

MAGISTRATES

) Where population of county falls below 30,000
) according to preliminary census figures,
) separate office of magistrate abolished as of
) January 1, 1951. No districting in such county
) for purpose of election ~~of~~ appointment of
) additional magistrate.

November 30, 1950

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Honorable Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

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

"Numerous questions have arisen in Marion County concerning our Magistrate Court in view of the recent 1950 decennial census.

"We have heretofore been classed as a County of the third class with the population in excess of thirty thousand inhabitants and, as such, we have had for the past four years a separate Magistrate, by that I mean that the Probate Judge has not been the ex-officio Magistrate.

"We have reason to believe, although we have no official knowledge thereof, that our County has fallen below the thirty thousand inhabitants in the 1950 decennial census. That being true, we respectfully request an opinion from your office concerning the following points.

"1. Assume that there is no official publication made of the population of Marion County under the 1950 decennial census before the general election in November; that a Magistrate is elected

Honorable Roger Hibbard

for a term of four years beginning January 1st, 1951; that after the November election and before January 1st, the 1950 decennial census is officially published and Marion County falls below thirty thousand population.

"Question. Would the Magistrate elected at the November election take office and serve for a term of four years or would the office thereby automatically be abolished?

"2. Assume the facts to be as in number one except that there is no official publication of the 1950 decennial census showing Marion County below thirty thousand population, until after January 1st.

"Question. (a) Would the Magistrate elected at the November election take office on January 1st? (b) If he did take office would his term continue for a full term of four years or would the office be abolished on the date of the publication of the census after January 1st?

"3. If Marion County falls below the thirty thousand population and we have a Probate Judge as ex-officio Magistrate and the Circuit Court under the provisions of Section One, Page 767, Laws of 1945, 'according to the needs of Justice' finds an additional Magistrate is required for the County.

"Question. Is it mandatory on the County Court to district the County under the provisions of Section Four, page 768, Laws of 1945, or could such additional magistrate have concurrent jurisdiction with the other Magistrate over the entire County?

"We respectfully request opinion from your office concerning these matters which we deem to be of vital importance to the judicial structure of this County."

Honorable Roger Hibbard

Section 18 of Article V, Constitution of Missouri, 1945, provides:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law."

Section 462.01 of Senate Bill No. 1144, Sixty-fifth General Assembly, provides:

"Magistrates, as herein provided for, shall be elected at the general election to be held in 1946, and every four years thereafter, and shall hold their offices for four years, or until their successors are elected or appointed, commissioned and qualified. In counties of 30,000 inhabitants or less the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice, the foregoing number of magistrates in any county may be increased

Honorable Roger Hibbard

by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. Such additional magistrates shall be appointed by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

Section 1.10 of Senate Bill No. 1001, Sixty-fifth General Assembly, provides:

"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."

Honorable Roger Hibbard

In your opinion request you asked that we assume that there is no official publication of census figures before the November election and before January 1, 1950. However, there has been official publication of preliminary census figures by the Director of the Census. On November 5, 1950, he issued Bulletin No. 4 of Series PC-3 setting forth preliminary population by counties of all states including Missouri. This report shows the population of Marion County by the preliminary count to be 29,736. The bulletin explains that it does not give the final verified population totals as the final totals may differ from the preliminary counts because of the allocation to the place of usual residence of persons who were enumerated elsewhere and because of other revisions.

Inasmuch as there has been an official publication of the population of your county, we think that consideration should first be given to the effect of such publication. If the figures contained in the preliminary report are to be accepted, there is no need for further speculation as to what might have been the situation in the absence of any publication.

In the case of *Garrett v. Anderson*, 144 S.W. (2d) 971, the Texas Court of Civil Appeals had under consideration the determination of population of a county of that state. In the course of its opinion the court stated, 144 S.W. (2d) 1. c. 972:

"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. Sections 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,

Honorable Roger Hibbard

preliminary and other census bulletins,
* * * and to publish and distribute said
bulletins and reports.' (Section 213.)

"The record in this case does not em-
brace 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.

"Form 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
'Released for Immediate Use

"Sixteenth Census--Preliminary Announce-
ment 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 Cen-
sus, taken as of April 1, 1940, is 337,557,
as compared with 292,533 on April 1, 1930.
The 1940 figures are preliminary and sub-
ject to correction.

