STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 16, 1983

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 83- 33

The Honorable Robert V. Talkington
Majority Leader of the Senate
Room 357-E, Statehouse
Topeka, Kansas 66612

Re: Apportionment -- Reapportionment of Senatorial Districts -- Constitutional Requirements

Synopsis: Pursuant to Article 10 of the Kansas Constitution, the 1979 Session of the Kansas Legislature enacted Senate Bill No. 220, which reapportioned the state senatorial districts, based on figures compiled in the 1978 state agricultural census. The reapportionment statute was presented to the supreme court by the Attorney General, with the court holding, in a final judgment, that the plan complied with the requirements of the state and federal constitutions. Accordingly, unless it is ordered to do so by a court of competent jurisdiction, the legislature may not act again on reapportionment until the time set forth by Article 10, which is 1989.

Reapportionment on a decennial basis, such as that provided by the Kansas Constitution, has been held consistent with equal protection rights under the federal constitution. Additionally, court decisions have sanctioned the use of figures derived from the state agricultural census, rather than the United States census, and have found no discrimination in the way the state census considered persons in military service in arriving at population figures for each district. Accordingly, the fact that U.S. census figures collected subsequent to 1979

are dissimilar from those used by the legislature and approved by the supreme court is insufficient to challenge the validity of the apportionment plan currently in effect. However, given that the state agricultural census has been replaced by the federal census, the next reapportionment scheduled for 1989 will of necessity use data collected in 1980, yet will draw districts which will be used until 1999. As population shifts during this lengthy period may give rise to equal protection concerns the legislature may wish to consider remedial measures prior to 1989, such as amending the Kansas Constitution, Article 10, or reinstituting some form of state census. Cited herein: K.S.A. 11-201, 24-3402, 24-3403, L. 1979, ch. 55, 1983 SR No. 1814, 1979 SB No. 220, Kan. Const., Art. 10, §1, U.S. Const., Amend. XIV.

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Dear Senator Talkington:

As Majority Leader of the Kansas State Senate, you have requested our opinion on several inter-related questions concerning the possible reapportionment of that body. Your request was prompted by 1983 Senate Resolution No. 1814, which directs the Senate Committee on Legislative and Congressional Apportionment to review the population of each district in light of the state and federal constitutions, and to determine whether a denial of the Equal Protection Clause of the 14th Amendment to the United States Constitution would occur if reapportionment is delayed until 1989, as is currently contemplated. You inquire whether any conflict exists between the current system of apportionment and the equal protection clause, and whether there is anything which the Legislature can do to remedy any such conflicts.

The current senatorial districts were drawn in 1979, and represented the first use of Article 10, Section 1 of the Kansas Constitution as amended in 1974. Pursuant to the section's requirements, 1979 Senate Bill No. 220 was presented by this office to the state supreme court for a determination of its validity. The court reviewed the plan and entered a judgment approving it in full, which judgment is final as provided by Article 10, Section 1(e). In re Senate Bill No. 220, 225 Kan. 628 (1979). Among other things, the court found that the population deviations contained in the new districts were acceptable (the maximum spread between districts was 6.5%),

and that the use of census figures collected by the Kansas State Board of Agriculture was acceptable. In making this latter determination, the court noted that it was following earlier decisions which had been rendered by the federal district court for this state. Winter v. Docking, 373 F. Supp. 308 (D. Kan. 1974). The districts so approved were used in the 1980 elections for the senate.

It is our understanding that the recent senate resolution was prompted by figures derived from the 1980 United States census, which differ, in some cases considerably, from the figures used in determining the districts in 1979, i.e., the 1978 state agricultural census totals. The three districts in Shawnee County are 12.6% below the population for an "ideal" district, which is 59,106. Similar deficiencies are found in several districts located in the western portion of the state. On the other hand, several districts in the eastern section of Kansas, such as the four districts in Johnson County, are above the ideal figure by as much as 9.6%. The most extreme anomaly, however, is the 22nd District, encompassing parts of Riley and Geary Counties, which exceeds the ideal total by 43.6%. In actual numbers, this district has 84,869 people, more than 25,000 in excess of the population for the ideal district.

