THE ATTORNEY GENERAL OF TEXAS

PRICE DANIEL
ATTORNEY GENERAL

AUSTIN 11, TEXAS

July 25, 1951

See H-220

Hon. Boyd Barjenbruch
County Attorney
Montague County
Montague, Texas

Opinion No. V-1218

Re: Validity of a commissioners' court order creating new justice precincts without correspondingly changing the boundaries of election precincts.

Dear Sir:

Your request for an opinion presents five seperate questions relating to the validity of an order of the Commissioners' Court of Montague County creating new justice precincts. You state that:

"On January 10, 1949, the Commissioners Court of Montague County, Texas, entered an order creating 4 new Justice Precincts in Montague County, Texas, in lieu of the 8 precincts which were in existence at that time.

"In creating the 4 new Justice Precincts, the Commissioners Court crossed certain Election Precinct lines, thereby placing said election precincts or parts thereof in two different Justice Precincts.

"In the elections of 1950, Justices of the Peace were elected for the 4 new created Justice Precincts, who took office January 1, 1951. And there were constables elected for Justice Precincts Nos. 1, 2, and 3 and there was no candidate for the office of constable in Precinct No. 4.

"In creating the 4 new Justice Precincts, the Commissioners Court failed to create new election precincts to correspond with the boundaries of said 4 Justice Precincts and have the election precincts entirely within the boundaries of said Justice Precincts."

Section 18 of Article V of the Constitution of Texas, provides in part:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. The present County Courts shall make the first division. Subsequent divisions shall be made by the Commissioner's Court, provided for by this Constitution. In each such precinct there shall be elected at each biennial election, one justice of the peace and one constable, each of whom shall hold his office for two years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8000 or more inhabitants, there shall be elected two justices of the peace. . . ."

In discussing the power of the commissioners' court derived from the above quoted constitutional provision, it is stated in State v. Rigsby, 43 S.W. 271, 273 (Tex.Civ.App. 1897, error ref.):

> "When the commissioners' court was organized, in pursuance of the constitution and the laws passed thereunder, it possessed all powers conferred by both. When the court was once established, no legislation was needed to enable it to exercise the powers given by the above provision, to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts. It is said that no procedure is prescribed by which the power is to be exercised. If any was needed, the statute supplied it, when it required that the proceedings of the court should be recorded in its minute book. Rev. St. 1895, art. 1554. This was all that was necessary. The power to divide the county into justices' precincts is also given by the statute, but not in terms so explicit as those used in the constitution. Rev. St. 1895, art. 1557. There can be no doubt that both constitution and statute confer the power, and the only question is as to its extent. It is contended that a limitation upon the power is

found in the constitutional provision fixing the terms of office of precinct officers; and that, since they are to hold for two years, it follows that the precincts cannot be changed during the terms, because the power to alter them would practically enable the court to destroy the office. The language of the constitution expresses no such limitation. The division is to be made 'from time to time.' The reason for the division is to be the convenience of the people; and the judge, both as to time and convenience, is the court. The limitation contended for by appellant would require the insertion in the constitution of a proviso which the court cannot read into it. The only limitation imposed serves to indicate the scope of the power. That limitation requires as many as four, and does not allow more than eight, precincts. But for it the county might have been cut up into as many precincts as the court saw proper to establish. By it the intention is made more manifest that, within the limits, the court is to determine the number. As to the time of making the division, it is equally plain. The language 'from time to time, for the convenience of the people,' clearly means that the convenience of the people, as judged by the court, shall control in determining the time when a division is proper. The phrase 'from time to time' repels the idea that it was the purpose to fix any particular time.

"If it should be urged that the provisions contemplate a complete, and not a partial, division, the answer is that, in effect they are the same. When two precincts are made out of one, or the boundaries between two are changed and defined, leaving all of the others unchanged, the effect is the same as if an order were entered setting out anew the boundaries of the unchanged precincts, as well as those changed. As no form of procedure is prescribed, there could be no substantial objection to such action. The power to establish the precincts does not necessarily conflict with the provisions fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. . . ."

The court, in Hastings v. Townsend, 136 S.W. 1143, 1145 (Tex.Civ.App. 1911), held:

> "It appears to be the undoubted right of a commissioners' court to change the boundaries of justice's precincts at will, and it has been held that such courts may abolish a precinct and create a new precinct composed of the one abolished and a part of another, and that it was immaterial that the court did not at the time redistrict the whole county. State v. Rigsby, 17 Tex.Civ.App. 171, 43 S.W. 271."

