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STATE OF NEBRASKA
OFFICIAL
AUG 3 1992
DEPT. OF JUSTICE

DATE: August 3, 1992.

SUBJECT: Election questions with respect to the legislative redistricting which must occur in light of Day v. Nelson, 240 Neb. 997, __ N.W.2d __ (1992).

REQUESTED BY: Senator Lowell C. Johnson, Nebraska State Legislature.

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

In Day v. Nelson, 240 Neb 997, __ N.W.2d __ (1992), the Nebraska Supreme Court held that portions of LB 614, the state's 1991 legislative redistricting bill, were unconstitutional under Article III, Section 5 of the Nebraska Constitution. You have now posed several questions concerning the additional legislative redistricting necessitated by that decision. Your questions are addressed below.

At the outset, we must note that there is little precedent dealing with the questions which you have raised. There are no Nebraska cases directly on point, and we have been able to find little law from other jurisdictions which sheds much direct light on the issues presented. Consequently, while we will give you our best legal assessment as to the correct answers for your questions, courts could rule otherwise in the context of actual litigation.

Your questions were premised upon the assumption that the boundaries of one or more odd-numbered legislative districts, where primary elections were held this past May, would likely be affected by the renewed redistricting process in the wake of the Day decision. In responding to your opinion request, we will make the same assumption as you did in your request letter. We will deal with your questions in inverse order from the way you presented them to us.

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First of all, you ask, "[d]oes the Legislature have the authority to redraw legislative districts for the entire state, or is the Legislature confined to redrawing only those districts necessary to comply with the holding of the Supreme Court?"

In the Day decision, the court stated:

> 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 at 1001. Subsequent to the supreme court's decision in Day, we successfully prevailed upon the Lancaster County District Court to limit the injunction which it issued in response to the supreme court's mandate to only Sections 5-219 and 5-241 of LB 614. Sections 5-219 and 5-241 involve legislative districts 18 and 40, even-numbered districts where there are no legislative elections in 1992. Presumably, the limited injunction issued by the district court and the language from the Day opinion quoted above form part of the basis for your first question.

Article III, Section 5 of the Nebraska Constitution does not allow the Legislature to redistrict itself more often than once in every ten years. Exon v. Tiemann, 279 F.Supp. 603 (D. Neb. 1967); Report of the Attorney General, 1971-1972, No. 14 at 30. However, if a particular legislative redistricting plan is constitutionally invalid, the legislature has the authority to enact another plan. Denny v. State, 144 Ind. 503, 42 N.E. 929 (1896). The duty to apportion the state which is imposed upon the legislature is mandatory, and continues until it is properly discharged. Selzer v. Synhorst, 253 Iowa 936, 113 N.W.2d 724 (1962), 81A C.J.S. States § 63. Therefore, the Legislature can and must, at some point, redistrict the state to correct the problems noted in the Day case.

In your opinion request, you stated that one or more odd-numbered legislative districts would likely be redrawn in order to give Madison County its own legislative district in compliance with the Day decision. We agree that it may well be necessary to redraw one or more odd-numbered districts to comply with the Day mandate. Given that necessity to redraw districts in addition to those referenced in the district court's injunction, it seems to us that the Legislature could redraw additional portions of the state, at its discretion. Otherwise, it would become necessary to attempt to somehow draw a line between an acceptable number of changes in legislative districts in response to the Day decision versus an unacceptable number of changes. Moreover, redistricting plans normally involve a number of compromises among competing interests, and a change in one aspect of a plan may have an impact on other aspects of the plan. Therefore, we believe that while the

Legislature clearly must do another redistricting plan so as to give Madison County its own legislative district, that plan may also involve legislative districts across the state other than those specifically listed in the district court's order in the Day case.

Our conclusion in response to your first question is supported by language in Burns v. Richardson, 384 U.S. 73 (1966). In that case, the United States Supreme Court indicated:

> . . . Maryland Committee for Fair Representation v. Tawes holds that a court in reviewing an apportionment plan must consider the scheme as a whole. Implicit in this principle is the further proposition that the body creating an apportionment plan in compliance with a judicial order should ordinarily be left free to devise proposals for apportionment on an overall basis.

384 U.S. at 83 (citations omitted).

You next ask, "[i]f a primary election has taken place in a district whose boundaries are changed by the Legislature prior to the general election, is a special primary election required in that district before the general election?" In such an instance, we do not believe that a special election is required, and nomination can be made as directed by the Legislature. Also, as discussed below, there may even be potential problems with conducting a special primary in some circumstances where individuals now hold certificates of nomination from legislative primaries held in May, 1992, if those existing certificates of nomination are invalidated by the special primary process.

