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STATE OF NEBRASKA
OFFICIAL
JUL 30 1992
DEPT. OF JUSTICE

DATE: July 30, 1992

SUBJECT: Questions Involving Legislative Redistricting in Light of Day v. Nelson, 240 Neb. 997, ____ N.W.2d ____ (1992)

REQUESTED BY: Senator Owen Elmer
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

On July 2, 1992, the Nebraska Supreme Court issued its opinion in Day et al. v. Nelson et al., 240 Neb. 997, -- N.W.2d -- (1992). In that opinion, the court held that Sections 5-219 and 5-241 of LB 614, the state's 1991 legislative redistricting bill, were unconstitutional under Article III, Section 5 of the Nebraska Constitution. As a result, the court required that enforcement of those sections of the bill be enjoined. You have now asked us several questions relating to the further legislative redistricting which must be accomplished in light of the Day decision. Our views are set out below.

The plaintiffs in the Day case were all residents of Madison County, Nebraska, who believed that Madison County had been treated improperly under the provisions of LB 614. In particular, the plaintiffs were concerned that Madison County was split among two new legislative districts under LB 614, since Madison County had, for some time, constituted one legislative district with its own legislator. Based upon the results of the 1990 Federal Census, it was also clear that Madison County closely approximated the ideal size of a legislative district when the requirements of numerical equality among legislative districts were considered, and that Madison County, along with Lincoln County, fit within the parameters of the ideal district size established by the legislative committee studying redistricting. As a result, the plaintiffs contended that the provisions of LB 614 which dealt with

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Madison County violated Article III, Section 5 of the Nebraska Constitution which provides, in pertinent part:

> At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. . . .The Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature.

The court's opinion in the Day case is very brief, and the holding of the case is contained in two paragraphs at the end of the opinion:

> As stated above, the only counties in this state where a single legislative district could lawfully follow the entire county boundaries are Lincoln County and Madison County. It is obvious that according to the plain language of article III, § 5, Madison County must constitute a single district unless not "practicable." It is also obvious that the presence of a number of proposed plans that apportion the state leaving District 21 substantially intact makes following that county's boundaries "practicable." . . .
>
> Since it was practicable to follow the county lines of Madison County and the Legislature failed to do so, it follows that §§ 5-219 and 5-241 of L.B. 614 violate article III, § 5, and the appellees should be enjoined.

Day v. Nelson, 240 Neb. 1000, 1001. Consequently, the Day opinion gives little guidance as to the reasoning underlying the court's decision, and it is most difficult to ascertain what the court might do with any other application of Article III, Section 5 beyond the narrow fact situation specifically at issue in the case. Nevertheless, we will attempt to respond to your opinion request based upon our best estimation of what the Day holding might require with respect to the questions you have presented.

You first ask whether the supreme court has "given...priority" in the Day case to drawing legislative district boundaries along

county lines if the population of such districts fits within parameters set by the federal government and the Legislature, and if such boundaries do not violate federal statutes regarding ethnic representation, etc. We are not entirely sure what you mean by the phrase "given...priority." However, the Day decision seems to require that county lines must be followed in legislative redistricting whenever practicable so long as the districts still meet population and other legal requirements.

You next ask, "[i]f more than one legislative district can be drawn within a single county's boundaries and each remain within population parameters set by the federal statute or the Legislature without crossing county lines, is it incumbent upon the Legislature to do so?" This question is obviously beyond the scope of the fact situation presented in the Day case. However, we would note that portion of Article III, Section 5 of the Nebraska Constitution which provides that, "...any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory." We believe that this constitutional language taken with the holding in the Day case indicates that the answer to your question is "yes," when the resultant legislative districts in the county are all close to the population ideal and within the population variances established by the Legislature as was the case with Madison County in 1991.

Your third question involves the situation where two or more contiguous counties, considered together, have a total population which falls within the ideal population parameters established by the Legislature and federal law, and where those counties "can reasonably be integrated into a redistricting plan for the entire state." You wish to know, "[i]s it incumbent upon the Legislature to include these counties in a single legislative district?"

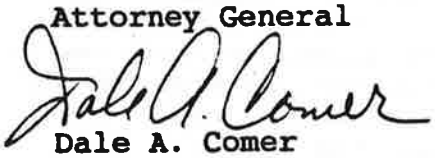
Again, this question goes considerably beyond the scope of the holding in the Day case, and our response must necessarily involve our estimation of what the court might do with this question. However, as noted above, it does appear clear from the Day decision that county lines must be granted deference in drawing redistricting plans for legislative districts. Moreover, the court in the Day case seems to equate the term "practicable" in Article III, Section 5 with "possible." As a result, Day appears to indicate that the Legislature must make an effort to follow county lines whenever possible, within the confines of the overriding interest in equality of population among legislative districts. Based upon these aspects of the Day decision, we believe that the answer to your third question is "yes" -- where two or more contiguous counties, considered together, have a total population

which falls within the ideal population parameters for district equality, those counties must be joined in a single legislative district. However, we would qualify our "yes" response to this question by noting that equality of population among legislative districts is paramount, and it is improbable that equal population among legislative districts can be achieved without dividing some counties. Given this reality, we believe that it is unlikely that the court would reject a particular redistricting plan for another plan which exhibits only marginal improvement in following county lines. On the other hand, if one redistricting plan followed county lines 30% of the time and another plan followed county lines 60% of the time, and both plans met equal population requirements, there is little doubt in light of Day, that the court would strike down the 30% plan.

Finally, you ask, "[s]hould the Legislature use as one of its primary criteria in creating districts for elected officials, the requirement to follow county lines, if reasonable to do so?" Our answer to that question, in the case of legislative districts, is also "yes," to the extent that your question equates the term "reasonable" with the term "practicable" in Article III, Section 5 of the Nebraska Constitution.

Sincerely yours,

DON STENBERG
Attorney General



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cc: Patrick J. O'Donnell
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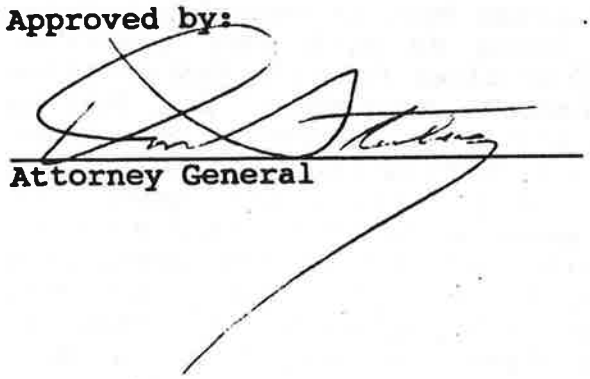

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