



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

January 22, 1970

see H-220

Honorable Ted Butler
Criminal District Attorney
Bexar County Courthouse
San Antonio, Texas 78204

Opinion No. M- 562
Re: Constitutionality of
Paragraph (a) of Article
2351-1/2, V.C.S., and
related questions.

Dear Mr. Butler:

Your recent request for an opinion of this office arises out of an order of the Commissioners Court of Bexar County entered on October 9, 1967, a copy of which was attached to your letter. The effect of the order in question is to reduce the number of justice precincts in Bexar County from eight to five. The order provides in part that "Justice of the Peace and Constable Precincts Three, Four, Five, Six, Seven and Eight, . . . are hereby abolished, eliminated and terminated effective as of January 1, 1969, and that Justice of the Peace and Constable Precincts Three, Four, and Five are hereby created and established as of January 1, 1969, . . ." Thereafter the order sets forth the territorial limits of the new precincts. The order further specifically provides that Precinct No. 1 and Precinct No. 2 were not abolished, eliminated and terminated by the order. The order then provides that the offices of Justice of the Peace and Constable in the newly created precincts were to be filled in the following manner:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Commissioners Court of Bexar County, Texas, that in the elections to be held in the year 1968 the aforementioned offices shall be filled at said elections by the voters of the respective precincts as they will exist on the effective date of January 1, 1969, and that any person who has resided within the territory embraced in the new precincts for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the elections to be held in the year 1968 shall be for a two year term beginning January 1,

1969, and expiring December 31, 1970, for Justices of the Peace of Precincts Three, Four and Five, and for a four year term beginning January 1, 1969, and expiring December 31, 1972, for Justice of the Peace, Precinct One, Place One, and for Constables of Precincts One, Two, Three, Four and Five."

This provision of the order of the Commissioners Court was entered pursuant to Paragraph (a) of Article 2351-1/2 of Vernon's Civil Statutes, which reads as follows:

"(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time."

Based upon these facts, you state in your letter that one of the Justices of the Peace elected pursuant to the order of the Commissioners Court at the general election in 1968 has raised the following questions:

1. "Was the order of the Commissioners Court establishing the term of office for Justices of the Peace of Precinct Three, Four and Five for two years, Beginning on January 1st, 1969 and ending on December 31st, 1970, constitutional?"

2. "Were the Justices of the Peace of Precinct Three, Four and Five who were elected at the General Election in November 1968 elected for a two year term or a four year term?"

3. "Do the Justices of the Peace of Precincts

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Three, Four and Five have to file for the Primary Election of their respective parties and if nominated run for election in the General Election of November, 1970?"

Under the provisions of Section 18 of Article V of the Constitution of Texas, the power to divide the county from time to time into justice precincts of not more than eight or less than four is exclusively lodged in the commissioners courts of the respective counties of this State. Williams v. Castleman, 112 Tex. 193, 247 S.W. 263 (1923); Dowlin v. Rigsby, 43 S.W. 271 (Tex.Civ.App. 1897, error ref.). In the exercise of its exclusive power to change precinct boundaries, the commissioners court can abolish an existing precinct and create a new precinct composed of the one abolished and a part of another without redistricting the whole county. Hastings v. Townsend, 136 S.W. 1143 (Tex.Civ.App. 1911, no writ). Therefore, it is clear that the Commissioners Court of Bexar County had the authority to abolish Precincts Three, Four, Five, Six, Seven and Eight and create three new precincts from the territory of the ones abolished, leaving Precincts One and Two unchanged and unaffected by the order.

The courts of this State have long followed the rule that upon the effective date of an order, such as the one entered by the Commissioners Court of Bexar County, the old precincts and precinct offices cease to exist, and, as of that date, the new precincts come into existence with the precinct offices vacant. Williams v. Castleman, 112 Tex. 193, 247 S.W. 263 (1923); Dowlin v. Rigsby, 43 S.W. 271 (Tex.Civ.App. 1897, error ref.); Brown v. Meeks, 96 S.W.2d 839 (Tex.Civ.App. 1936, error disp.). However, the offices in precincts that are unaffected by such order remain undisturbed and the persons holding such offices are entitled to occupy them for the term to which they were elected. State v. Akin, 112 Tenn. 603, 79 S.W. 805 (1904).

We must now determine whether the method prescribed by the Commissioners Court to fill the vacancies in Precincts Three, Four and Five, as authorized by Paragraph (a) of Article 2351-1/2, was proper. Section 28 of Article V of the Constitution of Texas provides as follows:

"Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the District Courts shall be filled by the Governor until the next succeeding General Election; and

vacancies in the office of County Judge and Justices of the Peace shall be filled by the Commissioners Court until the next succeeding General Election."

