

## Opinion No. 67-08

January 19, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. Clay Buchanan, Director New Mexico Legislative Council Room 201 State Capitol Santa Fe, New Mexico

### QUESTION

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1. Assuming that any new senatorial districts would be properly reapportioned and that each senator would reside in a separate senatorial district: In a multi-county senatorial district where two senators are presently elected at-large, would a division of the present district into two new senatorial districts result in the cutting off of the terms of the present two senators at large?
2. Assuming that any new senatorial districts would be properly reapportioned and that each senator would reside in a separate senatorial district: In a single county presently having two senatorial districts and a third senator elected at-large, would a division of the county into three new senatorial districts result in the cutting off of the term of office of any of the three present senators?

#### CONCLUSIONS

1. Probably.
2. In all probability, all three, depending on the effective date the new districts are to be used.

### OPINION

#### {\*10} ANALYSIS

Your questions raise interesting {\*11} and far-reaching issues. To be considered is the New Mexico Constitution, the 1966 Senate Reapportionment Act (Laws 1966, Chapter 27), the decision of the three-judge Federal Court in the case of **Beauchamp, et al v. Campbell, et al.**, civil docket number 5778, and certain decisions from other jurisdictions.

The decision in the **Beauchamp** case definitely has a bearing on the answers to your questions. That decision states that the first paragraph of Article 4, Section 4 of the New Mexico Constitution violates the Federal Constitution. The paragraph in question is the one which stated that certain counties were originally to elect State senators for six-year

terms and other counties were to elect State senators for four-year terms. With this paragraph now stricken from the Constitution, there is no constitutional provision relating to the term of office for State senators.

We must turn then to Section 8, Chapter 27, Laws 1966 (the Senate Reapportionment Act). This Section sets forth the terms of office of the forty-two senators who were elected in the 1966 general election. This provision in the Senate Reapportionment Act of 1966 is still valid since the **Beauchamp** decision stated that Section 8 of the Act (as well as certain other sections) is "not affected by this decision".

The original terms of the senators from the following senatorial districts were set at six years: 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40 and 42. Senators from all other districts were elected to four-year terms.

If the 1967 session of the legislature did enact a reapportionment measure redistricting the senatorial districts in present multi-county districts where two senators are elected at-large, the following counties would be affected: Rio Arriba, Sandoval, Curry, Roosevelt, Otero and Lincoln. If the legislature did redistrict the counties in which two senators are elected from districts within the county and a third senator is elected at-large within the one county, the counties of Chaves and Dona Ana would be affected.

The effect of such legislation, if it became law, would vary somewhat depending on the manner in which it was drafted. We will subsequently discuss this in more detail.

It is the universal rule that where a term of office is fixed by the Constitution, the legislature cannot change it. **Cawood v. Hensley**, Ky. 247 S. W. 2d 27; **Conley v. Brophy**, Ga. 60 S. E. 2d 122; **Barrows v. Garvey**, Ariz., 193 P. 2d 913. Conversely, where a public office has been created by the legislature and not by the constitution, the occupant may be deprived of the office without recourse by subsequent legislative action changing, regulating or limiting the tenure or by abolishing the office itself before the end of the term as public exigency or policy may require. **Williams v. City of New Bedford**, 21 N. E. 2d 265; **Burke v. Kern**, 38 N. E. 2d 500.

We don't have either of these two situations. Rather we have a constitutional office (State senator) which, in view of the **Beauchamp** decision, has no constitutionally fixed term of office. The term is now fixed by statute only -- in the 1966 Senate Reapportionment Act.

Our State Supreme Court has never had occasion to pass upon the questions you raise. Such questions have been considered by some other jurisdictions, particularly California, Arizona and North Dakota. The court in the 1965 case of **Azevedo v. Jordan**, 237 C.A. 2d 521, 47 Cal. Rptr. 125 had this to say:

"A public officer whose term [is] not established by the Constitution does not have a contract to hold . . . his office {*\*12*} . . . against the will of the legislature."

Similarly, the North Dakota Court stated as follows in **O'Laughlin v. Carlson**, 1 N. D., 152 N. E. 675:

"It is true that the office of county commissioner is created by the Constitution, but the term of office is expressly left to be determined by the legislature, without any limitation as to the duration thereof, and in the absence of a constitutional prohibition, the legislature may change the term of an office even after the election or appointment of the incumbent thereof."

The Arizona decision in the case of **Barrows v. Garvey**, supra, pointed out that if the constitution simply creates an office and sets no fixed term, the legislature is free to extend or reduce the statutorily fixed term. Accord: **Mansfield v. Chambers**, 26 Cal. App. 499, 147 Pac. 595.

Assuming our Supreme Court followed the basic principles enunciated in these decisions (and we cannot absolutely assure you it would) the net effect would be to cut short the terms of some recently elected State senators. If the legislation provided that the new districts were to be used in the next general election, the terms of office for every senator in the affected counties (enumerated heretofore) would be cut to two years. This is necessarily so since you would have completely new districts in toto in the affected counties. If the legislation provided that the new districts were not to be used until the 1970 general elections, and this could be done, the impact would be less. The terms of the six-year members in the affected counties, and there are some i.e., senatorial districts 8, 14, 16, 18, 24, 26 and 28, would be cut to four years.

If the new districts were not to be used until 1972 (and I am assuming that there had not yet been an over-all reapportionment based on the 1970 census) the net effect would be cut to two years the four-year terms to which members had been elected in 1970.

We should also point out that if such legislation is enacted, and we certainly are not making such a suggestion, the staggered terms could be built into such redistricting legislation.

By: Oliver E. Payne

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