a federal decennial census became official. The 65th General Assembly declared the population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year shall be determined on the basis of the last previous decennial census of the United States, and fixed the effective date of the 1950 decennial census of the United States on January 1, 1951, and the effective date of each succeeding decennial census of the United States on January 1, of each tenth year after 1951. Senate Revision Bill No. 1001, of the 65th General Assembly, Section 1.10 reads as follows:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

Inasmuch as this section applies only to political subdivisions and a judicial circuit is not a political subdivision this section can have no application to fixing the effective date of the 1950 decennial census for the purpose of determining the population in a judicial circuit for ascertaining the salary of a circuit court reporter.

Laws of Missouri, 1945, page 741 (Mo. R.S.A. Sec. 13341) provides in part:

"Court Reporter shall receive salary as follows: in judicial circuits which now have and such as may hereafter have a population of sixty thousand or more, an annual salary of three thousand five hundred dollars * * *."

We find the salaries of circuit court reporters are based on the population of the circuit in which they are employed. The federal decennial census is the basis for determining the population of the area composing each circuit. Also, we find from reviewing the case of State ex rel. Scobee v. Meriwether, 355 Mo. 1212, 200 S.W. (2d) 340, the court declared a court reporter is not a public officer. The court said: "When the various elements of a public office and the characteristics of a public officer are considered in connection with our statutes dealing with an official court reporter, he is not a public officer but an employee, and therefore relatrix is entitled to the increase in salary under House Bill No. 293 of the 63rd General Assembly on the effective date of that law."

Since the salary of the circuit court reporter is determined by the population of the judicial circuit and the population is determined by the last census of the United States your question must be answered by determining when the census of 1950 becomes "official" or effective in relation to your question. We recognize Senate Revision Bill No. 1001, quoted supra, does not apply to fixing the effective date of the 1950 decennial census in a judicial circuit and we find no other statute fixing the effective date of the 1950 federal census for the purpose of fixing salaries of circuit court reporters.

In the case of Dunne vs. Kansas City Cable Railway Co., 131 Mo. 1, the court said, in part:

"The census is taken by the United States regularly every ten years. All the means are provided for having an enumeration of all counties, cities, and other subdivisions of the state taken accurately. More reliable evidence of the population of counties and cities could not be provided under existing laws than that afforded by the United States census.

* * * *

"We can see no objection to a classification based upon census returns. Indeed the United States census is made the basis for state legislation, since the repeal of the law providing for taking a state census. Section 967 declares: 'All representation or other matters heretofore or now based on the state census shall be based on the United States census of this state.' No reason can be seen why classification of counties and cities for legitimate legislation might not properly be based upon the same evidence. The courts take

judicial notice of the facts appearing from the census returns. State ex rel. v. Herrmann, supra."

We would now call your attention to the case of Varble vs. Whitecotton, 190 S.W. 2d. 244, in which case the court said in part:

"There is no statutory provision, either Federal or State, which sets the time when the result of a census shall become official. In such a situation the general rule is that a census becomes official as of the date of its official publication. 14 C.J.S. Census, Section 6. This court has always taken judicial notice of 'the official records of the census' and we find no case where the fact of population has been proved by other means. State ex rel. Harris v. Herrmann, 75 Mo. 340; State ex rel. Martin v. Wofford, 131 Mo. 61, 25 S.W. 851; State ex inf. Crow v. Evans, 166 Mo. 347, 66 S.W. 355. In State ex rel. Major v. Ryan, 232 Mo. 77, 133 S.W. 8, a quo warranto to remove the jury commissioners of St. Joseph because the population fell below the applicable limit, the national census of 1910 'as officially promulgated' was the basis of the decision. And in Jerabek v. City of St. Joseph, 159 Mo. App. 505, 141 S.W. 456, which considered a motion to quash a panel selected by the above jury commissioners, the court of appeals in sustaining the motion pointed out the jury had been selected after 'the federal census of 1910 was officially announced.' To the same effect see Childers v. Duvall, 69 Ark. 336, 63 S.W. 802; Holcomb v. Spikes Tex. Civ. App. 232 S.W. 891; Lewis v. Lackawanna County, 17 Pa. Super, 25; Id., 200 Pa. 590, 50 A. 162. There are contrary rulings mainly in cases where the fact of population rather than its determination by the census controls. See Underwood v. Hickman, 162 Tenn. 689, 39 S.W. 2d. 1034; State ex rel. Jordan v. Dehart, 15 Wash. 2d 551, 131 P. 2d. 156; City of Twin Falls ex rel. Cannon v. Koehler, 63 Idaho 562, 123 P. 2d 715; Forde v. Owens, 160 S.C. 168, 158 S.E. 147.

