SENATE: Board of Election Commissioners for City of St. Louis cannot make any division of city
ELECTIONS: into senatorial districts, new districts having already been established under last decennial census.

JOHN M. DALTON
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John C. Johnsen
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Honorable Michael J. Doherty
Chairman
Board of Election Commissioners
City of St. Louis
208 S. Twelfth Boulevard
St. Louis 2, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

> "I have been directed by the Board of Election Commissioners for the City of St. Louis to write this letter to you and request herein a written opinion concerning the authority and right vested in this Board to re-district the seven senatorial districts within the City of St. Louis.
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> "This Board feels that the redistricting as declared and certified by its predecessor Board is unfair and illegal. This Board has declared its policy with respect to redistricting by the adoption of the following resolutions:
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> > 'The Board of Election Commissioners is unanimously of the opinion that the redistricting of Senatorial Districts in the City of St. Louis as declared, ordered and certified under the last redistricting is unfair, irregular and illegal; that it was drawn arbitrarily, and capriciously and that it is unjust

and unfair to the voters of the City of St. Louis. But before this Board can embark upon another redistricting program, or attempt such redistricting, it wishes to be satisfied that it is acting and performing its duties under and within the enacted and declared laws of this State. For such reason it has requested one of its counsel to be present and advise the Board as to its rights and authorities to proceed and undertake another redistriction.' Article III, Section 10 which concerns and relates to the instant question, is as follows:

> 'The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require.'

"The Board sincerely believes that another and new redistricting is urgently required in the public interest and to provide more compact and contiguous districts. It clearly appears that the present districts are arbitrary and unfair and in direct conflict with public convenience.

"Under such circumstances, as aforesaid, it is our intention to redistrict the seven senatorial districts within the City of St. Louis, if you are of the opinion that we possess such legal authority and right so to do.

"Incidentally, we also take this opportunity to direct your attention to the case of PAUL W. PREISLER vs. PAUL C. CALCATERRA, et al., Docket No. 43596, which presently is pending in the Missouri Supreme Court. It is our understanding that Count II of the action involves the question of redistricting. Perhaps such issue might be specifically injected therein and some decision obtained thereon."

The establishment of senatorial districts in the counties entitled to more than one senator is provided by Section 8 of Article III, Constitution of Missouri, 1945, which 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."

Section 10 of Article III of the Constitution of Missouri, 1945, provides:

> "The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require."

The only statutory enactment relative to the matter is found in Sections 22.020 and 22.030, RSMo 1949. Section 22.020 provides for the certification of the number of senatorial districts by the secretary of state to the bodies authorized to establish the districts. Section 22.030 provides:

> "On or before March first following the certification by the secretary of state as provided in section 22.020, the board of election commissioners of the city of St. Louis and the county courts of those counties which by said report are entitled to more than one senator, shall certify to the secretary of state a complete statement of the senatorial districts established therein; and in the event that said board of election commissioners of the city of St. Louis or the county courts of such

> counties fail to comply with this section, the number of senators in such districts to be elected at the next election shall be nominated and elected by the electorate from the state at large; provided the persons so nominated and elected shall reside in the city or the county entitled to such senators."

We are of the opinion that the answer to your inquiry is to be found in the decision of the Supreme Court of Missouri in the case of State ex rel. Major v. Patterson, 229 Mo. 373, 129 S.W. 888. That case involved an attempted redivision of Jackson County into legislative districts under the Constitution of 1875. Section 3 of Article IV of the Constitution of Missouri, 1875, authorized the county court to divide counties entitled to more than one representative into legislative districts. Section 6 of Article IV of the Constitution of Missouri, 1875, authorized the circuit court to divide into senatorial districts any county entitled to more than one senator. Section 9 of Article IV of the Constitution of Missouri, 1875, provided:

> "Senatorial and Representative districts may be altered, from time to time, as public convenience may require. When any Senatorial district shall be composed of two or more counties, they shall be contiguous; such districts to be as compact as may be, and in the formation of the same no county shall be divided."

