



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

ATTORNEY GENERAL OPINION NO. 88- 111

The Honorable Robert G. Frey
State Senator, Thirty-Eighth District
P.O. Box 1177
Liberal, Kansas 67901-1177

Re: Census -- Population or Census Statistics;
Application -- Enumeration of Residents; Persons to
be Included; Determination of Residence

Synopsis: Residency for reapportionment of state senatorial and representative districts is established by statute. Persons who are citizens of a country other than the United States are deemed to be residents of the country in which they hold citizenship. Those persons are not to be enumerated in the Kansas census unless they obtain United States citizenship as well as establish legal residence in this state prior to the time of enumeration. The resulting distinction between citizens and non-citizens does not impermissibly dilute the power of an individual's vote, and does not therefor deny equal protection. Cited herein: K.S.A. 1987 Supp. 11-204, as amended by L. 1988, ch. 67, § 2; K.S.A. 1987 Supp. 11-205; Kans. Const., Art. 10, § 1.

* * *

Dear Senator Frey:

As State Senator for the Thirty-Eighth District, you request our opinion concerning the enumeration of residents of this state for reapportionment purposes. Specifically, you inquire whether a non-citizen who has established residency at a nursing home in this state is to be included in the enumeration. Additionally, you ask whether the exclusion of non-citizens in the enumeration violates the United States and Kansas Constitutions.

As of January 1, 1988, residents of the State of Kansas are to be counted for the purposes of reapportioning state senatorial and state representative districts. K.S.A. 1987 Supp. 11-204, as amended by L. 1988, ch. 67, § 2. Residency is determined pursuant to K.S.A. 1987 Supp. 11-205, which states that the "enumeration shall include all persons who have established a permanent residence in the state on the date of enumeration." However, that section also qualifies who is a resident for those situation where residency may be subject to various interpretations.

For purposes of conducting the enumeration only, persons who are not United States citizens are deemed to be residents of the country in which those persons hold citizenship. K.S.A. 1987 Supp. 11-205(c). You ask whether a person who previously was a non-resident, but who lives in a nursing home and establishes that nursing home as the legal residence, should be counted when that same person is a citizen of another country. See K.S.A. 1987 Supp. 11-205(g). You state that since subsection (g) is the more specific provision, the statute indicates that the individual should be counted. However, we do not agree that subsection (g) is controlling.

As you correctly point out, other subsections presume residence elsewhere under various circumstances, unless that other residence has been abandoned and a new legal residence is established at the place where the individual is living at the time of enumeration. For example, K.S.A. 1987 Supp. 11-205(b) presumes that students attending school reside in the place where they lived prior to attending school, unless residence is otherwise established. Subsection (d) makes a similar presumption for those in the military, subsection (e) for persons living in areas of ceded jurisdiction, and (f) for persons living in state hospitals, and state benevolent and correctional institutions.

We believe that subsection (c) controls in circumstances where other subsections may also apply. If a person is not a United States citizen, then the statute establishes residency in the country of citizenship. If a person is a United States citizen, then residency is where the person lives at the time of enumeration, unless other circumstances are present which create a presumption of a different residency. Such a presumption may be overcome by establishing legal residency in the locality where the individual lives at the time of enumeration. In summary, a non-citizen cannot become a resident for purposes of enumeration without first establishing United States citizenship.

Your second question is whether the exclusion of non-citizens in the enumeration violates the United States and Kansas Constitution. Article 10, § 1 of the Kansas Constitution requires reapportionment in 1979 and every tenth year thereafter. The method used to determine legislative districts is not mandated by that section of the Constitution. See Bacon v. Carlin, 575 F. Supp. 763, 763-64 (D. Kan. 1983). You ask whether excluding non-citizens denies equal protection.

The United States Supreme Court has been more flexible in variations from ideal apportionment in state representation than in federal representation. Compare Kirkpatrick v. Preisler, 394 U.S. 526, 531, 22 L.Ed.2d 519, 525 (1969) (congressional districts must be drawn to give one person one vote, only limited and unavoidable variances tolerated) with Mahan v. Howell, 410 U.S. 315, 324, 35 L.Ed.2d 320, 330 (1973) (state redistricting plan to be judged by equal protection test, not by Kirkpatrick standard). That is not to say that states may deny individuals the right to an equal vote. The Equal Protection Clause protects the right of a citizen "to equal representation and to have his vote weighted equally with those of all other citizens." Reynolds v. Sims, 377 U.S. 533, 576, 12 L.Ed.2d 506, 535 (1964). The difficulty arises in determining who must be counted to compare voting power. While the comparison of voting equality in Reynolds used the total population as a basis, such is not required. In Burns v. Richardson, 384 U.S. 73, 16 L.Ed.2d 376 (1966), the Court stated:

"Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the states are required to include aliens, transients, short-term or temporary residents, or persons denied the

vote for conviction of a crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." 384 U.S. at 92, 16 L.Ed.2d at 390-91.

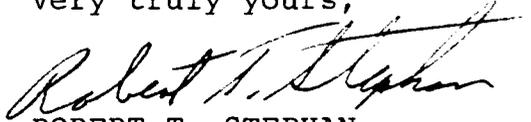
The language of Burns was cited in Bacon v. Carlin, 575 F. Supp. 763, 764-65 (D. Kan. 1983) aff'd, 466 U.S. 966, 80 L.Ed.2d 812 (1984), in holding that Kansas' 1979 apportionment scheme, which was based on the 1978 agricultural census, was constitutional. The agricultural census excluded aliens, transients, and military personnel who had not established legal residence in Kansas. The plaintiffs contended that, as the agricultural census had been discontinued after 1978, the state must rely on the 1980 federal census, which did not exclude those persons. If the federal census were used, legislative districts would deviate from those derived from the state agricultural census. 575 F. Supp. at 764. The court did not compel the state to reapportion legislative districts based on the federal decennial census.

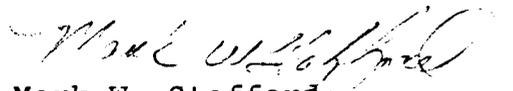
In light of the cases which have considered the question of whether different apportionment schemes deny equal protection, we believe that K.S.A. 1987 Supp. 11-205 is not so facially deficient that the presumption of constitutionality is overcome. Acts of the legislature are presumed constitutional, and before they may be stricken on constitutional grounds, they must clearly violate the constitution. Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 340 (1988). We do acknowledge and defend the right of an individual to cast a vote for representation which is equal to the vote of another. However, the method of enumeration provided by statute does not dilute the voting power of an individual. Being counted or having another counted in a census which is conducted for reapportionment does not appear to be a fundamental right. The enumeration scheme does not result in hostile or oppressive discrimination against a class of individuals. A rational basis for the exclusion of the non-residents therefore satisfies an equal protection challenge. See Farley v. Engelken, 241 Kan. 662, Syl. ¶ 3 (1987).

In conclusion, it is our opinion that residency for reapportionment of state senatorial and representative districts is established by statute. Persons who are citizens of a country other than the United States are deemed to be

residents of the country in which which they hold citizenship. Those persons are not to be enumerated unless they obtain United States citizenship as well as establish legal residence in this state prior to the time of enumeration. The resulting distinction between citizens and non-citizens does not impermissibly dilute the power of an individual's vote, and does not therefor deny equal protection.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Mark W. Stafford
Assistant Attorney General

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