The Supreme Court, in Williams v. Castleman, 112 Tex. 193, 247 S.W. 263 (1922), reviewed the above cases and made the following observation, at page 267:

> "It is thus seen that there is no limitation on the time when the commissioners' court may divide a county into justice precincts, and that, aside from the maximum and minimum prescribed in the Constitution, there is no limitation as to number. The Constitution does not state how the power of division by the commissioners' court shall be exercised, nor does the statute. From the quotation from the opinion by Judge Williams, supra, it is clear that no legislative action was necessary. It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action. Bourgeois v. Mills, 60 Tex. 76. Since it is clear that the determination of the facts necessary for action by the commissioners' court is not made dependent on state legislative action, it is inconceivable that it should be made dependent upon federal action, in the form of the United States census, unless the Constitution expressly so stated, which is not the case.
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> "There is no part of the duty enjoined by section 18, art. 5, on the commissioners'

court which may be performed without considering the population, occupations, and industries, not only of the county, but of each contemplated subdivision of the county; and to say that the commissioners' court must follow the census reports, which are issued only every 10 years, is to destroy the very purpose of the power conferred on the commissioners' court to divide the county from time to time into a sufficient number of justice precincts for the convenience of the people.

"It is plain from section 18, art. 5, of the Constitution that its prime purpose in not fixing definitely the number of justice precincts in any county, and the number of justices in any particular precinct was, as it states, 'the convenience of the people'; that is, to give to the commissioners' court some discretion so that the number of precincts may be made to meet the changing needs of the people.

"The object of the Constitution in providing for two justices of the peace in precincts containing 8,000 or more inhabitants is the same as that declared in the previous paragraph of the same section--that is, for the convenience of the people. No method of determining the population is given in this section or elsewhere in the Constitution. The determination of the population by some authority is necessary to set in motion the process by which two justices are to be elected, or a vacancy in the office filled by appointment. The Constitution contains no express direction, either to the electorate or to the appointive power, as to how or when this question of population is to be determined, nor is any provision made in the statutes therefor. Vernon's Complete Texas Statutes, arts. 2241, 2286. But legislation was not necessary to enable the commissioners' court to exercise any of the powers given in this provision of the Constitution."

In Attorney General's Opinion V-1032 (1950), it is stated:

> "In view of the foregoing you are advised that the Commissioners' Court of Sabine County had the authority to redistrict the justice precincts in the county so as to provide that the county would consist of four justice precincts rather than eight regardless of the territory the justice precincts now include." (Emphasis added.)

See also Brown v. Meeks, 96 S.W.2d 839 (Tex.Civ.App. 1936 error dism.).

In view of the foregoing, it is our opinion that the order of the commissioners' court creating new justice precincts is a valid exercise of its power expressly granted by the provisions of Section 18 of Article V, Constitution of Texas.

The conclusion we have reached above makes unnecessary an answer to your remaining questions. Hogg v. Campbell, 48 S.W.2d 515 (Tex.Civ.App. 1932), and Wilson v. Weller, 214 S.W.2d 473 (Tex.Civ.App. 1948), are, in our opinion, not applicable to the questions presented. These cases involved the validity of orders of the commissioners' court creating new election precincts under Article 2933, V.C.S., while your request involves an order of the commissioners' court creating only new justice precincts under Section 18 of Article V, Constitution of Texas. In this connection, any future order defining new election precincts must conform to the newly created justice precincts as provided in Article 2933.

SUMMARY

> Section 18 of Article V of the Constitution of Texas authorizes the commissioners' court to abolish existing justice precincts and create new justice precincts at any time for the convenience of the people, regardless of the territory to be included in the precincts. The only limitation on this power is that there must be at least four and not more than eight justice precincts at all times. State v. Rigsby, 43 S.W. 271 (Tex.Civ.App. 1897, error ref.); Hastings v. Townsend, 136 S.W. 1143 (Tex.Civ.App. 1911); Williams v. Castleman, 112 Tex, 193, 247 S.W. 263 (1922);

Brown v. Meeks, 96 S.W.2d 839 (Tex.Civ.App. 1936, error dism.); Att'y Gen. Op. V-1032 (1950).

APPROVED:

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Yours very truly,

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