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CONSTITUTIONAL LAW: Power of Legislature to reapportion.
LEGISLATURE: Reapportionment.

The legislature is without authority to enact a valid legislative reapportionment statute under the present provisions of the Michigan Constitution of 1963.

No. 4333 May 18, 1964.

Representative Arthur Cartwright
House of Representatives
Lansing, Michigan
and
Representative Albert R. Horrigan
House of Representatives
Lansing, Michigan

By separate letters addressed to me you have requested my opinion at the earliest possible date as to whether the members of the current session of the legislature, being the regular session of 1964, have it within their power to lawfully enact legislation establishing senatorial and representative districts and apportioning senate and house seats to the districts so established. Each of you is of course aware of the provisions appearing in Article IV, Sections 2 through 6, Constitution of 1963, relating to legislative districting and apportionment. You are likewise aware that no final plan of districting and apportionment has been approved or is in effect and that the action of the apportionment commission is now pending before the Michigan Supreme Court pursuant to procedures outlined in above-cited Section 6. As of this date there has been an adjudication by a three-judge Federal District Court, sitting in the Eastern District of Michigan, upholding by majority opinions the constitutionality of the foregoing section.[1] But an appeal has been taken to the Supreme Court of the United States from that decision and the matter is now pending.[2] There has been no adjudication as of this date on the constitutionality of these sections by the Supreme Court of Michigan. You are therefore concerned with the power of the Michigan legislature to enact a districting and apportionment statute which I assume you contemplate could be put into effect should the above-cited constitutional sections be declared invalid either by the Supreme Court of the United States or by the Supreme Court of Michigan.

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[1] The decision by the three-judge Federal District Court was issued in the case entitled *William C. Marshall, Barney Hopkins, August Scholle, Alexander D. Fuller and Charles A. Rogers, Plaintiffs, vs. James M. Hare, Secretary of State of State of Michigan, Defendant, and Frank D. Beadle, John W. Fitzgerald and Paul C. Younger, Senators of the State of Michigan, and Stanton S. Faville, Chief Assistant Attorney General of the State of Michigan, Intervening Defendants, Civil No. 24013.*

[2] A Jurisdictional Statement has been filed in the Supreme Court of the United States by the plaintiffs as appellants, No. 962. A Motion to Affirm the judgment of the lower court has been filed on behalf of the intervening Senators and the Intervening Defendant Faville to which appellants have filed a Brief in Opposition.

By Article IV, Section 1, Constitution of 1963, the legislative power of the State of Michigan is vested in a senate and a house of representatives. This provision without substantial change appeared as the first clause of Section 1, Article V, Michigan Constitution of 1908, and as Section 1, Article IV, Constitution of 1850.

The Michigan Supreme Court in a number of cases has defined the extent of the legislative power conferred on the legislative branch by the Michigan Constitutions. Under the Constitution of 1850 the Court said:

> "If there is no express denial, or denial by necessary implication by other limitations placed upon legislative power, contained in the Constitution, the power exists and may be exercised at the pleasure of the law-making power."
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> *Mason v. Perkins,* 73 Mich. 303, 318

Under the Constitution of 1908 the expressions by the Court are as follows:

> "The legislative power is the authority to make, alter, amend, and repeal laws. 1 Cooley, Constitutional Limitations (8th Ed.), p. 183. In this State, it is co-extensive with that of the parliament of England, save as limited and restrained by the State and Federal Constitutions."
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> *Harsha v. City of Detroit,* 261 Mich. 586, 590

> "The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself."
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> *Young v. City of Ann Arbor,* 267 Mich. 241, 243

> "The legislative authority of the State can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States."
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> *Attorney General, ex rel. O'Hara v. Montgomery,* 275 Mich. 504, 538

> Quoted with approval in *Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties,* 300 Mich. 1, 12

It is settled law in Michigan that the exercise of legislative power is not dependent upon a specific constitutional grant of authority. Basically, the Constitution operates as a limitation upon the exercise of legislative power. This doctrine was recognized by our Supreme Court in the case of *In re Palm,* 255 Mich. 632, 635, where the Court said:

> "It is a well-settled principle of law that a State Constitution operates in limiting and not in granting legislative power."

In applying the Constitution to the exercise of the legislative power the Supreme Court of Minnesota in the case of *State ex rel. Simpson v. City of Mankato et al* (1912), 136 N.W. 264, said that constitutional provisions being mere limitations, the issue to be considered in determining whether an act of the legislature violates a particular constitutional provision, is not whether the people in adopting the constitutional provision had in mind

that the legislature might act and were therefore attempting to authorize it but instead, whether the people having in mind the possibility of some future attempt on the part of the legislature to enact such a law, the people by their constitution were prohibiting it.

A corollary to the foregoing rule of constitutional construction is that the forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions which established them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other.

Cooley's Constitutional Limitations, Eighth Edition, Volume One, p. 359

It is obvious from an examination of Article IV, Sections 2 through 6, Constitution of 1963, that the people have placed a limitation on the power of the legislature to create senatorial and representative districts and to apportion senate and house seats to them. The function of the legislative districting and apportionment under these sections has been placed in an apportionment commission and not in the legislature. This is clearly a limitation upon the legislative power. The remaining question is whether the legislature has the power to validly enact legislation undertaking to district the senate and the house and to apportion seats while the foregoing sections of the Michigan Constitution of 1963 are still in effect. It is my conclusion that the legislature has no such power. No court decision precisely in point has been found but I draw an analogy from a number of decisions by the Michigan Supreme Court which have held that a statute which at the time of its enactment violated the State Constitution does not subsequently become valid by a constitutional amendment which removed the limitation which the statute violated. Neither can an invalid statute acquire validity by subsequent constitutional amendment conferring power upon the legislature to enact such a law. In *Dewar v. The People,* 40 Mich. 401, the Court said that where the legislature had no power under the Constitution as it then was to enact a licensing law it could not be presumed that any unconstitutional power was intended to be exercised. See also *The Village of Mount Pleasant v. James N. Vansice,* 43 Mich. 361 and *Dullam v. Willson,* 53 Mich. 392. In the case of *The Seneca Mining Company v. Osmun, Secretary of State,* 82 Mich. 573, 576, 577, the Court pointed out:

> "* * *, if the law-making power is prohibited from enacting a law, and in disregard of such prohibition it goes through the forms of enacting a law, such enactment is of no more force or validity than a piece of blank paper, and is utterly void, and power subsequently conferred upon the Legislature by an amendment of the Constitution does not have a retroactive effect, and give validity to such void law."

I conclude that there is no present power in the Michigan legislature to lawfully enact a law for the establishment of senatorial and representative districts and the apportionment of senate and house seats thereto.

FRANK J. KELLEY,
Attorney General.