STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

#92100

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

REC. STATE OF NEBRASKA OFFICIAL
AUG 10 1992
DEPT. OF JUSTICE

DATE: August 7, 1992

SUBJECT: Scope of Governor's Special Session Call, LB15 - Redistricting

REQUESTED BY: Senator Rex Haberman
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an opinion as to "whether LB15, introduced during the Special Session of the Legislature currently in progress, is within the 'call' issued by Governor Ben Nelson on July 27, 1992." Our analysis of your question is set forth below.

Article IV, Section 8 of the Nebraska Constitution provides:

> The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together.

As was discussed in Attorney General Opinion No. 89069, dated November 9, 1989, the last portion of Article IV, Section 8 places an express limitation on the power of the Legislature to act during a special session. In Arrow Club, Inc. v. Nebraska Liquor Control Commission, 177 Neb. 686, 689, 131 N.W.2d 134, 137 (1964), the court, discussing the nature of this limitation, stated:

> It is well established that the Legislature while in special session can transact no business except that for which it was called together. Chicago, B. & Q. R.R. Co. v. Wolfe, 61 Neb. 502, 86 N.W. 441. The proclamation may state the

L. Jay Bartel
J. Kirk Brown
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation.

The court in Arrow Club, quoting at length from the Pennsylvania Supreme Court's decision in Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932), continued as follows:

> This constitutional provision contemplates that there shall first exist in the executive mind a definite conception of the public emergency which demand an extraordinary session. His mental attitude or intention is expressed in his proclamation, the purpose of which is to inform the members of the legislature of subjects for legislation, and to advise the public generally that objections may be presented if desired. It is not only a guide or chart with respect to which the legislature may act, but also a check restricting its actions so that rights may not be affected without notice. The proclamation may contain many or few subjects according to the governor's conception of the public need. While the subjects may be stated broadly or in general terms, the special business, as related to the general subject on which legislation is desired, should be designated by imposing qualifying matter to reduce or restrict. Although the subjects should be sufficient to evoke intelligent and responsive action from the legislature, it is not necessary that they include all the methods of accomplishment. The guiding principle in sustaining legislation of a special session is that it be germane to, or within, the apparent scope of the subjects which have been designated as proper fields for legislation. In construing a call the words of any portion thereof must be interpreted not only as commonly and universally understood, but also as applicable to the subject intended to be affected by legislation.
>
> While the legislature must confine itself to the matters submitted, it need not follow the views of the governor or legislate in any particular way. Within the special business or designated subjects submitted, the legislature cannot be restricted or dictated to by the governor. It is a free agent, and the governor, under the guise of definition, cannot direct or control its action. The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it

> was convened. . . . The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the call if it can be done by any reasonable construction.

Id. at 689-90, 131 N.W.2d at 137. (Emphasis added.)

As we stated in Attorney General Opinion No. 86028, dated November 14, 1986, "the decision in Arrow Club, reflects certain general principles regarding the limitations imposed on legislative action by virtue of the scope of the executive's call for a special legislative session. First, courts uniformly agree that, for a legislative enactment to be valid under the call, the legislation must be "germane" or "related to" the subjects stated in the call. Second, it is universally held that the Governor's call cannot be used to inhibit legislative discretion, and that. . ."the Governor may not, under the guise of naming a subject, limit its scope so drastically that he in effect imposes upon the Legislature his own view of what policy should be adopted." Comment, Scope of Governor's Call as Constitutional Limitation on Business of Special Session of the Legislature, 43 Neb. L. Rev. 605, 608-09 (1964). In applying these principles, the majority of courts deciding cases challenging legislation enacted at special legislative sessions as outside the scope of the call have adopted a liberal construction, upholding legislative acts if they can conceivably fall within the subjects mentioned within the call. Id. at 610-615."

Therefore, we must next examine the language of the Call. The Call issued by the Governor on July 27, 1992 states:

> I, E. Benjamin Nelson, as Governor of the State of Nebraska, believing that an extraordinary occasion has arisen, DO HEREBY CALL the Legislature of Nebraska to convene in extraordinary session at the State Capitol on July 31, 1992, at 3:00 p.m. for the purpose of considering and enacting legislation on only the following subjects:
>
> . . .
>
> Legislation to correct unconstitutional provisions of Laws 1991, LB614 pursuant to Day vs. Nelson, No. S-92-229, slip op. (Neb. S. Ct. July 2, 1992).

Thus, the Governor's Call is limited to legislation to correct unconstitutional provisions of Laws 1991, LB614 pursuant to Day v. Nelson. . . ." In Day v. Nelson, §§5-219 and 5-241 of LB614 were declared unconstitutional. These sections pertain to legislative districts 18 and 40 in northeast Nebraska. LB15, as you have noted

in your request, would adjust legislative district boundaries in southwest Nebraska. However, as we stated in Attorney General Opinion No. 92098, dated August 3, 1992:

> 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 is supported by language in Burns v. Richardson, 384 U.S. 73 (1966). In that case, the United State Supreme Court indicated:
>
> > . . .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).

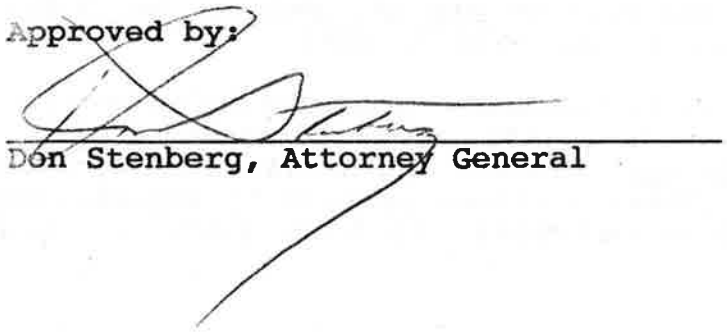
Since the correction of unconstitutional provisions of LB614 requires changes outside of districts 18 and 40, and in light of the U.S. Supreme Court's decision quoted above, we conclude LB15 would be upheld by a court as being germane to or within the scope of the Governor's Call. To remove any uncertainty, it is within the Governor's power to amend the Call so as to more clearly define its scope.

Sincerely,

Steve Grasz
Deputy Attorney General

LSG:bks

Approved by:



Don Stenberg, Attorney General