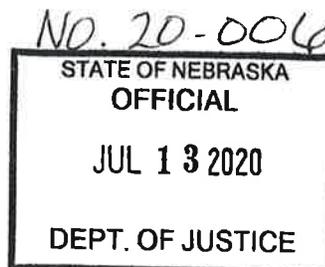




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SUBJECT: Constitutionality of LB 1207 – The Redistricting Act

REQUESTED BY: Senator John McCollister
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office concerning the constitutionality of LB 1207. You describe the bill as establishing “statutory standards governing substance and procedures for redistricting legislation based on the decennial census performed by the U.S. Census Bureau.” Your four questions are as follows:

1. Does LB 1207, either explicitly or by implication, restrict or limit the power or authority of a subsequent Legislature to enact or repeal legislation concerning the establishment of the boundaries of districts represented by elected officials in Nebraska?
2. Does LB 1207 conflict with provisions of the Constitution of the State of Nebraska that specify characteristics of the district boundaries for members of the Nebraska Supreme Court (Article V, Section 5); the Nebraska Legislature (Article III, Section 5); the Board of Regents of the University of Nebraska (Article VII, Section 10); the Public Service Commission (Article IV, Section 20); or the State Board of Education (Article VII, Section 3)?

3. Does LB 1207, either explicitly or by implication, restrict or limit the power or authority of a subsequent Legislature to adopt rules of its proceedings pursuant to Article III, Section 10 of the Constitution of the State of Nebraska?
4. Does LB 1207 conflict with any provision of the Constitution of the State of Nebraska or with any provisions of the Constitution of the United States or the Voting Rights Act of 1965 (Public Law 89-110)?

PROPOSED LEGISLATION

While we will address each of your questions in turn, our description of LB 1207 will be common to all questions.

LB 1207 creates the "Redistricting Act." LB 1207, § 3 states that the purpose of the Act is to "establish procedures" and designate "boundary lines based on population" for the election or appointment of various officials, including those listed in your second question. Section 4(2) provides that the maps shall be drawn using politically neutral criteria, which are more specifically set forth in subsections (2), (3) and (4).

LB 1207, § 5 provides that "legislative bills incorporating the initial version of the maps shall not be placed on the agenda for General File consideration until fourteen calendar days after the last public hearing held pursuant to section 6 of this act." Section 6 provides that the redistricting committee shall make maps available to the public and conduct at least one public hearing in each congressional district.

Section 7 provides that no changes other than corrective amendments shall be allowed to the initial version of the maps or the legislative bills which incorporate the maps. Section 2(2) defines a corrective amendment as "an amendment which corrects a technical error but does not substantially alter the boundary lines. . . ."

Finally, LB 1207, § 8 states that if "the Legislature fails to enact legislation to provide for district boundaries for any entity listed in section 3 of this act prior to adjournment of the legislative session, the Governor shall call a special session within thirty days after the adjournment. . . ."

ANALYSIS

I. Whether LB 1207 Would Restrict the Authority of Subsequent Legislatures to Enact or Repeal Redistricting Legislation

Our analysis begins with the fundamental principle that the Legislature has plenary legislative authority except as limited by the state and federal constitutions. *Pony Lake School District 30 v. State Committee for the Reorganization of School Districts*, 271 Neb. Neb. 173, 710 N.W.2d 609 (2006); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972). The Nebraska Constitution is not a grant of power, but instead, a limitation

of power and the Legislature may legislate upon any subject not inhibited by the Constitution. *State ex rel. Creighton University v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984).

Neb. Const. art. I, § 1 provides that “[t]he legislative authority of the state shall be vested in a Legislature consisting of one chamber.” Your first question implicates another principle derived from this constitutional power of the Legislature to legislate. One legislature cannot generally bind or restrict a succeeding legislature. *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 544 N.W.2d 344 (1996) [“*Stenberg*”]. In *Stenberg*, the Legislature had enacted LB 507, which required future legislation projected to increase the total inmate population in state correctional facilities to include estimates of the operating costs resulting from the increased population. The Court held that LB 507 was an unconstitutional attempt by one legislature to restrict a future legislature from exercising its constitutional power to legislate. “The authority of a legislature is limited to the period of its own existence. One general assembly cannot bind a future one.” *Stenberg*, 249 Neb. at 594, 544 N.W.2d at 348 (citing *Frost v. State*, 172 N.W.2d 575, 583 (Iowa 1969)). In other words, one legislature cannot restrict the constitutional power of subsequent legislatures to revise, amend, or repeal an act.

In our review of LB 1207, we have found no provision which would restrict a future legislature from acting to amend or repeal the bill. A subsequent legislature could amend the statutes created by LB 1207 to set different parameters for redistricting or could determine to repeal the provisions of LB 1207 altogether.

II. Whether LB 1207 Conflicts With State Constitutional Provisions Pertaining to District Boundaries

The Nebraska Constitution sets forth requirements for the district boundaries of several elected state officials. As you point out in your second question, certain requirements for apportionment and redistricting are found in state constitutional provisions concerning districts for members of the Legislature, districts for State Board of Education members, districts for the Board of Regents members, districts for members of the Supreme Court, and districts for members of the Public Service Commission. You ask whether LB 1207 conflicts with any of these constitutional provisions.

We explained in response to your first question that the authority of the Legislature is extensive. However, while that legislative authority is very broad, it is subject to any limitations contained in the Nebraska Constitution. The question is whether any provision of LB 1207 impermissibly contradicts the constitutional provisions on apportionment and redistricting or merely supplements them.

We first note that each of the constitutional provisions which you list contains similar language concerning the population of each district created by the Legislature. For Supreme Court judicial districts and Board of Regents districts, the Legislature must divide the state into districts of “approximately equal population.” Neb. Const. art. V, § 5 and Neb. Const. art. VII, § 10. For State Board of Education districts and Public Service

Commission districts, the Legislature must divide the state into districts of "substantially equal population." Neb. Const. art. VII, § 3 and Neb. Const. art. IV, § 20. Legislative districts must also be apportioned based on population and, if any county contains the population sufficient to entitle it to two or more members of the Legislature, that county shall be divided into separate districts "as nearly equal in population as may be." Neb. Const. art. III, § 5.

This principle of equal representation, or the one person-one vote rule, which underlies these population requirements is derived from the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which requires "equal representation for equal numbers of people." *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). There are a series of federal district court cases concerning the Nebraska legislature's multiple attempts to reapportion legislative districts following the 1960 census. The court discussed the one person-one vote doctrine in *League of Nebraska Municipalities v. Marsh*, 242 F. Supp. 357 (D. Neb. 1965) and held that a bill which reapportioned the Nebraska Legislature into 50 districts so that one vote in the smallest district created was equivalent to 1.6 votes in another district was unconstitutional. Following the enactment of a subsequent reapportionment plan, in *League of Nebraska Municipalities v. Marsh*, 253 F. Supp. 27 (D. Neb. 1966), the court pointed out that the Nebraska Constitution also required following county lines when practicable and stated that "[t]he law does not require that counties be massacred to achieve mathematical exactness." *Id.* at 30. Further, the court held that some margin of variance was acceptable and approved the redistricting plan created by LB 925, the redistricting bill at issue, in which five districts had a variance of more than 7.0 percent above the mathematical average.

Following the 1990 census, a legislative committee formulated redistricting guidelines, including a requirement that no redistricting plan would be considered in which districts deviated more than 2 percent from the ideal population. When this guideline was challenged, the Nebraska Supreme Court noted that, while several United States Supreme Court cases permitted a greater variation in district populations, such deviation was not required. "Certainly, the Legislature may adhere to a more stringent standard in order to best achieve proportional representation for the citizens of Nebraska. Indeed, such a strict standard is consistent with the requirement of article III, § 5, that any reapportionment of legislative districts be based solely on population." *Hlava v. Nelson*, 247 Neb. 482, 486, 528 N.W.2d 306, 309 (1995).

Section 3 of LB 1207 states that its purpose is to designate "boundary lines based on population" and section 4(2)(a) provides that maps and districts are to be drawn with "a population deviation of plus or minus one percent or less." This language appears consistent with the specific constitutional provisions you have listed, as interpreted by Nebraska courts.

Three of the constitutional provisions about which you inquire also require that county lines "shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature." Neb. Const. art. III, § 5 (legislative districts);

Neb. Const. art. V, § 5 (Supreme Court judicial districts); Neb. Const. art. VII, § 10 (Board of Regents districts). The Nebraska Supreme Court interpreted this language in a case concerning the proposed division of Madison County after the 1990 census. *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992). The 1990 population of Madison County closely approximated the ideal size of a legislative district at that time. The Court held that the division of Madison County violated art. III, § 5. “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.’” *Id.* at 1000-01, 485 N.W.2d at 586.

Section 4(3)(d) of LB 1207 provides that maps and districts are to be drawn with “deference to county and municipal boundary lines when appropriate.” While this provision does not directly contradict the three constitutional provisions listed in the preceding paragraph, we note that the Nebraska Supreme Court, based on its holding in *Day*, could find the language of LB 1207 on following county boundaries to be less stringent than the constitutional requirements.