'Ben S. Morris
'Supervisor of Census.'

"No question is made of Supervisor
Morris' authority to execute and promul-
gate the 'preliminary announcement of
population' of Bexar County, nor is there
any contention that the figures in his re-
port to the County Judge are substantially
inaccurate, or so far from the true number

Honorable Roger Hibbard

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 necessary 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. * * *"

Honorable Roger Hibbard

As pointed out in the above case, Section 213 of Title 13, U.S.C.A., authorizes the Director of the Census to publish preliminary census bulletins. As further pointed out Federal Statutes make no provision for procedure for official promulgation of population figures. Such being the case and under the provisions of Section 1.10 of Senate Bill No. 1001, fixing the effective date of the 1950 census as of January 1, 1951, we are of the opinion that in view of the holding of the above-cited case, the preliminary figures published by the Director of the Census should be relied upon in the absence of any final report in determining population for the purposes of Senate Bill No. 1001.

Holding this view, the population of Marion County "for the purpose of representation or other matters" as of January 1, 1951, will be 29,736. Under the provisions of Section 5, Laws of Missouri, 1945, page 765, a person elected at the November 7, 1950, election would have entered upon the discharge of his duties as magistrate on January 1, 1951. However, under the provisions of Section 18 of Article V of the Constitution there would be no office to be filled on that date inasmuch as the population of the county is less than 30,000 inhabitants.

As for your third question, we point out that the division of a county having more than one magistrate into magistrate districts does not affect the territorial jurisdiction of the magistrate courts. Section 19 of Article V, Constitution of Missouri, 1945, provides:

"After each census of the United States the boards of election commissioners, or if none, the county courts, shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate shall be elected. Each of such magistrates shall have jurisdiction coextensive with the county, and the magistrates may organize into a court or courts with divisions."

(Underscoring ours.)

Section 4, Laws of Missouri, 1945, page 765, provides in part:

Honorable Roger Hibbard

"The election of magistrates shall in all respects be conducted as other elections and the returns made as for other officers. In counties where under the last preceding decennial census of the United States or by order of the circuit court as provided by law, they are entitled to more than one magistrate, the board or boards of election commissioners, or if none, the county court, shall on or before April 1, 1946, and thereafter within 60 days after such board or boards, or if none, the county court, shall be officially informed that the duty has arisen for them to divide such county into magistrate districts, divide such counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected, who shall be a resident of the district in which he is elected. When the number of magistrates in any county has been increased or decreased by order of the circuit court as provided by law, the board or boards of election commissioners, or if none, the county court, shall within 60 days thereafter redistrict said county into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected. * * *"

Thus, the division of the county into districts is only for the purpose of election when there is more than one magistrate in the county. We are of the opinion, however, that such districting would not be required in your county on the abolition of the separate office of magistrate followed by the appointment of an additional magistrate in accordance with the constitution and statutes. You will note that the constitutional and statutory provisions require districting only in "counties having more than one magistrate." Under Section 18 of Article V, Constitution of Missouri, 1945, a county having a population of less than 30,000 inhabitants does not have a magistrate. The probate judge is judge of the magistrate court. Therefore, on the appointment of a magistrate in your county pursuant to order of the circuit court, your county would have only one magistrate, although it would have two judges of the magistrate

Honorable Roger Hibbard

court: the probate judge and the magistrate. Each would, under the provisions of Section 19 of Article V, quoted above, have jurisdiction coextensive with the county, but there would be no districting for the purpose of election.

CONCLUSION

Therefore, this department is of the opinion that in the absence of the final census report when the preliminary population figures released by the census bureau for the 1950 decennial census show that the population of a county, which has previously had a population in excess of 30,000 inhabitants, has fallen below 30,000 inhabitants, the separate office of judge of the magistrate court is abolished as of January 1, 1951, and the judge of the probate court thereupon becomes judge of the magistrate court in such county.

If, in such county, an additional magistrate is provided after January 1, 1951, such additional magistrate and the judge of the probate court would have magistrate jurisdiction coextensive with the county. Upon the appointment of such additional magistrate, the county would not be required to be divided into magistrate districts, inasmuch as the county would have only one magistrate.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh