

Opinion No. 81-31

December 16, 1981

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Honorable Robert M. Hawk, New Mexico State Representative, 1005 Washington, S.E., Albuquerque, New Mexico 87108

FACTS

Article X, Section 7(A) of the New Mexico Constitution was adopted at a special election held on November 6, 1973 to provide for a five-member board of county commissioners in counties with a population of more than 100,000 and an assessed valuation of more than \$75,000,000. At the general election held on November 4, 1980, Section 7(B) was added to provide for a five-member board of county commissioners in those counties having a population of less than 100,000 but more than 65,000 and an assessed valuation of between \$200,000,000 and \$450,000,000. Bernalillo County is governed by the provisions of Article X, Section 7(A).

QUESTIONS

1. May the Bernalillo County Commission reapportion itself, with or without legislative approval?
2. Having been initially apportioned in 1974, may Bernalillo County be reapportioned in 1983 or 1984 for 1984 elections instead of 1982 for the 1982 elections?

CONCLUSIONS

1. No.
2. Yes.

ANALYSIS

Article X, Section 7(A) of the New Mexico Constitution provides that the "county shall be divided into five county commission districts which shall be compact, contiguous, and as nearly equal in population as practicable." In **State ex rel. Robinson v. King**, 86 N.M. 231, 233-234, 522 P.2d 83 (1974), the Supreme Court found that Article X, Section 7(A)

"...made no provision for who should have the power and authority to divide the county into districts. It simply states that 'the county shall be divided into five county

commission districts ***.' This language is certainly not self-executing since it merely indicates a principle without laying down rules having the force of law."

The Court went on to explain that as a county has only such powers as are granted by the legislature and as the county has been granted no power to district itself, then "the power to district must rest in the state legislature." 86 N.M. at 234. Accordingly, by Laws 1974, Chapter 21, the legislature specifically defined the five commission districts of Bernalillo County by precinct. Section 4-38-5 NMSA 1978. Similarly, the Bernalillo County Commission has no authority to reapportion itself after the 1980 census.

Section 4-38-3(C) NMSA 1978 requires that an apportionment of Bernalillo county "shall be made once after each federal decennial census." Such reapportionment may be effected by amendment of Section 4-38-5. It is not specifically required, however, that the legislature reapportion the county in the first legislative session for which the new census figures are available.

Where constitutional language specifically required reapportionment as the "first session" after the census enumeration, it was held that such language "would seem clearly to point to definite and prompt action at the earliest practical moment." **People ex rel. Carter v. Rice** , 135 N.Y. 473, 31 N.E. 921, 924 (1892). Where the constitutional language provided that "[a]fter each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable," it was held to be within the discretion of the board of county commissioners, upon study of the decennial census figures, to decide whether existing districts are as nearly equal as possible. **Flager County Board of Commissioners v. Likins, Fla.** , 337 So.2d 801 (1976).

In any case, failure to reapportion may invite judicial intervention. Although reapportionment is a legislative responsibility, judicial relief is appropriate "when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." **Reynolds v. Sims** , 377 U.S. 533, 586 (1964); see also, **White v. Weiser** , 412 U.S. 783 (1973); **Chaoman v. Meier** , 420 U.S. 1 (1975).

The constitution requires, under the equal protection clause of the Fourteenth Amendment, that any representational plan be calculated to make each person's vote the equal, as nearly as possible, of any other person's vote. See, e.g., **Wesberry v. Sanders** , 376 U.S. 1 (1964). In **Avery v. Midland County** , 390 U.S. 474 (1968), the Supreme Court applied this requirement to local governmental bodies. The Court held that the Constitution "permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." 390 U.S. at 485.

With respect to the frequency of reapportionment, the Supreme Court stated in **Reynolds v. Sims** , *supra* , that the equal protection clause does not require "daily, monthly annual or biennial reapportionment, so long as a State has a reasonably

conceived plan for periodic readjustment of legislative representation." 377 U.S. at 583. The Court concluded that decennial reapportionment would meet "minimal requirements for maintaining a reasonably current scheme of legislative representation." 377 U.S. at 583-584.

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