In the Patterson case, supra, it was contended that, under the provisions of Section 9 of Article IV of the Constitution of 1875, the county court had the authority to make new representative districts for Jackson County. The court held that such authority was not to be found in Section 9 of Article IV, and its decision and opinion cover the question asked by you. In the course of its opinion the court stated (229 Mo. l.c. 381):

> "To start with, this section gives, within itself, no power to the county court. The county court is not mentioned and if it was intended to give it power, such fact must be gathered from the context of the article and not from the section itself. Going to the section itself, it mentions

> both senatorial and representative districts. That the county courts have no power as to senatorial districts must be conceded. That the power here conferred as to senatorial districts had reference to a legislative power reserved by the Constitution to that branch of the government, can not well be disputed. For as to most of the senatorial districts the Legislature has the right to fix the boundaries. If then it appears that the Constitution was reserving to the Legislature the right to legislate as to senatorial districts, is it not reasonable to construe that such was the intent as to representative districts? Both are mentioned together. One clearly refers to a reservation of power in the Legislature, why not the other? But the section says that such districts may be altered 'from time to time.' How must this be read? <u>That senatorial districts cannot be rearranged oftener than once in ten years is more than evident from the Constitution.</u> * * *" (Emphasis ours.)

The court further stated (229 Mo. l.c. 388):

> "If it be said that these two sections grant a power to the county court in the one instance and to the circuit court in the other, yet the exercise of this power must be within constitutional and legal prescriptions. The power confided to both is dependent upon prior legislative action. In the matter of senatorial districts, nothing is said as to a rearrangement of them by the circuit court or any other body. In neither case can the legislative sanction be given oftener than once in every ten years, and in both cases the contemplation of the law is that the subdivision shall be at once made, and remain made until the next decennial period. It might be said that injustice would follow in later years from the division made of senatorial districts in a county entitled to more than

> one senator, yet there is no legal way to escape it. What would be a fair division of a county at one time, might be apparently inconvenient, if not unfair, later, but no authority is vested anywhere to authorize a change. If this be true as to the senatorial districts of a single county, why should there be a different rule as to representative districts? If circuit courts were not to be invested with plenary power to redivide such counties ad libitum, by what reason can it be urged that county courts were given such powers by mere implication?
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> "It is true that section 9 of article 4 says that 'senatorial and representative districts may be altered, from time to time, as public convenience may require,' yet this language is applied to all senatorial districts and not merely to districts within a single county. It is clear that as to all senatorial districts save and except those within a single county, the power to fix the lines thereof lies with the Legislature, or in the event of its failure to act, with the Governor, Secretary of State and Attorney-General. Could it then be said that as to senatorial districts, this section 9 referred more to the powers of the circuit courts than to the powers of the Legislature? We think not. Yet the language is as definite as is the language referring to legislative districts. As stated before there is an evident reservation of power in this clause, but it is to the Legislature and not to the courts, either circuit or county."

The court further stated (229 Mo. l.c. 391):

> "* * * This section 9 of article 4 is merely directory in terms, and in our judgment reserves to the Legislature the right to provide for the alteration of legislative districts once established as per the terms of the Constitution. In other words the Constitution contemplates

that these districts shall be established at decennial periods, but has reserved a power in the Legislature to provide by law for a change in the same. This, upon the theory that there is a difference between dividing a county into districts, and afterward changing the boundary lines of those districts. That this power is reserved to the Legislature is further emphasized by the fact that section 9 does not, within itself, undertake to prescribe the conditions under which the changes or alterations should be made. Nor does it undertake to prescribe the method of determining the requisites for such changes. These things were evidently left for legislative determination, and the Legislature has not acted. This section 9 only speaks of changes when 'public convenience may require.' It places no restrictions as to compact and contiguous territory. It contains no safeguards whatever. Upon its face it is not self-executing, but clearly indicates that there was to be legislative action. If so, then how does it authorize action upon the part of the county court. Unless it can be said that this section is self-executing, the whole of respondents' claims fail. So that, in addition to the construction to be given to the words 'from time to time' as applied to both senatorial and representative districts, we are confronted with this further barrier. To give section 9 the construction contended for by respondents, it must stand alone. As above indicated, the use of the phrase 'from time to time,' if not considered as the decennial period, precludes the idea of making both sections 3 and 9 stand together. If section 9, to give it respondents' construction, must stand alone, then as above indicated, (1) it fails to confer any power upon the courts, either as to senatorial or representative districts, and (2) it upon its face is not self-enforcing, and contemplates and requires legislative action. In other words, it is a reservation of power to the Legislature and not a conference of power upon the