In that the 22nd District presents a situation which is entirely dissimilar from the other 39 districts, it would be in order to discuss it separately later in this opinion. Prior to doing so, the initial question which you raise concerning the authority of the legislature to act should be examined, so as to determine whether any legislative action is constitutionally permissible. As noted above, Article 10 of the Kansas Constitution was followed in the drawing of the current districts. Therein, Section 1 provides in pertinent part:

> "(a) At its regular session in 1979, and at its regular session every tenth year thereafter, the legislature shall enact a statute reapportioning the state senatorial districts and representative districts. Bills reapportioning legislative districts shall be published in the official state paper immediately upon final passage and shall be effective for the next following election of legislators and thereafter until again reapportioned.

> "(b) Within fifteen days after the publication of an act reapportioning the legislative districts within the time specified in (a), the attorney general shall petition the supreme court of the state to determine the validity thereof. The supreme court, within thirty days from the filing of the petition, shall enter its judgment . . . .
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> . . . .
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> "(e) A judgment of the supreme court of the state determining a reapportionment to be valid shall be final until the legislative districts are again reapportioned in accordance herewith." (Emphasis added.)

By the plain language of the above, it is clear that the legislature, having acted in accordance with the constitution in 1979, is without the authority to act again until 1989, which is the tenth year after the initial reapportionment under the above-quoted language. In our judgment, any attempt by the legislature to reapportion senatorial districts on its own motion would be in direct contravention of the Kansas Constitution, and in our opinion would be struck down by the supreme court as unconstitutional. In addition, any bill enacted by the legislature prior to 1989 would be in conflict with the final judgment of the supreme court rendered in 1979. Only through a change in the constitution could the legislature act prior to 1989.

This conclusion has direct support in Kansas case law. In Harris v. Shanahan, 192 Kan. 183 (1963), the court was faced with 1963 Senate Bill No. 440, which, although stipulated to by all parties as providing equal representation, contained a serious technical flaw (the city of Leawood was disenfranchised). The court stated as follows (at 192 Kan. 190-191):

> "It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution. (Jones v. Freeman, 193 Okl. 554, 146 P.2d 564; Denney, Clerk, et al., v. The State, ex rel., Basler, 144 Ind. 503, 42 N.E. 929; The People v. Hutchinson, 172 Ill. 486, 50 N.E. 599; Parker, et al. v. The State,

> ex rel. Powell, 133 Ind. 178, 32 N.E. 836, 33 N.E. 119; People ex rel. Henderson v. Supervisors, 147 N.Y. 1, 41 N.E. 563; Harmison v. Ballot Com'rs, 45 W. Va. 179, 31 S.E. 394; 18 Am.Jur., Elections, §14, p. 190.) The apportionment period provided in the Constitution does not, of course, require that the act be passed at a regular session, but a special session may be called for that purpose. (The State ex rel. Attorney General vs. Cunningham, 81 Wis. 440, 51 N.W. 724; 18 Am.Jur., Elections, §14, p. 190.)
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> "The existing apportionment of the house of representatives was enacted in 1961 and that of the senate in 1963. Thus, both being current in terms of time within the meaning of Article 10, Section 2, those acts are not subject to change by the legislature until the next constitutional apportionment period unless held to be invalid. Since there is a presumption that laws passed by the legislature are valid and constitutional until judicially determined to be otherwise, the legislature will be powerless to lawfully reapportion until the next apportionment period, unless this court adjudges the present senate apportionment act to be invalid." (Emphasis added.)

After finding no acceptable way to read the omitted city back into the bill, the court threw out the entire measure.

