1979 WL 43554 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 31, 1979

***1** The Honorable James M. Waddell, Jr.
Senator
District No. 15
Post Office Box 1026
Beaufort, South Carolina 29902

Dear Senator Waddell:
You have requested an opinion concerning whether or not Section 2-1-70 of the 1976 Code of Laws would be applicable to the upcoming special elections to fill several Senate seats. Section 2-1-70 reads as follows:
(a) In a multi-county district, when the population of any county exceeds one forth-sixth of the State's population it may have a number of resident Senators equal to each whole part of one forty-sixth of the State's population of such county and may have an additional resident Senator for any fractional part of such one forth-sixth only if such fractional part is at least one half of one forty-sixth of the State's population; provided, that nothing herein shall be construed to mean that any county shall be prevented from having at least one resident Senator.

(b) All candidates for the office of State Senate in multi-county districts who are residents of the same county shall compete for the same numbered office except in those districts where more than one Senator may be elected from a county. When filing has been made for the number of offices for which such a county is eligible, all additional candidates from the same county shall qualify for one of the same offices only.

This Code provision, which is known as a negative residency requirement, was enacted in 1967 as part of the 1967 Act which reapportioned the Senate. [1967 (55) 1005]. It was recodified in the 1976 Code of Laws.

In 1966 the Senate passed Act No. 743 which proposed to reapportion the Senate. [1966 (54) 2016]. This plan was litigated in the case of O'Shields v. McNair, 254 F. Supp. 708 (D.C.S.C. 1966). After expressing grave doubt as to its validity, the court upheld the plan but only as an interim measure until a new reapportionment plan could be devised. The court dealt at length with the provisions for 'negative residence' in the plan and expressed substantial reservations about such a provision. O'Shields, supra, pp. 713-715.

In 1967 the General Assembly enacted Act No. 540 [1967 (55) 1005] which again reapportioned the Senate. This Act contained a slightly less stringent negative residency plan than the 1966 plan. See Act No. 540 of 1967, § 1(e); § 2(d); O'Shields, supra, p. 713. The 1967 plan provided for a second Senator in the county if the county's population exceeded one-half of one forty-sixth of the State's population. It is this section that is now codified as Section 2-1-70.

In 1971 the Senate established a reapportionment plan. [1971 (57) 2070]. Section 3 of Plan B of the Act set out verbatim the language of negative residency found in the 1967 Act, now codified at Section 2-1-70. This reapportionment plan was also submitted to the federal courts in the consolidated case of Twiggs v. West, Civil Action Nos. 71-1106, 71-1123, 71-1211, filed April 7, 1972 (unreported). The court struck both Plan A and B of the reapportionment plan. The court stated in part that:
***2** [p]lan B has what the parties describe as a 'negative residence' provision, under which, for instance, three counties —Cherokee, Clarendon and Georgetown—with a population less than the number required for the allotment of a

senate seat would be guaranteed a resident senator. Twenty-six other counties, also without a population sufficient to permit them to have their own senator, would not have guaranteed a resident senator. Such patently capricious and arbitrary disparities between the voters and candidates in similarly situated counties are clearly violative of constitutional principles. Twiggs, Order, pp. 12-13.

The court directed the General Assembly to enact a new reapportionment plan within thirty days. The court expressly stated that the General Assembly could keep in place numbered seat provisions if the
. . . plan does not incorporate the invalid residency provision, or some similar invalid restriction . . . Twiggs, Order, p. 19.

The General Assembly enacted in 1972 Act 1205 which reapportioned the Senate. [1972 (57) 2384]. The plan contained two alternative plans. Each plan contained provisions for numbered seats; however, neither plan contained provisions of 'negative residence.' This Act constituted the only provisions before the court. The court approved Plan A. It is this plan under which the Senate is presently operating.

If one assumes that the provision of the 1967 reapportionment act, Section 2-1-70, should be applied to the 1972 reapportionment act, the same inequities that the court held to be unconstitutional in the Twiggs case would still occur. According to the mathematical formula set out in Section 2-1-70, a county must have a least 84,474 people in order to have more than one resident Senator. In the Twiggs case the court used Clarendon County as an example of the inequities of negative residency. Under the 1972 reapportionment plan the inequity still exists. Sumter County has 79,000 people and is, therefore, entitled to one resident Senator. However, since it does not have at least 84,474 people residing in Sumter, Clarendon County would be guaranteed a resident Senator. Likewise, Orangeburg County has 70,000 people and is entitled to one resident Senator; however, as it does not have more than 84,474 people, Dorchester with 32,000 people or Calhoun County with 11,000 people would be entitled to a resident Senator. Neither one of these counties would have sufficient population under the formula to have even one resident Senator without the utilization of the negative residency requirement. This situation is repeated throughout the Senatorial districts and is the very occurrence the Twiggs court found to violate constitutional principles.

It is clear that the 1976 recodification of the Code re-enacted Section 2-1-70. However, when a statute is void or invalid, the fact that it is recodified does not make it valid. Southerland, Statutory Construction, Vol. 1A, § 28.08; 82 C.J.S., Statutes, § 274(b).

***3** The 1972 Act purported to cover the entire area of reapportionment of the Senate. It does not expressly or impliedly refer back to the negative residency requirement codified from the 1967 reapportionment act. Further, the reapportionment act was enacted following the holding of the Twiggs court that the negative residency requirement contained in Plan B of the act (the same language contained still in Section 2-1-70) was unconstitutional. In Independence Insurance Co. v. Independent Life & Accident Co., 218 S.C. 22, 61 S.E.2d 399, (1950), the court quoted with approval from American English Encyclopedic Law, Vol. 26, p. 731. which states that:
'Where the later of two acts covers the whole subject-matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, though the two are not repugnant.'

The 1972 reapportionment act clearly covered the entire subject-matter of the earlier 1967 reapportionment act. The express provisions of that 1972 act, and only those provisions, should control the present reapportionment of the Senate.

Therefore, it is the opinion of this Office that Section 2-1-70 of the 1976 Code of Laws, the negative residency provisions, is not applicable to the 1972 reapportionment plan of the Senate.
Very truly yours,

Treva G. Ashworth
Senior Assistant Attorney General

1979 WL 43554 (S.C.A.G.)

End of Document