> courts. We hardly think the language of this section self-enforcing. (State ex rel. v. Gibson, 195 Mo. l.c. 260.)
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> "Let it be said that there is a direction therein contained to the effect that both senatorial and representative districts may be altered between decennial periods for public convenience, yet it is not therein said by whom to be altered, nor what guide-posts shall be observed in the alteration. This strongly tends to show that this clause of the Constitution was intended to give legislative authority to act, and by proper laws provide for such alteration or changes in previously established districts, but not to confer upon courts a power not usually exercised by them."

The court further stated (229 Mo. l.c. 394):

> "So when we take the context of the present article 4, and the origin of section 9 therein, it appears to us clear that there is a reservation of power to the Legislature, and until the Legislature acts with reference to the alteration of the districts established under section 3, there can be no action by the courts. The Legislature perhaps can act by laws duly passed, and in so doing can delegate its constitutional powers over the subject-matter but up to this time it has not been done. Until such time as the Legislature may legally provide for the alteration of legislative districts, there is no such power in the county courts."

This decision appears to us to preclude any new redistricting at the present time as a matter of "public convenience" under Section 10 of Article III of the Constitution of 1945.

Whether or not the districts as presently constituted are "of contiguous territory, as compact and nearly equal in population as may be," is a question of fact. State ex rel. Davis v. Ramacciotti (Mo. Sup.), 193 S.W. (2d) 617. We cannot determine whether or not the districts as presently formed comply

with the constitutional requirements, and do not attempt to do so.

You state that the Board has determined that "the last redistricting is unfair, irregular and illegal; that it was drawn arbitrarily, and capriciously and that it is unjust and unfair to the voters of the City of St. Louis." We find, however, no authority conferred upon the Board to make such a determination and to order a redistricting based thereon.

Courts may pass upon the validity of a redistricting. 59 C. J., States, Section 50, page 83. In the case of Preisler v. Calcaterra, referred to in your opinion request, plaintiff sought to have the redistricting here in question declared invalid and to have the court order, under the provisions of Section 22.030, RSMo 1949, quoted above, that senators from the city of St. Louis should be elected at large. The petition was dismissed in the circuit court, and the matter is now before the Supreme Court on appeal.

In view of the policy of this office not to render opinions on matters pending in litigation, we will not attempt to pass upon the question of what the effect of a decision of a court holding the previous redistricting invalid would be, in view of the provisions of Section 22.030, supra. We do note that that section requires the Board to act prior to March 1, after receiving notice from the secretary of state of the number of senators to which the city of St. Louis is entitled, and that it does provide that upon failure of the Board to act within that time the senators from the city of St. Louis shall be elected from the state at large, and that there is no provision for action by the Board subsequent to March 1. Should the Supreme Court fail to pass upon the question in the Preisler case, and should the Board or someone else entitled to do so properly bring before a court of competent jurisdiction the question of the validity of the redistricting, the question of the effect of an adjudication of invalidity could be determined judicially at the same time.

CONCLUSION

Therefore, it is the opinion of this department that, the Board of Election Commissioners of the City of St. Louis having previously divided the city of St. Louis into senatorial districts following the 1950 Decennial Census, Section 10 of

Honorable Michael J. Doherty

Article III of the Constitution of Missouri, 1945, which authorizes the alteration of senatorial districts from time to time as public convenience may require, does not confer any power upon the Board of Election Commissioners of the City of St. Louis to order a redistricting at this time.

This conclusion is based upon the premise that the previous redistricting is legal and valid until declared otherwise by a tribunal having authority to do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

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