A primary election is not a regular election in any sense of the term. Millard v. City of Bay City, 334 Mich. 514, 54 N.W.2d 635 (1952). Rather, it is merely a substitute for a nominating convention, a caucus or a petition effort. 29 C.J.S. Elections § 1(4). Moreover, a primary is not an election to office, but merely a nominating device. Id.

When the nature of primary elections is considered along with that portion of Article III, Section 7 of the Nebraska Constitution which indicates that the manner of election for members of the Legislature ". . . shall be determined by the Legislature," it seems to us that the Legislature is not bound to hold additional primaries in all districts where boundaries are changed as a result of a new redistricting plan. To the contrary, the Legislature has discretion under Article III, Section 7 to determine exactly what the nomination process should be for those new districts. For example, the Legislature could decide to consider the results of the May primary as a nomination from the new districts if those

persons nominated in May continue to be residents of the new districts, or the legislature could elect to devise some form of petition process for nomination.

We would also note that there are cases which indicate that a certificate of nomination from a primary entails a valuable property right which may be enforced. Canto v. Parr, 338 S.W.2d 182 (Ct. Civ. App. Tex. 1960); Boyd v. Garrison, 246 Ala. 122, 19 So.2d 385 (1944); Taylor v. Nealon, 132 Tex. 60, 120 S.W.2d 586 (1938); State ex rel. Rinder v. Goff, 129 Wis. 668, 109 N.W. 628 (1906); 29 C.J.S. Elections § 135. Therefore, individuals who hold valid certificates of nomination from legislative primaries held in May, 1992, may have a property right in those nominations. If the Legislature redraws their districts in any new plan so that they remain residents of the district from which they were nominated, it is possible that those individuals could have a right to remain on the November, general election ballot. Obviously, any special primary process which would negate that right could be suspect.

Finally, you ask, "[s]hould such a district [where the Legislature has changed district boundaries after a May primary] be changed so that one or both of the two candidates holding a certificate of election are drawn out of the district, do the candidates remain on the general election ballot?" We believe that the answer to that question is "No."

Article III, Section 8 of the Nebraska Constitution provides, in pertinent part:

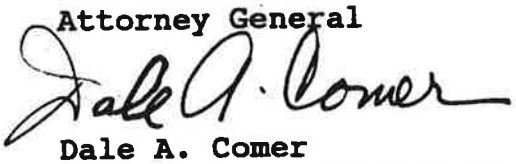
> No person shall be eligible to the office of member of the Legislature unless on the date of the general election at which he is elected or on the date of his appointment he . . . has resided within the district from which he is elected for the term of one year next before his election, . . .

This constitutional provision obviously requires that candidates from legislative districts be residents of their districts. It seems to us that if a valid redistricting plan is enacted now in special session so that certain individuals who presently hold certificates of nomination from May primaries are geographically removed from their districts, then their certificates of nomination must give way to the constitutional residency requirement. Those individuals could not be elected to the legislative districts specified in their certificates of nomination since they would no longer be residents of those districts. Alternatively, those individuals need not be placed on the ballot for the new legislative districts where they are placed after redistricting since their certificates of nomination, issued previously, were for nomination to different districts. As a result, if there are

instances where individuals who hold current certificates of nomination are geographically removed from their districts under a revised redistricting plan, it appears to us that the Legislature will have to devise some form of nomination procedure, by special election or otherwise, so that additional legislative candidates can be selected for those altered districts.

Sincerely yours,

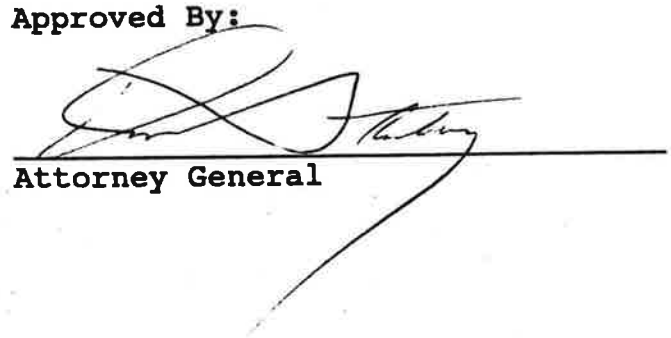
DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:



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