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March 19, 1981

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ATTORNEY GENERAL OPINION NO. 81-72

Mr. Glenn D. Cogswell  
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Topeka, Kansas 66612

Re: Drainage and Levees -- Drainage Districts Within  
Counties or Cities -- Elections of District  
Directors

Synopsis: Except as limited by the state constitution and  
the grant of authority to the federal government  
by the federal constitution, the power of the  
state legislature is absolute with respect to all  
offices it creates. Such power includes the  
authority to shorten or lengthen the term of a  
public office, even though the effect may be to  
curtail or extend an incumbent's unexpired term.  
Thus, the provisions of K.S.A. 1980 Supp. 24-412  
which extend the terms of office of drainage  
district directors elected in March of 1980 until  
April of 1983 represent a valid exercise of leg-  
islative authority. Cited herein: K.S.A. 1980  
Supp. 24-409, 24-412, Kan. Const., Art. 2, §18,  
Art. 15, §1, L. 1980, ch. 107.

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Dear Mr. Cogswell:

As attorney for the North Topeka Drainage District in Shawnee  
County, you have requested our opinion as to whether the pro-  
visions of K.S.A. 1980 Supp. 24-412 validly operate to extend  
the terms of office of drainage district directors elected on  
March 4, 1980, until the election in April of 1983.

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A response to your request requires a brief review of this statute's recent legislative history. In 1979, the legislature amended K.S.A. 24-409 and 24-412 (L. 1979, ch. 103, §§1,2) so as to change the term of office and the time of electing drainage district directors. Prior to these amendments, these statutes collectively provided that all directors of a district were to be elected at the same time to serve for terms of three years, and the elections were to be held on the first Tuesday in March. The 1979 amendments, however, reduced the term of office to two years and also provided, in effect, that the election of directors would be held on the first Tuesday in April in odd-numbered years, commencing in April of 1981.

The obvious purpose of these amendments was to synchronize the elections of drainage district directors with the regular city and school district elections and, by so doing, to reduce to some extent the proliferation of elections held by the various political and taxing subdivisions of the state. To assist in effectuating this objective, the 1979 Legislature inserted the following language in 24-412: "Directors elected in any district prior to March 21, 1981 shall hold their office until successors are elected and qualified at the election in April, 1981."

In apparent recognition that the latter amendment created a situation where drainage district directors elected in March of 1980 would serve only until the election in April of 1981, the 1980 Legislature further amended 24-412 (L. 1980, ch. 107, §1) by adding the following provision: "Directors elected in any district on March 4, 1980, shall hold office until successors are elected and qualified at the election in April, 1983." Pursuant to the previously-mentioned provisions of that statute, then, the successors elected in 1983 and each succeeding election will be elected for two-year terms.

The manifest purpose of the 1980 amendment was to avoid the election of directors in two successive years, while at the same time attempting to provide for the eventual coordination of all drainage district elections with regular city and school district elections. However, section 3 of the 1980 enactment amending 24-412 provided that the act would "take effect and be in force from and after its publication in the official state paper." L. 1980, ch. 107, §3. The records of the Secretary of State, as evidenced by the 1980 Session Laws of Kansas, reveal that this act was so published on March 13, 1980. Id. at 493. Thus, the act became effective nine days after the March 4, 1980, election to which the 1980 amendment applied, which fact has prompted you to inquire

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whether K.S.A. 1980 Supp. 24-412 validly extends the terms of directors elected on March 4, 1980, until the April election in 1983.

In our opinion the provision in question is a valid exercise of legislative authority.

Arguably, the 1980 act might be considered "retroactive" or "retrospective" legislation. Regardless of whether the act is to be viewed as having prospective or retrospective application, though, such determination does not affect our conclusion as to the effectiveness of the act's provisions relating to the terms of office of directors elected on March 4, 1980. As stated in State v. Hutchison, 228 Kan. 279 (1980):

"Regarding the retroactive argument, the general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. Nitchals v. Williams, 225 Kan. 285, 590 P.2d 582 (1979). The foregoing rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties. Nitchals v. Williams, 225 Kan. 285." Id. at 287.

Assuming arguendo tht the statutory provision in question is to be viewed as having retrospective application because of its reference to an election which occurred prior to the time the amended statute took effect, such fact, in light of the rules announced in State v. Hutchison, supra, would not invalidate such provision, since the legislature's intended application has been clearly expressed. Moreover, the act has no effect on any substantive rights of the persons elected as directors in March of 1980. It is well-established that the holder of a public office

"has no contractual right or property interest in the office. . . . [T]he tenure of the office is not protected by constitutional provisions which prohibit impairment of the obligation of contract." (Footnotes omitted.) 63 Am. Jur. 2d Public Officers and Employees §34.

Thus, irrespective of whether the 1980 amendment of 24-412 is considered retrospective legislation, such consideration is not

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in and of itself determinative of the amendment's validity. Rather, the controlling issue is the extent of the legislature's power to modify the tenure of a public office.

It is well established that the power of the state legislature is absolute with respect to all offices that it creates, except as restricted by the state constitution and the grant of authority to the federal government by the federal constitution. Leek v. Theis, 217 Kan. 784, 809 (1975); Higginbotham v. Baton Rouge, 306 U.S. 535, 83 L. Ed. 968 (1938). From our examination of both the state and federal constitutions it is evident that neither, expressly or impliedly, restrict nor impose duties upon the legislature in regard to drainage districts or the directors thereof. Drainage districts are solely creatures of the legislature. The only state constitutional provisions having application to drainage districts are those relating to the legislature's power to provide for the election or appointment of officers not otherwise provided for in the state constitution.

Article 2, Section 18 of the Kansas Constitution provides: "The legislature may provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution." And, using similar language, Article 15, Section 1 of the Kansas Constitution states: "All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."

It is clear from these provisions that the framers of the state's constitution intended the legislature to have broad powers over the terms of officers not prescribed by the constitution, and there are few constitutional restrictions placed on the exercise of that power.

This determination is supported by the Kansas Supreme Court's decision in State v. Monahan, 72 Kan. 492 (1905). There, the Court was discussing the validity of requiring voters in drainage district elections to be property owners. It had been asserted that this violated the constitutional prohibition forbidding a property qualification for any office of public trust. In upholding the property requirement, the Court noted the separate nature of drainage district elections, stating:

"The elections referred to in the act under consideration were not provided for by the constitution, nor did the constitution impose

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upon the legislature any duty to make provision for them. They were not required to be held by reason of anything contained in the fundamental law of the state. The drainage district in question is wholly the creation of the legislature, which had practically unlimited discretion in the matter. The statute might have made the office of director appointive instead of elective . . . ."  
(Emphasis added.) Id. at 500.

This broad power of the legislature over non-constitutional officers is also recognized by the Court's statement in State, ex rel., v. Doane, 98 Kan. 435, 438 (1916), that "it is clearly within the power of the legislature to provide for the election or appointment of all mere statutory officers in any reasonable manner . . . ." To the same effect is the following statement in Sartin v. Snell, 87 Kan. 485, 494 (1912):

"The constitution contains no inhibition upon the power of the legislature to provide as it may deem best the method for the appointment of officers whose election or appointment is not otherwise provided for. On the other hand, the constitution expressly declares that 'all officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law.' (Const. art. 15, §1.) It will thus be seen that the constitution has placed in the legislature the power to regulate the mode of appointing officers not otherwise provided for." (Emphasis added.)

Therefore, from the foregoing we have concluded that the legislature has broad, almost unlimited authority over the terms of office of drainage district directors and the method of selecting them. As to the legislature's authority to modify an incumbent director's term of office, we note the decision in Schumacher v. Rausch, 190 Kan. 239 (1962), wherein the Court upheld the validity of a statute abolishing an office during the incumbent's term of office. There, the Court stated: "Generally speaking, that which is purely a creature of the legislature is subject not only to the legislative power to create, but also to the legislative power to modify, dissolve or abolish." (Emphasis added.) Id. at 244.

This is in accord with general authorities. In 63 Am. Jur. 2d, Public Officers and Employees §147, it is stated: "There is no

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doubt of the power of the legislature which creates an office, to abolish it or to change it, and the legislature may shorten or lengthen the term of the office itself, in the absence of constitutional inhibition." (Footnotes omitted.) Cited as one authority for this encyclopedic statement is Lanza v. Wagner, 11 N.Y. 2d 317, 229 N.Y.S. 2d 380, 183 N.E. 2d 670; 97 A.L.R. 2d 344, app. dismd. 371 U.S. 74, 9 L.Ed.2d 163, 83 S.Ct. 177, cert. den. 371 U.S. 901, 9 L.Ed.2d 164, 83 S.Ct. 205 (1962). There, it was stated:

"Public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in the office . . . . Absent any express constitutional limitation, the Legislature has full and unquestionable power to abolish an office of its creation or to modify its term, or other incidents attending it, in the public interest, even though the effect may be to curtail an incumbent's unexpired term." (Citations omitted.) 97 A.L.R.2d at 350.

Although we have discovered no Kansas case precisely on point, there are several decisions of our Supreme Court which have upheld the legislature's power to postpone elections for the purpose of establishing uniform terms and the power to provide for the filling of the interim period as it deems proper. The principal case in this area is Wilson v. Clark, 63 Kan. 505 (1901), wherein the Court stated at 510:

"The policy of the statute, as we have seen, is to secure uniformity in the beginning of official terms, and also to avoid the expense, agitation and other disadvantages of frequent elections. The postponement of elections for one year is a reasonable and, in fact, the only practicable method of accomplishing the beneficial purpose of the legislature. If the legislature had postponed elections an unreasonable length of time, longer than was necessary to effect the avowed purpose, and so long as to betray an intention to make the offices appointive by preventing the people from choosing their officers at stated intervals and for regular terms, or, if it appeared

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that it was done merely to extend official terms and as a favor to incumbents of offices, there might be occasion for judicial interference and condemnation."

And, as subsequently stated in that opinion:

"The matter of dispensing with unnecessary elections and of securing uniformity in the commencement of official terms is one that is purely political in its character, and within the discretion of the legislature as well as within its power." (Emphasis added.) Id. at 515.

This decision and the analysis behind it has been explicitly affirmed and followed by subsequent cases. See, e.g., State v. Andrews, 64 Kan. 474 (1902); Murray v. Payne, 137 Kan. 685 (1933). Furthermore, as the court in Wilson noted, "[t]he question of legislative power to postpone elections and readjust the commencement of official terms has been affirmatively decided by courts of other states." 63 Kan. at 515.

From these cases it is clear that the legislature has the power to postpone elections for a reasonable length of time, in order to secure uniformity in terms of office and to avoid the expense, agitation and other disadvantages of frequent elections. They are also persuasive of the legislative power to fill the resultant interim by holdover, appointment or election. The only judicial constraints upon this power are that its exercise not conflict with the constitution, the postponement be for a reasonable length of time, that where the office is constitutionally required to be elective the "elective nature" not be destroyed and finally that the statute is not enacted solely for the purpose of continuing the incumbents in office.

Although the 1980 amendment to 24-412 lengthened the terms of office of directors elected in 1980, it is clear that the same result would have obtained had the legislature postponed the 1981 election, in those drainage districts where these directors were elected, until 1983. In our judgment, based on the cases previously cited, had the legislature undertaken such postponement, such action would be a reasonable exercise of legislative authority. It would not contravene any of the restrictions on the legislature's power to postpone elections set forth in Wilson v. Clark, supra at 510.

First, as noted earlier, there are no constitutional constraints on the legislature's power to provide for the method

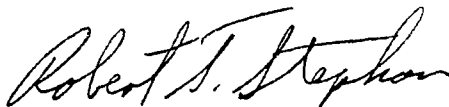
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of selecting drainage district directors. Second, while the Kansas courts have not specifically ruled that a two-year postponement of an election would be reasonable, it appears that such a postponement would be appropriate, in light of the Wilson court's reliance on Jordan v. Bailey, 37 Minn. 174, 33 N.W. 778 (1887), which upheld a two-year postponement as reasonable. Third, since the legislature can make the office of drainage district director either elective or appointive, the office cannot be deemed to have an "elective nature" which the postponement would destroy. Even if the office can be considered as having acquired an "elective nature" through the passage of time, filling the interim with an officer already elected does preserve that status to some extent. Finally, we have found no evidence that the statute was enacted for the purpose of extending the terms of particular incumbents.

Since the action taken by the 1980 legislature to lengthen the terms of directors elected in March, 1980, is tantamount to a two-year postponement of elections in those districts wherein such directors were elected, we believe our conclusion that such postponement would be valid is pertinent in supporting our conclusion that the lengthening of such terms is a valid exercise of legislative power.

In summary, therefore, it is our opinion that the provisions of K.S.A. 1980 Supp. 24-412 which extend the terms of office of drainage district directors elected in March of 1980 until April of 1983 represent a valid exercise of legislative authority.

Very truly yours,



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