

5369 February

The State of South Carolina



Office of the Attorney General

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March 14, 1994

The Honorable David L. Thomas
Senator, District No. 8
612 Gressette Building
Columbia, South Carolina 29202

Dear Senator Thomas:

By your letter of February 23, 1994, you have requested the opinion of this Office as to the constitutionality and legality of using the 1980 congressional census lines for purposes of electing the members of the Public Service Commission. Further, you have asked whether the General Assembly is obligated, constitutionally or legally, to use 1990 congressional lines for determining representation to the Public Service Commission. Finally, you have asked, if the General Assembly is not obligated to use 1990 census figures, whether a lawsuit from a citizen challenging the validity of the election of Public Service Commission members might invalidate such an election.

Members of the Public Service Commission (hereinafter referred to as "PSC") are selected according to S.C. Code Ann. § 58-3-20 et seq. (1993 Cum. Supp.). The PSC is to be comprised of seven members:

The General Assembly shall provide for the election of the seven member commission and elect members thereto based upon the congressional districts established by the General Assembly pursuant to the official United States Census of 1980. If the number of congressional districts is less than seven, additional members shall be elected at large to provide for a seven member commission.

The Honorable David L. Thomas

Page 2

March 14, 1994

Members of PSC do not represent a particular constituency; instead, § 58-3-26 contemplates that the commission "shall be broadly representative of the people of the State, men and women of ability and dedication with compassion and common sense."

While members of the PSC are elected to their offices by the General Assembly, such election is not the type of popular election which triggers the application of the equal protection principle of "one man, one vote." A strict legal reading of the case law to date reveals that "one man, one vote" has not been applied to appointed (i.e., not popularly elected) boards. Sailors v. Kent Board of Education, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); Moore v. Wilson, 296 S.C. 321, 372 S.E.2d 357, reh. den. 296 S.C. 326, 372 S.E.2d 360 (1988). Thus, the fact that the PSC members are elected according to districts established pursuant to the 1980 census does not in and of itself appear to raise a constitutional issue on its face.¹ Section 58-3-20 might well withstand scrutiny under this constitutional consideration. We discern no constitutional or legal reason that would prevent the 1994 election of PSC members from proceeding as scheduled, if the General Assembly sees fit to proceed.

Until § 58-3-20 should be amended or a court should declare otherwise, the statute is still a part of the Code of Laws of this State. This Office cannot say unilaterally that § 58-3-20 should not be followed.² Whether the General Assembly should update § 58-3-20 to reflect the current census or make other changes (such as structuring the PSC to make the principle of "one man, one vote" applicable) are, of course, policy matters for the General Assembly to consider. We would certainly recommend that the statute be amended to reflect the current census and population distribution, to make certain that the interests of all citizens of this State are well-represented.

As to your final question as to whether a lawsuit challenging the validity of the PSC election might invalidate such election, it would be difficult to predict results of any lawsuit without knowing the basis for the lawsuit, what matters were raised in the pleadings, and other such factors. It is also possible that a plaintiff could raise issues

¹ Parenthetically, we observe that prior to amendment in 1979, § 58-3-20 provided for election of seven PSC members from congressional districts as constituted in 1930. We are unaware of any challenge, constitutional or otherwise, following censuses taken in 1940, 1950, 1960, or 1970 or the resulting reapportionments of congressional districts.

² Even if we were to conclude that § 58-3-20 is unconstitutional (which we do not), the statute would nevertheless be entitled to the presumption of constitutionality and would be enforceable unless and until a court should declare otherwise.

The Honorable David L. Thomas
Page 3
March 14, 1994

other than those usually raised (equal protection, "one man, one vote") in similar situations, which have not been contemplated in the preparation of this opinion, an impossible task at best.

In conclusion, we are of the opinion that:

1. There is no constitutional or legal impediment to electing the members of the Public Service Commission in 1994 according to the procedure in § 58-3-20 which utilizes the congressional district lines drawn according to the 1980 census.
2. Whether the General Assembly should amend § 58-3-20 to reflect the 1990 census and congressional lines drawn accordingly or make other statutory changes are matters of policy to be determined by the General Assembly. This Office recommends that the statute be amended to reflect the current census and population distribution, to ensure that the interests of all citizens of this State are well-represented.

With kindest regards, I am

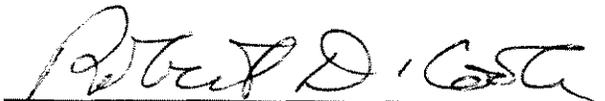
Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:


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