

CONSTITUTIONAL LAW: General Assembly can reapportion House of Representatives but cannot delegate such authority to commissions. House of Representatives of any size may be created by Constitutional Amendment.
GENERAL ASSEMBLY:
ELECTIONS:
ELECTION DISTRICTS:

August 27, 1965



Honorable Warren E. Hearnes
Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Hearnes:

This is in answer to your opinion request of recent date. You ask the following questions:

1. Can the General Assembly provide for reapportionment of the Missouri House of Representatives by statute and, if so, can such a statute provide for the creation of a commission to establish the election districts for members of the House of Representatives.
2. Is there any limitation on the number of members of the House of Representatives if an amendment is passed providing for a specific number of members of the House of Representatives and providing that the election districts from which such members shall be elected shall be created by a bipartisan commission.

In the case of *Jonas v. Hearnes*, 236 F. Supp. 699, a three judge Federal Court held that the provisions of Section 2 of Article III of the Constitution of Missouri and Section 22.040, RSMo, are invalid because such provisions are repugnant to the Federal Constitution. The Court said l.c. 707:

"However, it is apparent under these guidelines and principles that Section 2 of Article III of the Constitution of the State of Missouri and the reapportionment statute pursuant thereto, RSMo 1959, § 22.040, V.A.M.S., are violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution."

Obviously, under such ruling the provisions of Section 9 of Article III of the Constitution allocating representatives to the various counties and the City of St. Louis "until reapportionment can be made in accordance" with Article III of the Constitution are also invalid as contravening the Federal Constitution.

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The Court, however, specifically held that the provisions of Section 3 of Article III of the Constitution and Section 22.050, RSMo, providing for apportioning counties entitled to more than one representative and the City of St. Louis by local bodies are not, as such, repugnant to the United States Constitution. The Court said l.c. 707:

"* * * Section 3 of Article III, relating to districts within a county, and the reapportionment statute pursuant thereto, RSMo 1959, § 22.050, V.A.M.S.; on their face are not constitutionally void, and are susceptible to being worked into a constitutionally permissible scheme of apportionment. * * * *"

In view of the Federal Court's holding that the provisions of Section 2 of Article III of the Constitution and Section 22.040, RSMo, are invalid, it is our view that the Legislature can enact a statute creating districts for the House of Representatives so long as such statute does not contravene any provision of the Missouri Constitution not held invalid by the Federal Court provided that such districts meet the requirements of the United States Constitution.

Section 9 of Article III, of the Constitution contains the following language:

"Until apportionment of the representatives can be made in accordance with this article, the house of representatives shall consist of one hundred fifty-four members apportioned among the several counties as follows: * * * *"

In the event the Legislature chose to district the House of Representatives by Statute, it would appear that the Legislature might be limited to one hundred fifty-four members of the House of Representatives.

Section 1, Article III, of the Constitution of Missouri provides as follows:

"The legislative power shall be vested in a senate and house of representatives to be styled 'The General Assembly of the State of Missouri.'"

Enactment of a statute providing for districts for members of the House of Representatives is a Legislative function.

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In the case of State ex rel. Scott et al. v. Calcaterra et al., 362 Mo. 1143, 247 S.W. 2d 728, a case involving the creation of senatorial districts in St. Louis City by the St. Louis City Board of Election Commissioners, under the provisions of Section 8 of Article III of the Constitution, the Supreme Court held that the creation of such districts is legislative in nature, stating S.W. 2d 1.c. 731:

"* * * Traditionally, such a function as that here involved has always been regarded as legislative. State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40. Indeed, the authority for the board to divide the territory of the City of St. Louis is found in the legislative article of the Constitution, which is Article III. It is too clear for argument that in so acting respondents were performing a legislative function, and we so hold."

In the case of State ex rel. Dunne et al. v. Mooney et al., 362 Mo. 1128, 247 S.W. 2d 722, the Supreme Court held that the creation of senatorial districts by the St. Louis County Council was the performance of a legislative function under Section 8 of Article III of the Constitution, stating S.W. 2d 1.c. 724:

"[1] It is conceded by all parties that the redistricting of St. Louis County into senatorial districts is a legislative function. With this we agree. State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40."