Accordingly, while the legislature may not act on its own motion to reapportion the senatorial districts until 1989, it of course may be ordered to do so by the state supreme court or the federal district court, as has occurred numerous times in the past. See, e.g., cases cited at 225 Kan. 634, 635. Since the plan was deemed to be constitutionally sound when enacted, it may now be found defective only because the passage of time and the occurrence of events have rendered it unacceptable, or because of an inherent defect in the entire system used in Kansas for the reapportionment of such districts. In our opinion, a review of the facts and the case law precedents does not support either of the above grounds.

We would initially note that, while the figures used in drawing up the current districts and those presented by the federal census (a table of which you attached to your request) do differ in every district, the differences in most cases are slight. Indeed, the ideal district under the current plan is 59,000, or only 106 persons less than that presented by the federal census figures, which were compiled two years later. Furthermore, to the extent that such variances from the ideal figure have developed, they are probably due to population shifts or differences in counting, not action taken by the legislature which is subject to scrutiny for constitutional defects.

It is also pertinent to note that, with the exception of the 22nd District, the deviations between the two sets of census figures are within the range approved by other decisions in the area of reapportionment, given the valid state interest in preserving existing political subdivisions. See, e.g., Winter v. Docking, supra, 373 F. Supp. at 309-310 (11.6% variance from ideal), Harris v. Anderson, 196 Kan. 450, 453 (1966) (11% variance from ideal), Yancey v. Faubus, 251 F. Supp. 998 (1965) (15% variance from mean average), Mahan v. Howell, 410 U.S. 415, 35 L.Ed.2d 320 (1972) (16.4% total variance between largest and smallest districts). As the courts are so fond of saying, mathematical exactness is not required, even in the absence of a state interest. White v. Regester, 412 U.S. 755, 37 L.Ed.2d 314 (1973). Where a state interest is present, fairly large differences have been tolerated. Wyche v. Madison Parish Policy Jury, 635 F.2d 1158 (5th Cir. 1981).

It is additionally our opinion that the Kansas Constitution is not subject to attack on the grounds that reapportionment will not occur again until 1989. The validity of reapportionment on a decennial interval was discussed and approved by the United States Supreme Court in the landmark case of Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506 (1964), wherein the court stated:

> "That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth . . . . Limitations on the frequency of reapportionment are justified by the need for

> stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period . . . .
>
> "In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation." 12 L.Ed.2d at 539-540.

However, even if subsequent population shifts since 1979 are insufficient to call the plan into question, it is possible that inherent flaws may have been present at the outset which would result in the same finding. Specifically, this would arguably be the case for District 22, which is the one district where the state agricultural census figures differ widely from those of the federal census taken two years later. However, it is our opinion that the variance, while real, reflects a difference in the purpose for which the figures were gathered, and does not invalidate the 1979 reapportionment on equal protection grounds. The Supreme Court has held that states are not required to use the federal census for apportionment purposes, and has recognized that the use of other types of enumerations will give different, yet permissible, results. Burns v. Richardson, 384 U.S. 73, 16 L.Ed.2d 376 (1966).

A number of background facts about the 22nd District can be obtained from material contained in prior court files and decisions. As established by the final decree of the federal district court in Anderson v. Docking, Case No. W-3220, the district contained the city of Junction City and the townships of Milford and Smoky Hill in Geary County, and the city of Manhattan and the townships of Madison, Grant, Wildcat, Ogden, Manhattan, Ashland and Zeandale in Riley County. This left the district with a population which by 1978 had reached 60,444 (using the agricultural census), or only 2.5% over the ideal figure. Given this, only minimal changes were made

by 1979 Senate Bill No. 220, which shifted two and one-half townships in Riley County to the district on the east (the 21st), which needed more people.

As it is currently constituted, the district contains Junction City, Manhattan and the territory between the two cities, including the Fort Riley Military Reservation. While the residents of the post were included in the 1980 federal census, they were for the most part not counted by the state in its annual agricultural census, including the 1978 census from which the 1979 districts were derived. Only those inhabitants who had registered to vote, or who had taken other affirmative steps to establish residency, were counted. This fact was noted by the federal district court in Winter v. Docking, supra at 310-11, which rejected arguments that the agricultural census discriminated against military personnel. The court noted that Kansas statutes in fact treat persons living in federal enclaves on the same basis as Kansas residents for purposes of registering to vote. K.S.A. 25-3402, 25-3403.