III. Whether LB 1207 Would Restrict the Authority of Subsequent Legislatures to Adopt Their Own Rules Pursuant to Article III, § 10

Neb. Const. art. III, § 10 provides, in pertinent part, that “the Legislature shall determine the rules of its proceedings. . . .” In interpreting this constitutional provision, the Nebraska Supreme Court stated in *State ex rel. Johnson v. Hagemeister*, 161 Neb. 475, 73 N.W.2d 625 (1955), that this power “extends to the transaction of any [legislative] business, or in the performance of any duty conferred upon it by the constitution.” *Id.* at 481, 73 N.W.2d at 629 (citations omitted).

“The typical understanding of state legislative bodies is that, with the limited exception of valid contractual obligations with third parties, pending matters die at the expiration of the legislative body’s 2-year term.” *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 654, 930 N.W.2d 551, 564 (2019). “In any event, no state legislative body has been similarly described as a ‘continuing body.’ We hold that the Nebraska Unicameral Legislature, while unique because it is not a bicameral system, is likewise not a ‘continuing body.’” *Id.* at 657, 930 N.W.2d at 566. “Finally, unlike in the Senate, all procedural rules of the Nebraska Unicameral Legislature are adopted by a majority vote at the ‘commencement of each regular session in odd-numbered years,’ and the adopted rules ‘govern the Legislature for a period of two years.’” *Id.* at 658, 930 N.W.2d at 566.

Currently, Rule 3, § 6 of the Rules of the 106th Nebraska Legislature establishes a Redistricting Committee of the Legislature and sets out several rules to guide the Legislature’s redistricting process. This rule provides that the Redistricting Committee will adopt substantive and procedural guidelines which will then be presented to the Legislature for approval. It is our understanding, based on past practice, that new

substantive and procedural rules will be adopted by the 107th Legislature when that body commences its regular session in January of 2021 and that redistricting criteria will be adopted by the full legislature's approval of a legislative resolution.

LB 1207 includes provisions as to the officers of the Redistricting Committee, the holding of public hearings by the Committee, the drawing of maps and districts, the timing of placing legislative bills on the agenda and a limitation on amendments to the initial version of the maps which are drawn. It appears that LB 1207 would put into statute procedural rules for the Redistricting Committee as well as some substantive guidelines for redistricting rather than leaving those rules to be adopted by a future legislature as it commences its session. If LB 1207 were enacted, a subsequent legislature and its redistricting committee could still adopt additional rules on redistricting as long as they exercised that power in conformity with LB 1207. However, while Neb. Const. art. II, § 10 provides broad authority for the legislature to "determine the rules of its proceedings," it may not adopt rules which contradict the Constitution or attempt to modify or alter state statutes. Therefore, if a future legislature wanted to adopt redistricting rules which were not consistent with LB 1207, it would be necessary to first amend or repeal the provisions of LB 1207.

IV. Whether LB 1207 Raises Other Constitutional Concerns

Your final question asks whether LB 1207 conflicts with any provision of the state or federal constitutions or with any provision of the federal Voting Rights Act. This question is so broad that it is not possible for us to answer it within the scope of this opinion. We have discussed in section I of our opinion whether LB 1207 violates Neb. Const. art. I, § 1, and in section II whether it violates specific provisions of our state constitution which pertain to redistricting. Our response to your second question also included a brief discussion of the Equal Protection Clause of the United States Constitution. We do not believe that a general discussion of the Equal Protection Clause or the Voting Rights Act would be beneficial as cases decided under those provisions are very fact specific, depending on the details of each particular redistricting plan.

CONCLUSION

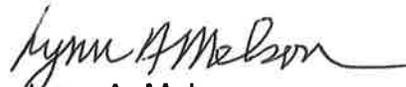
For the reasons discussed above, it is our opinion that LB 1207 does not limit the authority of a subsequent Legislature to enact legislation concerning district boundaries. Also, we conclude that LB 1207 does not contradict the specific state constitutional provisions that you list in your second question, although a court could find the language on following county lines when establishing boundaries to be less stringent than those constitutional provisions. Finally, we conclude that, if LB 1207 were enacted, each subsequent legislature could continue to determine the rules of its proceedings.

Senator John McCollister
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However, the rules pertaining to the redistricting committee and drawing of maps and district boundaries would need to be consistent with LB 1207 as well as pertinent constitutional provisions.

Sincerely,

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Approved by:


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pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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