

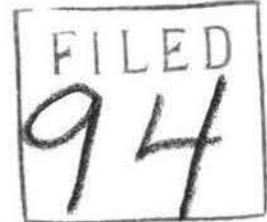
SENATORIAL APPOINTMENT

COMMISSION:
GENERAL ASSEMBLY:
SENATE:
REPRESENTATIVES:

1. Discretion of senatorial apportionment commission in establishing senatorial districts;
2. Board of Election Commissioners has sole authority to establish senatorial districts in City of St. Louis.
3. Senatorial apportionment commission has no authority in establishment of representative districts.

April 13, 1961

Honorable Sorkis J. Webbe
Member, Missouri Senate
Fourth District
Senate Post Office
Jefferson City, Missouri



Dear Senator Webbe:

This is in response to your request for an opinion dated February 28, 1961, which reads as follows:

"I am submitting to you this letter as a request for an opinion on the following subjects:

"Under the Constitution of the State of Missouri, what authority does the ten-man committee appointed by the Governor have in the redistricting of the State of Missouri as it relates to State Senatorial and State Representative Districts? By this I mean, what percentage of leeway are they allowed in setting up each State Senatorial and State Representative District?

"I should also like to know what are the Constitutional provisions relating to this ten-man committee establishing the State Representative and State Senatorial Districts within the City of St. Louis. By this I mean, can this ten-man redistricting committee set St. Louis State Senatorial and State Representative Districts and not refer this to the City Board of Elections Commissioners to set these boundaries?"

Inasmuch as your inquiry refers to representative districts, it should be noted at the outset that the Constitution of Missouri

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provides for the establishment of a senatorial apportionment commission. The commission is not authorized to reapportion or redistrict representative districts. Those districts are covered by Sections 2 and 3 of Article III of the Constitution, which sections read as follows:

Section 2.

"The house of representatives shall consist of members elected at each general election and apportioned in the following manner. The ratio of representation shall be the whole number of the inhabitants of the State divided by the number two hundred. Each county having one ratio, or less, shall elect one representative; each county having two and a half times the ratio shall elect two representatives; each county having four times the ratio shall elect three representatives; each county having six times the ratio shall elect four representatives, and so on above that number giving an additional member for every two and a half additional ratios. On the taking of each decennial census of the United States, the secretary of state shall forthwith certify to the county courts, and to the body authorized to establish election precincts in the City of St. Louis, the number of representatives to be elected in the respective counties."

Section 3.

"When any county is entitled to more than one representative, the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one representative shall be elected."

The senatorial apportionment commission is authorized by Section 7, Article III, as follows:

"Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial

census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall reapportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such re-apportionment shall be subject to the referendum."

The Supreme Court has held, in the case of *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 SW 40, that the act of establishing senatorial districts, whether accomplished by the General Assembly or by some other group or body, is an exercise of legislative authority. As the court said, at l.c. 48:

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"That the districting of the state into legislative, senatorial, congressional, and judicial districts is the exercise of legislative authority cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the United States government. That authority is akin to and flows from the same power and authority that fixes the boundary lines of the state, and subdivides the state into counties, etc. Not only that, but the very same section of the Constitution which authorizes and empowers the Legislature proper to apportion and redistrict the state into senatorial districts also provides for and empowers this body of three state officials to redistrict it, in case the General Assembly neglects or fails to do so. That being true, and both deriving their authority from the same source, and performing precisely the same duties, it must stand to reason that, if the labors of the General Assembly are legislative, then the work of this body must also be legislative in character. We call the one an act of the General Assembly, the other the statement of the Miniature Legislature."

Since the function is legislative, the senatorial apportionment commission, as set up under the Constitution of 1945, must act in the exercise of a delegated legislative power.

The standards by which the commission is to be guided are set out in Section 5 of Article III, as follows:

"The senate shall consist of thirty-four members elected by the qualified voters of the respective districts for four years. For the election of senators, the state shall be divided into convenient districts of contiguous territory, as compact and nearly equal in population as may be. No county shall be divided in the making of districts composed of more than one county."

While under the terms of this section the commission is necessarily granted a certain discretion in the establishment of senatorial districts, the courts have seen fit to pass on the exercise of that discretion, and in so doing have, to some extent, prescribed its limits. In *Preisler v. Doherty*, 365 Mo. 460, 284 SW2d 427, 1.c. 431, our Supreme Court said:

"It is well settled that courts have jurisdiction and authority to pass upon the validity of legislative acts apportioning the state into senatorial or other election districts and to declare them invalid for failure to observe non-discretionary limitations imposed by the Constitution. *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, loc. cit. 473, 146 S.W. 40, loc. cit. 53 and cases cited; *Annotation A.L.R. 1337*; 18 Am. Jur. 191-201, Secs. 16-31; 16 C.J.S., *Constitutional Law*, § 147 p. 438. See also *Jones v. Freeman*, 193 Okl. 554, 146 P. 2d 564, loc. cit. 570, stating that the courts of 38 states had exercised this power. However, as these authorities show, the courts may not interfere with the wide discretion which the Legislature has in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis. As said in a leading case, *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 55, 17 L.R.A. 145: 'If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the

conclusion is inevitable that the legislature did not use any judgment or discretion whatever.' Likewise, In re Sherill, 188 N.Y. 185, 81 N.E. 124, 128, the Court said: 'But, if the Legislature under the assumption of an exercise of discretion does a thing which is a mere assumption of arbitrary power, and which, in view of the provisions of the Constitution, is beyond all reasonable controversy, a gross and deliberate violation of the plain intent of the Constitution, and a disregard of its spirit and the purpose for which express limitations are included therein, such act is not the exercise of discretion, but a reckless disregard of that discretion which is intended by the Constitution. Such an exercise of arbitrary power is not by authority of the people. It is an assumption, and, when it is claimed that an act is thus in violation of the Constitution, a question of law is presented for the determination of this court.' Thus, in the matter of districting, as well as in other matters, the Legislature has no authority to enact unconstitutional laws."

In that case, the court ruled that the senatorial districts established by the Board of Election Commissioners in the City of St. Louis violated the constitutional requirement of compactness.

The nature of the discretion granted a redistricting body was considered by the Supreme Court in *State ex rel. Barrett v. Hitchcock*, supra. Though the case was decided under the Constitution of 1875, the constitutional limitations on legislative discretion in the establishment of senatorial districts were practically identical with Section 5 of Article III, previously quoted. The court considered those limitations as being of two kinds, the first class being those which leave no discretion to the redistricting body and the second being those which grant a limited discretion. The court said (146 SW 53):

"The first class of duties before mentioned, namely, those which must be performed by the Legislature without the exercise of any discretion upon its part, may be subdivided into

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three other classes, viz.: (a) That the Legislature shall divide the state into 34 senatorial districts; (b) that when a district is to be composed of two or more counties they must be contiguous; and (c) that in forming a district, to be composed of more than one county, no county shall be divided; that is, one part of a county shall not be placed in one district and the remainder placed in another.

"And the second class of duties before mentioned, namely, those which must be performed by the Legislature, but in the performance of which it may exercise a limited degree of discretion, may be divided into: (a) It shall make each district as nearly equal in population as is practical, or as may be done. (b) That when a district is to be composed of more than two counties it shall be as compact as it can reasonably be made."

Applying these principles, the court went on to state (146 SW54):

"As regards the first class of limitations mentioned, it is sufficient to state that there is no special controversy as to it; it being practically conceded by counsel that the limitations therein stated were observed and substantially complied with by the Legislature in the formation of the districts, and it will therefore be put aside. However, the limitations mentioned in the first class are so closely interwoven and intimately connected with those stated in the second that what may be said regarding the one will necessarily apply more or less to the other.

"This brings us to the consideration of the second class of duties previously mentioned, or those powers delegated by the Constitution upon the Legislature, with a limited discretion. I use the

words, 'limited discretion,' for the reason that the Constitution, in express terms, limits the discretion by providing that the Legislature shall apportion the state into districts; but in doing so it shall make each district as nearly equal in population as may be, and that when a district is to be composed of more than two counties they shall be as compact as may be convenient. The words italicized show conclusively that it was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper, nor to give to each a population which it deemed best. Had the framers of the Constitution intended that the Legislature should apportion the state into districts according to its own free and untrammelled will, then they would not have used the words of restriction before mentioned. This is too plain for argument. Therefore, having seen that the authority and discretion of the Legislature is thus limited, it would be error to treat the proposition upon the theory that the Legislature had unlimited discretion in the matter, and for that reason many of the authorities cited and relied upon have no application to this case; they dealing with officers whose discretion was un-restricted."

From the foregoing, it seems clear that the commission, under the present Constitution, is totally without discretion, in that (1) there must be thirty-four districts; (2) counties composing a multi-county district must be contiguous; and (3) in districts composed of more than one county, no county shall be divided.

Constitutional requirements as to the population of each district, however, leave a limited discretion in the commission. While Section 7 of Article III states that no district shall vary from the established quotient by more than one-fourth, Section 5 of Article III provides that districts shall be "as nearly equal in population as may be." Reading the two provisions together, it is apparent that the commission is constitutionally required to provide equality in population among the

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districts to the extent possible, but in no event may any district exceed the outside limits of population set out in Section 7 of Article III of variance in excess of one-fourth from the quotient.

Finally, as the cases quoted above demonstrate, the constitutional requirement of compactness imposes a further limitation on the discretion of the commission, and the Supreme Court will set aside a redistricting plan reflecting a gross abuse of that discretion. It is impossible to state the limits of the commission's discretion as regards the requirement of compactness. However, the careful language of both the Preisler and Hitchcock cases, *supra*, would seem to indicate that the court will hesitate to substitute its discretion for that of the commission, doing so only in case of a clear, deliberate and reckless disregard of the Constitution.

One factor which the Supreme Court has used as a guide in passing on a legislative redistricting is whether those districts most lacking in compactness compare favorably with others in terms of equality of population. In both the Preisler and Hitchcock cases the court pointed out that those districts most lacking in compactness also had the greatest variance from the equal population figure. As the court there stated, the necessity of equalizing the population of each district may necessarily detract from the desired compactness, but where districts lack logical coherence and vary widely in population the conclusion is inescapable that the constitutional standard is being violated.

Your final question pertains to the authority of the senatorial apportionment committee to establish districts within the City of St. Louis.

Section 8 of Article III reads as follows:

"When any county is entitled to more than one senator the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one senator shall be elected."

The Board of Election Commissioners is the body authorized to establish election precincts in the City of St. Louis. Section 118.150, RSMo 1959. By the terms of Section 8 of Article III, a

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clear and unequivocal grant of authority is made to the Board of Election Commissioners, which authority must be exercised by that Board alone to the exclusion of the commission.

CONCLUSION

It is the opinion of this office that:

1. The senatorial apportionment commission has no authority in the establishment of state representative districts;

2. The commission has no discretion, in that it may not vary from the number of districts constitutionally established, the requirement of contiguity within districts and the prohibition against dividing a county within a multi-county district. The commission has a limited discretion in establishing districts "as compact and nearly equal in population as may be." However, the court will review the exercise of this discretion and set aside the redistricting plan of the commission in the event of a gross abuse of discretion;

3. The Board of Election Commissioners of the City of St. Louis has the sole authority to divide the City of St. Louis into senatorial districts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JJM:ml