In the case of State ex rel. McNary et al. v. Mooney et al., 362 Mo. 1139, 247 S.W. 2d 726, the Supreme Court held that the creation by the County Council of St. Louis County of districts for the election of members of the House of Representatives under Section 3 of Article III of the Constitution is a legislative act. The Court said S.W. 2d 1.c. 728:

"[1] It is conceded by the parties that the redistricting of St. Louis County into representative districts, as provided in Article III of our Constitution is a legislative function. State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40. * * * *"

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In the case of State ex rel. Gordon v. Becker, 329 Mo. 1053, 49 S.W. 2d 146, the Supreme Court held apportionment of senatorial districts under the provisions of Section 7 of Article IV of the Constitution of 1875 was a legislative act. Such constitutional provision provided for apportionment by the General Assembly after each decennial census. The Court said S.W. 2d 1.c. 148:

"[4] In this brief discussion it has been assumed that the apportionment of the state into districts for the election of Senators is a legislative act, whether done by the General Assembly or by designated state officers. That the performance of that act calls for the exercise of legislative power is no longer open to question. State ex rel. Carroll v. Becker (Mo.Sup.) 45 S.W. (2d) 533.
* * * *"

In the case of State ex rel. Carroll v. Becker, 329 Mo. 501, 45 S.W. 2d 533, a case involving congressional redistricting, the Supreme Court said S.W. 2d 1.c. 537:

"Further, dividing a state into political subdivisions, or creating territorial districts of any kind, is a legislative act. Haeussler v. Bates, 306 Mo. loc. cit. 411, 267 S.W. 632. This court said in State ex rel. v. Hitchcock, 241 Mo. loc. cit. 457, 146 S.W. 40, 48, 'that the districting of the state into legislative, senatorial, congressional, and judicial districts is the exercise of legislative authority cannot be successfully questioned.'

"That case concerned the state senatorial districts, and it might be claimed that the mention of congressional and judicial districts is obiter. Yet the same principle would apply. It is a legislative act. That case was quoted and approved in State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017. While there were dissenting opinions as to the result in the latter case, the principle was not questioned that dividing the state into districts is a legislative act."

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In the case of State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017, the Supreme Court said S.W. 1.c. 1023:

"* * * All concede, and, if not, the cases and the Constitution so hold, that the redistricting of the state is a legislative act. * * * *"

In the case of State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W.40, the Supreme Court said, in a case involving the senatorial redistricting of St. Louis City under the 1875 Constitution by the circuit judges of such city, S.W. 1.c. 48:

"[1] 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. * * * *"

The concurring opinion in such case stated S.W. 1.c. 66:

"* * * The duty so imposed, although it is laid on the circuit court, is not judicial in its character, and could not be imposed on the court by any authority less than the Constitution itself. The duty is purely legislative in its character, and could be performed only by the General Assembly, but for the express provision referred to. * * * *"

Since the creation of representative districts is legislative, the power is in the General Assembly to provide by statute for such districts because there is no valid provision in the Missouri Constitution providing for the creation of such districts.

In the case of State ex rel. Gordon v. Becker, supra, the Court said S.W. 2d 1.c. 147:

"[1,2] All the sovereign power of this state, except the portion delegated to the general government, rests with the people of the state. They may at their pleasure grant or withhold such power, or having granted it to the agencies

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which they have set up for their own government, they may withdraw all or any part of it, through the medium of their organic law. By section 1, above, they granted the legislative power to the General Assembly, subject to the limitations contained in the Constitution. The grant would have been no broader had the words, 'subject to the limitations herein contained,' been omitted, because, broadly speaking, all the parts of state Constitutions, following the general grants of powers to certain state agencies which they create, are but limitations upon those powers, directly or indirectly. * * * * "

In the dissenting opinion of Judge Atwood in such case, it is stated S.W.2d 1.c. 155:

"* * * 'The test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do.' * * * * "

In the dissenting opinion of Judge Frank, it is stated S.W.2d 1.c. 161:

"Section 1 grants to the General Assembly all legislative power of the state, subject to the limitations contained in the Constitution. Absent some limitation on this unqualified grant of power, no agency other than the General Assembly would have power to redistrict the state. * * * * "

Since there is no valid constitutional provision granting the power to create representative districts except Section 3 of Article III of the Constitution, it is apparent that the Legislature has power to create by statute representative districts.

In view of the holding of the Federal Court that Section 3 of Article III of the Constitution is not contrary as such to the Federal Constitution, the proper body in the counties entitled to more than one representative and the City of St. Louis is given the constitutional power to apportion such counties and the City of St. Louis and the legislature is under the Constitution not authorized to apportion representatives to counties entitled to

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more than one representative or the City of St. Louis and has no power to create representative districts in such counties or the City of St. Louis. In counties where a fractional district would remain after allocating more than one representative to such counties the General Assembly should include such fractional district in creating districts under the power of the General Assembly and the body authorized by the Constitution to redistrict counties entitled to more than one representative should apportion the remaining district in such counties.