"The Application of the statute we are considering is governed by the official records of the census. The statute itself denotes this. According to its terms the mere fact of the population in and of itself does not determine the statute's relevancy. The determining factor is enumerated (according to the last preceding

national census.' Thus the operation of the statute is based on the record of the census. The record of the census furnishes evidence under which the statute shall be operative. Dunne v. Kansas City Cable R. Co., 131 Mo. 1, 32 S.W. 641. This appears to us to be an added reason why the application of the statute to Jackson County could not change at least until the official record of the 'last preceding census' was promulgated disclosing Jackson County had a population which was without the limits set by the statute.. Even thereafter a de facto jury might properly function under certain circumstances but we need not determine such a question in this case."

We would next direct your attention to the case of Garrett v. Anderson, 114 S.W. 2d 971, a Texas case, in which an opinion was rendered November 27, 1940, in which the court stated:

"This action was brought by W. R. Garrett and others, all of them being official court reporters of the District Courts and County Courts at Law of Bexar County, against Honorable Charles W. Anderson, County Judge, and the County Commissioners and County Auditor of said County. The object of the suit is to force the County officials, by mandamus or injunction, to continue, as theretofore, to pay the plaintiffs annual salaries of \$3,600 each, as prescribed by statute for court reporters in counties having a population of more than 290,000 and less than 325,000, 'according to the last preceding or any future federal census.'

"The suit was provoked by an order of the Commissioners' Court which had the effect of reducing the appellants' annual salaries from \$3,600 to \$3,000 per year, on the assumption that the population of the County was 337,557 according to the 'last preceding' (1940) federal census, whereby the County was taken out of the 290,000 - 325,000 population bracket, as ascertained by the census of 1930.

"Garrett and his associates have appealed from an order of the District Court denying mandamus and injunction.

"The appeal turns on the question of whether the population of Bexar County, as ascertained by the sixteenth decennial federal census, taken in 1940, had been officially determined and promulgated so as to give it the status of the 'last preceding

federal census' within the contemplation of the statutes prescribing the salaries of official court reporters in the several classes of counties in this state.

"Appellants stand, in their suit, upon the provision of Article 2326e, Vernon's Civ. Stats., as follows: 'Sec. 2. That the official shorthand reporter of each District Court, Criminal District Court, and County Court-at-law in each county in the State of Texas having a population of more than two hundred and ninety thousand (290,000) and less than three hundred and twenty-five thousand (325,000) inhabitants, according to the last preceding or any future Federal Census, shall receive a salary of Thirty six hundred dollars (\$3600) per annum' * * *.' As amended Acts 1939, 46th Leg. Spec. L. p. 623, Sec.1.

"The federal statutes provide no formula or procedure for the promulgation of reports of the population ascertained by the taking of any census. The nearest approach to such procedure is found in 13 U.S.C.A. Secs. 4 and 213, in which it is provided that, 'The Director of the Census is authorized and directed to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law; * * *.' (Section 4.) 'The Director of the Census is hereby authorized * * * to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, * * * and to publish and distribute said bulletins and reports.' (Section 213.)

"The record in this case does not embrace any report or statement purporting to emanate directly from the 'Director of the Census,' but the Hon. Ben S. Morris, duly accredited supervisor of the census for the Twentieth District, consisting of Bexar County, issued and delivered to the County Judge the following preliminary report of the census for said County.

"From P 114 (1940 and 1930)

"Department of Commerce

"Bureau of the Census

"Sixteenth Census of the United States

"Office of Supervisor of Census
"821 Frost Bank Building
"San Antonio, Texas,
"June 25, 1940

"Release for Immediate Use

"Sixteenth Census-Preliminary Announcement of
Population

(Subject to Correction)

"The population of County of Bexar, State of
Texas, as shown by a preliminary count of the
returns of the Sixteenth Census, taken as of
April 1, 1940, is 337,557, as compared with
292,533 on April 1, 1930. The 1940 figures are
preliminary and subject to correction.

"Ben S. Morris
"Supervisor of Census."

"No question is made of Supervisor Morris' authority to execute and promulgate the 'preliminary announcement of population' of Bexar County, nor is there any contention that the figures in his report to the County Judge are substantially inaccurate, or so far from the true number as to affect the question presented here. The report purports (without question of its authenticity) to be upon forms furnished the Supervisor by the Census Bureau, apparently under authority provided in Sections 4 and 213 of the Census Act, supra. Like reports, or 'preliminary announcements,' of the census of the City of San Antonio and of Bexar County, were furnished on this form by Supervisor Morris to the Mayor and Chamber of Commerce, as well as the County Judge, in accordance with the policy of the Bureau. It should be presumed from the record here that Mr. Morris was acting fully within his official authority as supervisor in issuing the report for the benefit of the public.

"We are of the opinion, therefore, and here hold as a matter of law, under the record made here, that the report of Supervisor Morris amounted to an official announcement, in behalf of the federal government, that the population of Bexar County, according to the last preceding federal census, is 337,557, subject to such necessarily slight and here immaterial corrections as may be made in the final figures promulgated by the appropriate authority in the National

government. It follows from this conclusion that the County Officials of Bexar County were authorized to take official notice of that report as a declaration of the 'last preceding * * Federal Census' as contemplated in Article 2326e, and, accordingly, to discontinue payment of the salaries prescribed in that statute for court reporters in counties having a population of not less than 290,000 and not more than 325,000.

"The trial court therefore did not err in refusing to issue any writs requiring the county officials to authorize and make payment of such salaries. 14 C.J.S., Census, page 103, Sec. 6; Forde v. Owens, 160 S.C. 168, 158 S.E. 147; Elliott v. State, 150 Okl. 275, 1 P. 2nd 379; Herndon v. State, 119 Tex. Cr. R. 204, 44 S.W. 2d 380; Holcomb v. Spikes, Tex. Civ. App. 232 S.W. 891."

On February 18, 1950, this office wrote to the Acting Director of the Bureau of Census of the United States inquiring when census figures became official. The answer to our letter is in part quoted below:

"Soon after the completion of the actual field canvass the district supervisors will make local Announcements of preliminary population figures for counties and for urban places of 10,000 inhabitants or more in their districts. These figures result from preliminary counts made in the field and are subject to revision when the final tabulations are completed in this office. The final 1950 population of counties and cities in Missouri, including those under 10,000 inhabitants, should be available early in 1951.

"The Census law does not state when the population figures for a given area become official. This is a matter for the State authorities to determine on the basis of your State law. I am not aware of any case in which the court has refused to sanction official action based on the preliminary figures. For your information, I am referring you to the following cases which may assist you in your determination; Childers v. Duval, 69 Ark. 336, 63 S.W. 802; Holcomb v. Spikes, 232 S.W. 891; Elliott v. State of Oklahoma, 150 Okla. 257, 1 Pac. 2(d) 390; Ervin v. State of Texas, 44 S.W. 2(d) 380."

We have carefully examined the cases referred to in the letter above, and find that they do sustain the principle enunciated by the Director of the Census. The Childers case holds that announcement of population figures by a district supervisor of the census justifies official action which the law requires to be based upon the last official census of the United States.

The Holcomb case holds that the census takes effect to determine the population of a county when the portion of the census relating to the county is completed and is ready to be officially promulgated.

The Elliott case (the correct citation of which is 1 Pac. 2d 370) holds that the preliminary census announcement of the population of the City of Tulsa, Oklahoma, by the district director of the census, is official.

The Ervin case holds that a preliminary announcement of population figures, subject to correction, by the district supervisor, is official.

CONCLUSION.

From the foregoing authorities and in the absence of a statute fixing the effective date of the 1950 decennial census in judicial circuits, it is the opinion of this office that when announcement of the population of the area composing a judicial circuit is made by the district supervisor of the census of that area, this constitutes an official announcement of the result of the last census of the United States and such result determines the population of the area within the judicial circuit within the meaning of the statutes fixing the salary of the circuit court reporter. The salary should be fixed by the 1950 decennial census as of the date the announcement of the population of the area composing a judicial circuit is made by the district supervisor of the census of that area.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General.

APPROVED:



J. E. TAYLOR
Attorney-General.

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