This provision of the Constitution clearly provides for vacancies in the office of Justice of the Peace to be filled by the Commissioners Court until the next general election. The power of the Commissioners Court to fill vacancies by appointment under the authority of this provision of the Constitution is exclusive and the Legislature has no authority to authorize or provide for the filling of such vacancies in any other manner. State v. Valentine, 198 S.W. 1006 (Tex.Civ.App. 1917, error ref.). Therefore, Paragraph (a) of Article 2351-1/2 and that portion of the order of the Commissioners Court of Bexar County which was entered in conformity with this statute, are unconstitutional because they provide for a method of filling the vacancies in the office of Justice of the Peace of Precincts Three, Four and Five by election and are in direct conflict with the above quoted constitutional provision. They are further invalid as attempts to provide for the election of persons to fill an office not in existence at the time of the election. Brown v. Meeks, 96 S.W.2d 839 (Tex.Civ.App. 1939, error disp.).

With reference to the terms of office of Justice of the Peace of Precincts Three, Four and Five as they came into existence on January 1, 1969, we must look to those provisions of the Constitution relating to that office. Under the provisions of Section 18 of Article V and Section 64 of Article XVI of the Constitution of Texas, the term of office of Justice of the Peace is four years. Section 65 of Article XVI of the Constitution of Texas reads, in part, as follows:

"The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

". . . (j) Justices of the Peace.

". . .

"In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for

'Place No. 1,' 'Place No. 2,' etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for a term of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution."

Upon authority of the foregoing constitutional provisions, the offices of Justice of the Peace in all precincts having a single Justice of the Peace are to be filled for a term of four years at the general election in November of the years 1954, 1958, 1962, 1966, 1970, 1974, etc. Therefore, when Precincts Three, Four and Five came into existence on January 1, 1969, the office of Justice of the Peace in such precincts came into existence with a term of office which expires on December 31, 1970. A new four-year term for such offices will begin on January 1, 1971. Attorney General's Opinions WW-1292 (1962), C-147 (1963) and C-235 (1964). Since the term of office of Justice of the Peace is fixed by the Constitution, the Commissioners Court of Bexar County had no authority to provide for a two-year term of office for Justices of the Peace of Precincts Three, Four and Five when they came into existence on January 1, 1969.

Adverting to your first question, you are advised that the Commissioners Court of Bexar County had no authority to establish a term of office for Justice of the Peace of Precincts Three, Four and Five for a period of two years beginning January 1, 1969, and ending December 31, 1970. Although the expiration date of the term fixed by the Commissioners Court coincides with the expiration date of the term provided by the Constitution, the provision of the Commissioners' order pertaining to the term of office of Justices of the Peace for Precincts Three, Four and Five is void because it attempts to prescribe a term of office which is contrary to that fixed by the Constitution.

With regard to your second question, since Paragraph (a) of Article 2351-1/2 and that portion of the order of the Commissioners Court entered in conformity therewith are unconstitutional because they provide for the filling of vacancies in the office of Justice of the Peace by election rather than appointment of the Commissioners Court, you are advised that the election of Justices of the Peace for Precincts Three, Four and Five at the November, 1968, general election was invalid.

Since the Commissioners Court of Bexar County has not filled the vacancies in the office of Justice of the Peace of Precincts Three, Four and Five by appointment under Section 28 of Article V of the Constitution of Texas, and the persons who purported to have been elected to such offices at the general election in November, 1968, have attempted to qualify for such offices and have occupied and exercised the powers of such offices under color of said election, they are de facto officers and their acts while occupying such offices are valid. 47 Tex.Jur.2d 307-313, 324-327, Public Officers, §253-255, §264.

In answer to your third question, you are advised that the offices of Justice of the Peace of Precincts Three, Four and Five of Bexar County are subject to being filled at the general election in November, 1970, for a term of four years beginning January 1, 1971; and persons desiring to run for such offices as the nominees of a party which holds primary elections should file as a candidate for nomination to such office in the party primaries.

S U M M A R Y

When the order of the Commissioners Court of Bexar County abolishing Precincts Three, Four, Five, Six, Seven and Eight and creating from the same territory Precincts Three, Four and Five became effective on January 1, 1969, the offices of Justice of the Peace of Precincts Three through Eight ceased to exist and the offices of Justice of the Peace of Precincts Three, Four and Five came into being with an existing vacancy. Paragraph (a) of Article 2351-1/2, V.C.S., authorizing the election of persons to fill the offices of Justice of the Peace created under such circumstances, is unconstitutional because it is in conflict with the exclusive power of the Commissioners Court to fill such vacancies by appointment under Section 28 of Article V, Constitution of Texas. Persons purporting to hold such offices by virtue of elections held in conformity with Paragraph (a) of Article 2351-1/2, V.C.S., are de facto officers and their acts are valid.

Justices of the Peace for Precincts Three, Four and Five of Bexar County should be elected

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at the general election to be held in November,
1970, for a four-year term beginning January 1,
1971.

Very truly yours,


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