The principle of "one man, one vote," first applied in Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962), is predicated upon the concept that one elector's voice should have the same weight as another's, within practical limits. Unless a person living within a federal enclave has taken steps to become a resident of Kansas, whether by registering to vote or otherwise, he or she has no connection with the political affairs of this state. The situation presented here is not like that in Evans v. Cornman, 398 U.S. 419, 26 L.Ed.2d 370 (1970), where residents of a federal enclave were not permitted to vote in Maryland, nor are members of the military being discriminated against because of the nature of their employment. Davis v. Mann, 377 U.S. 678, 12 L.Ed.2d 609 (1964). While it is theoretically possible that the 25,000 persons not reflected on the 1978 state agricultural census have since registered to vote, it is enough for the state to demonstrate a rational basis for its procedures. In considering such cases, courts have placed on plaintiffs the burden of showing that a particular class has reduced opportunity to participate in the electoral process, and are so disenfranchised. Clark v. Marengo City, 469 F. Supp. 1150 (S.D. Ala. 1979). The exclusion from the census of non-registered military personnel has already been challenged in Kansas, and the state's procedures upheld. Winter v. Docking, supra.

Having examined each of the above challenges to the current plan used to apportion the population of Kansas for senatorial

districts, it is our opinion that none rise to a level which results in a denial of equal protection under the law. Hence, in our opinion, no basis exists for court-ordered reapportionment at this time. However, given the timing of the next regularly scheduled reapportionment (1989), and the abolition of the state agricultural census, we feel constrained to note a likely grounds for challenge in the future.

In that the agricultural census was abolished in 1979 (L. 1978, ch. 55), with the federal census now used for all purposes (K.S.A. 11-201), the 1989 session of the legislature will be required to utilize the 1980 federal census figures, with the resulting districts based on such number until 1999, or nearly 20 years later. Such a result would be extremely vulnerable to an equal protection attack, which could end in yet another court-mandated reapportionment.

The existence of this potential problem was recognized during the 1979 hearings on Senate Bill No. 220 and its companion measure reapportioning the house of representatives. (Minutes of House Committee on Legislative, Judicial and Congressional Reapportionment, January 8, 1979.) As yet, we are aware of no steps which have been proposed to correct the situation, which of necessity would involve either amending Article 10 or reinstituting some form of state census. In contrast to undertaking actual reapportionment now, the legislature is fully capable of studying these or other solutions and then taking action.

In conclusion, pursuant to Article 10 of the Kansas Constitution, the 1979 Session of the Kansas Legislature enacted Senate Bill No. 220, which reapportioned the state senatorial districts, based on figures compiled in the 1978 state agricultural census. The reapportionment statute was presented to the supreme court by the Office of the Attorney General, with the court holding, in a final judgment, that the plan complied with the requirements of the state and federal constitutions. Accordingly, unless it is ordered to do so by a court of competent jurisdiction, the legislature may not act again on reapportionment until the time set forth by Article 10, which is 1989.

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derived from the state agricultural census, rather than the United States census, and have found no discrimination in the way the state census considered persons in military service in arriving at population figures for each district. Accordingly, the fact that U.S. census figures collected subsequent to 1979 are dissimilar from those used by the legislature and approved by the supreme court is insufficient to challenge the validity of the apportionment plan currently in effect. However, given that the state agricultural census has been replaced by the federal census, the next reapportionment scheduled for 1989 will of necessity use data collected in 1980, yet will draw districts which will be used until 1999. As population shifts during this lengthy period may give rise to equal protection concerns, the legislature may wish to consider remedial measures prior to 1989, such as amending the Kansas Constitution, Article 10, or reinstituting some form of state census.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Jeff Southard BJS

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle