Opinion No. 63-153

November 11, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Honorable W. C. Wheatley President Pro Tempore New Mexico State Senate Twenty-Sixth Legislature Santa Fe, New Mexico

QUESTION

QUESTIONS

1. If the Special Session of the legislature enacts legislation reapportioning the State House of Representatives from the number of representatives now existing, what legal effect would such reapportionment legislation have upon the actions of the Legislature at the anticipated Special Session to be held in February, 1964, and what legal effect will such reapportionment have on any legislation passed by the Legislature in the February 1964 Session?

2. May the Legislature enact reapportionment legislation at the present session, in view of the fact that at the present time there is a constitutional provision, Article IV, Section 3, governing the method of legislative apportionment and which constitutional provision has not formally been declared unconstitutional by a final order of any court; and in the event that the court declares the present provision of the constitution regarding reapportionment unconstitutional, as the court has indicated it will do in its memorandum, what effect will legislation passed at this session have, as to the method of reapportioning?

CONCLUSIONS

1. See Analysis.

2. See Analysis.

OPINION

*{*356}* **ANALYSIS**

Because of the related nature of the two questions presented the two inquiries will be considered together.

At present the New Mexico State Legislature has been called into Special Session by the Governor to enact legislation concerning the method of apportionment of legislative members to the State House of Representatives. The Court in **Cargo et al., vs. Campbell, et al.,** Cause No. 33273, District Court of Santa Fe County, New Mexico,

has indicated in a memorandum opinion that Section 3 of Article IV of the Constitution violates the provision of the equal protection clause of the Fourteenth Amendment to the Federal Constitution, and the court in written order entered September 9, 1963, stayed the entry of final judgment in the case pending an opportunity for legislative action prior to December 1, 1963.

Since the United States Supreme Court decision of **Baker v. Carr** (March 26, 1962) 82 S. Ct. 691, 369 U.S. 186, 7 L. Ed. 663, state and federal courts in approximately forty states have considered cases involving the validity of state constitutional and statutory provisions respecting the method of apportioning legislative offices.

In a majority of the states *{*357}* wherein court decisions have been rendered striking down constitutional or legislative apportionment provisions, the state legislatures have been called into session to rectify the existing mal-apportionment of such legislative bodies. Examination of the methods utilized by the legislative bodies of the various states indicates that reapportionment has been effected by means of either constitutional or legislative provisions.

Upon the formal entry of a written order by the District Court, in the case of **Cargo et al., v. Campbell, et al.,** declaring invalid the state constitutional provision regarding apportionment of members to the State House of Representatives, New Mexico will be left without specific legal provision specifying the number of representatives which are to serve in the State Legislature or the method and means of their selection, unless legislation or judicial provision is made to fill such void.

Article XIX, Section 1, of the New Mexico State Constitution specifies that any proposed amendment to the State Constitution may be proposed in either House of the Legislature **"at any regular session thereof..** . ." This provision prevents the legislature from enacting a proposed constitutional amendment concerning reapportionment at the present Special Session and thus its action at such Special Session is limited to the passage of legislation.

Until a court enters its final judgment, a presumption of validity attends legislative or constitutional provisions. Oral pronouncements by a court prior to entry of a final judgment are not binding upon the court, **Ferret v. Ferret,** (1951), 55 N.M. 565, 237 P. 2d 594; **Wray v. Pennington** (1957), 62 N.M. 203, 307 P. 2d 536, and as stated in Wray v. Pennington, supra, no judgment of a court is effective until placed in writing and filed as such. Similarly, written memorandums do not constitute entry of a final judgment, but are explanatory of the holding of the court. **State v. Scott** (1926) 247 P. 699, 35 Wyo. 108; and **Sloan v. Dunlap** (1946) 194 S.W. 2d 32.

Thus, until the court in **Cargo, et al., v. Campbell, et al.,** enters its final judgment in writing, technically, the existing state constitutional provisions pertaining to reapportionment remain. However, upon formal entry of the court's final judgment such existing constitutional provisions relating to reapportionment, in accordance with the court's judgment would become void. At such time legislation adopted by the Twenty-

Sixth Legislature at a Special Session would become effective to control the method of apportioning the State House of Representatives, unless the trial court were to rule that such new legislation failed to comply with the requisition of due process guaranteed by the Fourteenth Amendment and enunciated in **Baker v. Carr,** supra. Dependent upon the action of the trial court, it is our opinion that reapportionment legislation adopted by the Legislature at the Current Special Session would take effect upon the entry of the trial court's final judgment striking down existing constitutional apportionment provisions, and such legislation would constitute the legal basis upon which future elections for state representatives would be grounded.

In light of the stated unconstitutionality of existing constitutional provisions providing for reapportionment, it is apparent that the only manner available to the Legislature to correct this mal-apportionment is by the formulation and adoption of reapportionment legislation which would become effective upon the entry of the trial court's final judgment, declaring *{*358}* the state constitutional means of apportionment void.

In our opinion if reapportionment legislation is adopted at this Special Session it is not mandatory that such legislative reapportionment be effected prior to the calling of an anticipated Special Session of the Legislature in February, 1964, to deal with state fiscal matters, since a reading of the complaint in **Cargo, et al v. Campbell, et al.,** indicates plaintiffs seek only an adjudication that reapportionment of the State House of Representatives be carried out prior to November, 1964. Dependent upon the specific provisions of the court's final judgment in such case, and subject to the particular provisions of adopted legislation, it is our opinion that the enactment of reapportionment legislation by the current Special Session would not affect the validity of legislative acts at a Special Session of the Twenty-Sixth Legislature if called in February, 1964.

In the case of **United States, ex rel Watkins v. Commonwealth of Pennsylvania, et al.,** (March 8, (1963) a habeas corpus proceeding was brought alleging in part that petitioner's conviction was void by reason of the invalidity of a legislative enactment passed by a malapportioned legislature. The Federal District Court dispensed with such contention, holding:

". . . His complaint is that the legislators who enacted the statute by which he was convicted, were 'elected illegally,' and so his conviction was unconstitutional.

Thus, while seeking consequentially to invalidate a state statute, his object here is to strip the legislators, who enacted the law, of their authority and to oust them, in retrospect, from office and title to office. This again is being indirectly done since title to public office may be tested only in Pennsylvania courts by procedures in quo warranto. Shoemaker v. Thomas, 328 Pa. 19, 195 A. 103; Mahoney Township Authority v. Draper, 356 Pa. 573, 52 A. 2d 653; Spencer v. Snedeker, 361 Pa. 234, 64 A. 2d 771.

Even such unstable assertions are met by an abundance of law which guides this Court. There is well-settled law that where one who is in possession of public office under color and authority derived either from election or appointment, however irregular or informal,

and where such a one discharges his duties in behalf of the public or in public interests, the acts of such a one are valid and binding whether his status is de jure or de facto. This has been recognized as early as 1812 when in the Bank of America v. McCall, 4 Binn. 371, 4 Pa. 371. . . See also Commonwealth v. Brownmiller, 141 Pa. Super. 107, 14 A. 2d 907; Coyle v. Commonwealth, 104 Pa. 117; Warner v. Borough of Coatesville, 231 Pa. 141, 80 A. 576; Commonwealth ex rel. Palermo v. City of Pittsburg, 339 Pa. 173, 13 A. 2d 24; Borough of Pleasant Hills v. Jefferson Township, 359 Pa. 509, 59 A. 2d 697; Town of Largo v. Richmond, 109 F.2d 740, 742 (5th Cir.)."

In the early case of **In Re Sherill, et al.,** (1907) 81 N.E. 124, 188 N.Y. 185, the New York Court of Appeals considered at length the effects of a legislative body alleged to have been mal-apportioned. In a concurring opinion it was stated:

". . . When this appeal was before us immediately prior to the general election last year, in dismissing that appeal we unanimously said that, whether the apportionment act of 1906 *{*359}* was constitutional or not, the Legislature which might be actually chosen by the electors of the state under that apportionment would be a de facto Legislature, whose acts would, in all respects, be binding. To that declaration we still adhere, and we understand no one to gainsay it. It is now, however, suggested that, when our decision that the apportionment act is unconstitutional is announced, from that time the present Legislature will no longer be a de facto body. This suggestion is without force either in principle or under the authorities. An act of the Legislature if invalid, as violating the Constitution, is invalid from the time of its enactment, not merely from the declaration of its character by the courts. But though the appointment or election of a public officer may be illegal, it is elementary law that his official acts while he is an actual incumbent of the office are valid and binding on the public and on third parties. 2 Kent's Comm. 295; People ex rel Bush v. Collins, 7 Johns. 549; Wilcox v. Smith, 5 Wed. 231, 21 Am. Dec. 213; People ex rel Sinkler v. Terry, 108 N.Y. 1, 14 N.E. 815; State v. Carrol, 38 Conn. 449, 9 Am. Rep. 409. In the case last cited there is one of the best expositions of the doctrine of de facto officers to be found in the Reports. The doctrine is not one of convenience merely, but of necessity. . . .

". . . The position of the members of the present Legislature is much stronger. The proceeding before us is not to try the title of any member of the Legislature to his office, but against certain administrative officers as to the conduct of an election. Therefore, were it possible for the courts to try the title of members of the Legislature, this decision would not directly affect that title. But, under the Constitution, each house of the Legislature is the exclusive judge of the election and qualification of members. The courts have no jurisdiction to determine the title of any member. In the case of People ex rel. Sherwood v. State Board of Convassers, 129 N.Y. 360, 29 N.E. 345, 14 L.R.A. 646, by a divided court, it was held that the relator being disqualified under the Constitution from election as a senator the courts would not compel a board of canvassers to give a certificate of his election, but even the majority opinion conceded that the ruling of the court would in no way bind the Senate, when convened, on the question of the relator's rights. As already said, the Senate and Assembly elected under the apportionment act, and actually assembled, constitute in any aspect a de facto

Legislature. As a de facto body each house has, under the Constitution, not only the exclusive power, but the exclusive right, to judge of the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat becomes thereby a de jure member of that house, even though the courts, were such a question triable before them, might be of a different opinion. **It follows, therefore, that not only is the present Legislature a valid Legislature, but that each member thereof, so long as the particular house to which he belongs does not oust him, is as to all the world not only a de facto, but a de jure, member, and he is entitled to all the privileges of a member, the exemption of his person, the right to his salary, and the like, and his title to office cannot be challenged before any tribunal except the house itself.** Thus there can be *{*360}* no vacancy in any particular district which the Governor or other officer can call upon the electors to fill, unless the house ousts the member and declares him not entitled to his seat. . ." (Emphasis supplied).

In **State ex rel. Sullivan et al., v. Schnitzer,** (1908), 95 P. 698, the Supreme Court of Wyoming expressed the rule that the Courts will not declare a legislative apportionment act unconstitutional when there is no prior valid apportionment act to fall back upon. The Court noted also that the acts of a legislative body, even though the body was elected under an inequitable apportionment act, constituted the acts of a de facto body. See also **State ex rel Winnie v. Stoddard et al.,** (1900) 62 P. 237.

It was held also, in **Fesler v. Brayton,** 44 N.E. 37, that the courts will not act to strike down the existing legislature and thereby sweep away all means of electing another legislature. The court stated therein in part:

". . . it is justly held in Denney v. State, supra, that the legislature may not wantonly sweep away all means of electing another legislature. . .

As was said in Denney v. State, supra, the people in the constitution have provided that all officers except members of the legislature shall hold their respective offices during the term for which they were elected, and until their successors are elected and qualified. We may notice, in passing, that such provision points unerringly to the design of the framers of the constitution that the functions of government, executive and administrative, should not come to an end for want of persons authorized to perform them. But as to members of the general assembly, for important and obvious reasons, a different rule was provided. That rule is that each member's official career and authority ends with the end of the term for which he is elected. Whether his successor is elected or not. Therefore, if there is no law in force for the election of a legislature, and the existing legislature expires without enacting such a law, the legislature expires without enacting such a law, the legislative department of the state government is at an end. The other two departments must soon expire if there be no legislative department. . . . A reference to the apportionment so confirmed will show that it was not constructed in accordance with the provisions of the supreme law itself; and yet it is confirmed and adopted for the simple and all-sufficient reason that some law was necessary under which a legislature might be chosen. Even a defective law would be upheld, rather than

that there should be no law for the election of a general assembly. The constitution of the United States itself would compel the recognition of such a law for the election of a legislature as valid, at least until another could be enacted to take its place. In Article 4, § 4, of the federal constitution, it is provided that 'the United States shall guaranty to every state in this Union a republican form of government'; and it is impossible for us to conceive of a republican form of government without the election by the people of representatives in the general assembly.

. . ."

The New Mexico Supreme Court has recognized that the acts of public officers carried out under a de facto status are valid and *{*361}* effective. **City of Albuquerque v. Water Supply Co.** (1918) 24 N.M. 368, 174 P. 217; **In Re Santillanes** (1943) 47 N.M. 140, 138 P. 2d 503; and **Heron v. Gaylor** (1945), 49 N.M. 62, 157 P. 2d 239.

The Florida Supreme Court **In Re Advisory Opinion to the Governor** (January 31, 1963) 150 So. 2d 721, held in a situation analogous to that existing in New Mexico, that even though the federal court had declared the state constitutional and legislative provisions for reapportionment invalid, that it was the power of and, the duty of the Governor to call recurring sessions of the Florida Legislature until valid reapportionment was accomplished.

A number of courts as a concomitant of holding that state reapportionment provisions were violative of the Fourteenth Amendment to the Federal Constitution, have permitted the various state legislatures meet and adopt legislation to correct such inequitable features. It is obvious, that under such court extensions, or decrees that the legislature must effect reapportionment promptly after such judicial ruling, but the legislature under such rulings is not and cannot be limited to considering only reapportionment legislation, for to hold otherwise would permit setting the state for a possible financial crisis in state government and to strip the legislature of its legitimate area of control. See **Opinion of the Justices to the Senate and the House of Representatives** (July 8, 1963), 191 N.E. 2d 779, Supreme Judicial Court of Massachusetts, wherein it was held:

". . . In Lamson v. Secretary of the Commonwealth, 341 Mass. 264, 168 N.E. 2d 480, we rejected a contention that the reapportionment would have to take place only at the 'first regular session after the return' (341 Mass. p. 268, 168 N.E. 2d 483). At page 270 of 341 Mass., page 414 of 168 N.E. 2d 484, 34 said, 'The manifest object of Art. 22 is reapportionment promptly after the enumeration. . ."

The above case is indicative that reapportionment must be carried out with dispatch and promptness. However, the legislature may concurrent with its consideration of reapportionment measures, or within a reasonable time prior to the time reapportionment can be effected, transact other business vital to the state's interests.

After careful consideration of the above authorities, we believe that it is clear that the legislature may properly provide for legislative reapportionment by statutory means at

the current Special Session, and that such legislation if adopted, would become effective at such time as the trial court actually enters a written final judgment declaring existing constitutional apportionment provisions invalid. In addition, it is our opinion that if reapportionment legislation is adopted at the present Special Session, the legislature as it is now constituted, may properly meet again in another Special Session held in February, 1964, to consider and enact emergency legislation of concern to the state. Since legislators as public officers continue to hold office until their successors are elected and qualify, it is our opinion that they patiently are vested with the right, as de jure, or even as de facto officers, to carry out their legislative duties, until within the framework of new legislative apportionment legislation, there can be adequate time for the orderly processes of nomination, election and qualification of new representatives to the State Legislature. And, in accordance with the above cited authorities we conclude that legislation enacted by the Twenty-Sixth *{*362}* State Legislature at such contemplated Special Session would be valid and effective.

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