It is our view, however, that the Legislature must create districts by statute and cannot delegate to any commission or other body the power to create such districts. As pointed out above, the power to create representative districts is exclusively legislative. It is our view that the General Assembly has no power to delegate such legislative function to another body but must exercise such exclusive legislative authority itself.

In the case of *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, the Supreme Court said S.W. 2d 1.c. 545:

"* * * It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. 11 Am. Jur. 921, Sec. 214; 16 C.J.S. Constitutional Law, § 133; A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947. * * *"

This is not a case where a commission or other body is created to carry out the details of the legislative enactment set out in the statute but the creation of representative districts by a commission, would be a legislation by the commission or other body created by the statute and would, therefore, be constitutionally prohibited. The Legislature cannot by statute divest itself of the power and duty to carry out the purely legislative function of creation of representative districts.

It was held in the case of *State ex rel. Gordon v. Becker*, supra, 49 S.W. 2d 146, that the referendum provisions of the Constitution of 1875 (now Section 52a, Article III of the Missouri Constitution) except as otherwise provided in the Constitution are applicable to statutes apportioning the State into legislative districts. Section 52a of Article III provides as follows:

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"A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded."

The Court said S.W. 2d 1.c. 148:

"* * * Manifestly the framers of the Amendment of 1908 intended, as did the people in adopting it, that every vestige of legislative power granted directly by the Constitution itself to agencies of the state government, the exercise of which would affect the state as a whole, should be subject to its initiative and referendum provisions. * * * *"

"[3] Did the people in adopting the Amendment of 1908 intend to make all legislative acts affecting the state as a whole, including the acts making apportionment of the state for the election of senators, subject to the referendum? The language, 'The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives,' was used for some purpose; it cannot be disposed of by saying that the framers of the amendment blindly copied it from the Constitution of Oregon, wholly disregarding the existing provisions of our own Constitution. * * * *"

In the concurring opinion it was stated S.W. 2d 1.c. 150:

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"The people 'reserve to themselves' the power regarding, not merely laws which are or might be enacted by the General Assembly, but laws covering every subject of legislation. By that amendment they take back, reassume, all legislative authority theretofore granted, with the general grant as before to the General Assembly, and the additional limitation of initiative and referendum. Can it be doubted that the initiative and referendum apply to every subject and method of legislation? The people reserve to themselves the unlimited power to redistrict the state, to control such legislation as they do all other legislation. The method provided is by initiative and referendum, the latter applying only to acts of the General Assembly. * * * *"

Since the referendum is limited to acts of the General Assembly and since the Supreme Court has held that except as otherwise provided in the Constitution, a statute creating legislative districts is subject to the referendum, a statute delegating to a commission or other body the power to reapportion legislative districts would be unconstitutional because such redistricting could not be referred to the people for their approval or rejection.

A bipartisan commission with the authority and duty to establish election districts for members of the house of representatives of this State can be provided for only by amendment of the Missouri Constitution.

Provision for senatorial apportionment in this State by a bipartisan commission is now found in Section 7 of Article III of the Missouri Constitution. The Federal Court in the case of Jonas vs. Hearnes, supra, held that the only defect in such Section of the Constitution is the provision allowing a permissible one-fourth variation in the population of the districts from the quotient arrived at by dividing the population of the State by thirty-four, the number of members of the Missouri Senate.

If, therefore, a bipartisan commission to create election districts for members of the house of representatives is provided for by a constitutional amendment, such commission will have authority to establish election districts for the members of the house of representatives. If Section 3 of Article III of the Constitution

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is repealed, the adoption of an amendment authorizing a bipartisan commission to create election districts for members of the house of representatives would give such commission power to create such districts throughout the entire State.

Your second question asks whether there is any restriction on the size of a House of Representatives that might be provided for by a constitutional amendment.

We are of the opinion that there is no limitation on the size of the House of Representatives that may be provided for by a constitutional amendment. There is no provision in the Constitution of the United States as to the size of either house of the legislature of a state.

There is no valid provision in the state constitution which prevents the creation by a constitutional amendment of a House of Representatives of any size thought proper and desirable.

CONCLUSION

(1) It is the opinion of this office that the General Assembly of Missouri can by a statute provide for election districts for members of the House of Representatives, but the General Assembly cannot by statute delegate such authority to a commission or other body, because granting authority to such commission to create election districts would be an unconstitutional delegation of legislative power which can be exercised only by the General Assembly.

(2) A bipartisan commission with authority to create election districts for members of the House of Representatives can be established only by an amendment of the Missouri Constitution.

(3) A Constitutional Amendment may provide for a House of Representatives of any size.

Very truly yours,


NORMAN H. ANDERSON
Attorney General