



OFFICE OF THE COUNTY ATTORNEY

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OPINION NO. 95.003

December 6, 1995

Kenneth Clark, Chair
Charter Review Commission
100 Maryland Avenue
Rockville, Maryland 20850

Re: Councilmanic Redistricting: Validity of the Charter Provision Providing for Adoption of the Commission on Redistricting's Plan in the Event of a Failure by the County Council to Take Timely Legislative Action to Enact a Redistricting Plan of its Own

Dear Mr. Clark:

This legal opinion is being provided to the Charter Review Commission in response to the Commission's request for guidance regarding the validity of a provision in Section 104 of the Montgomery County Charter. The provision in question calls for the councilmanic redistricting plan adopted by the Commission on Redistricting to become law in the event that the County Council fails to enact through legislation a redistricting plan of its own within a specified period of time.

I. SUMMARY OF OPINION REQUEST AND CONCLUSION

The Montgomery County Charter requires that councilmanic districts in Montgomery County be reestablished every ten years and it provides the framework for making this happen. The process begins with the creation by the County Council of a Commission on Redistricting; the members of this Commission are appointed by the Council. Elected officials are not eligible to become members of the Commission. Section 104 of the Charter requires the Commission to prepare a redistricting plan for submission to the Council. This Section further provides that if the Council fails to enact a plan of its own within 90 days after the presentation of the Commission's plan to the Council, the Commission's redistricting plan will become law.

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It is this latter provision in Section 104 calling for the Commission's plan to automatically take effect if the County Council fails to take timely action which is the subject of this legal opinion. Specifically, we have been asked to determine whether this provision constitutes an unlawful delegation of legislative power to a non-elected body. For the reasons set forth in Part III below, it is the legal opinion of this Office that the questioned provision in Section 104 of the County Charter is valid and would withstand legal challenge under the delegation doctrine.

II. FACTUAL BACKGROUND

Montgomery County is divided into five councilmanic districts. Each district must be compact in form and be composed of adjoining territory. In addition, the districts are to have substantially equal populations. See Charter Section 103. The boundaries of the five districts are redrawn every ten years as new census information becomes available. Section 104 of the Charter provides the following framework for the adoption of these new councilmanic boundaries:

The boundaries of Councilmanic districts shall be reestablished in 1972 and every tenth year thereafter. Whenever district boundaries are to be reestablished the Council shall appoint, not later than February 1 of the year prior to the year in which redistricting is to be effective, a commission on redistricting, composed of three members from each political party chosen from a list of five names submitted by the central committee of each political party which polled at least fifteen percent of the total vote cast for all candidates for the Council in the last preceding regular election. The Council shall appoint one additional member of the Commission. The Commission shall, at its first meeting, select one of its members to serve as chairman. No person who holds any elected office shall be eligible for appointment to the Commission.

By November 15 of the year prior to the year in which redistricting is to be effective, the Commission shall prepare a plan of Councilmanic districts and shall present that plan, together with a report explaining it, to the Council. Within thirty days after receiving the plan of the Commission, the Council shall hold a public hearing on the plan. **If within ninety days following presentation of the Commission's plan no other law reestablishing the boundaries of the Councilmanic districts has been enacted, then the plan, as submitted, shall become law.** (emphasis added)

The councilmanic boundaries were most recently reestablished in 1991. Acting pursuant to the Charter requirements, a bipartisan Commission on Redistricting was duly appointed by the County Council. The Commission adopted a plan revising the councilmanic district boundaries

and it presented this plan, along with an explanatory report, to the Council prior to the Commission's November 15, 1991, deadline. In addition to the Commission's plan, the Council also had before it for consideration several competing redistricting plans that had been introduced by individual council members in the form of proposed legislation. On December 10, 1991, the County Council enacted its own redistricting legislation. As a result of the Council's action, the redistricting plan submitted by the Commission on Redistricting did not become law.

III. LEGAL ANALYSIS

It has been said that in the enactment of laws the legislature acts in the exercise of a power conferred upon it by the people and that the legislature cannot validly redelegate that authority. Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747, 759 (1981), Maryland Co-operative Milk Producers, Inc. v. Miller, 170 Md. 81, 88, 182 A. 432 (1935), Browner v. Supervisors of Elections, 141 Md. 586, 119 A. 250 (1922). Further, 5 M.L.E. *Constitutional Law*, Section 105 (1982) provides that "[g]enerally, the legislature may not delegate legislative powers to private persons," citing Ackley v. Wicomico County Urban Services Commission, 223 Md. 196, 163 A.2d 122 (1960), and Luskin's Inc. v. United States Pioneer Electronics Corp., 26 Md. App. 711, 338 A.2d 396 (1975). See also Carter v. Carter Coal Co., 298 U.S. 238 (1936). The delegation doctrine is a corollary to the separation of powers doctrine. See Sugarloaf Citizens Association, Inc. v. Gudis, 319 Md. 558, 573 A.2d 1325 (1990), and Department of Transportation v. Armacost, 311 Md. 64, 532 A.2d 1056, 1062 (1987). These same restrictions apply to local governments as well. Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956). For charter counties such as Montgomery County, Article XI-A, Section 3 of the State Constitution provides that "[e]very charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said . . . County." Section 101 of the Montgomery County Charter vests the legislative powers in the County Council.

Delegations of power for fact-finding purposes necessary for the effectuation of legislation have been upheld by the courts. See Armacost, 532 A.2d at 1063, and the cases cited therein. Broad delegations of legislative power to administrative agencies have been approved where there are sufficient safeguards to guide the agency, especially in the areas of public health and safety. See, e.g., Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747, 759 (1981), citing Gino's v. Baltimore City, 250 Md. 621, 640, 244 A.2d 218 (1968). The trend is for courts to permit broad grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases. Pressman v. Barnes, 209 Md. 544, 121 A.2d 816, 822 (1956). This type of delegation is generally permitted in recognition of the practical difficulties that would exist in the functioning of the government if such delegations were not allowed. Metropolitan Life Insurance Company v. Insurance Commissioner, 58 Md. App. 457, 471, 473 A.2d 933, cert. denied, 300 Md. 795, 481 A.2d 239 (1984)

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In the Metropolitan Life Insurance Company case, 58 Md. App. at 468, the Maryland Court of Special Appeals examined the historical precedent for delegation of legislative authority, analyzing the decision of the Supreme Court in Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), wherein that court distinguished between proper and improper delegations of authority. The Supreme Court in Marshall observed as follows:

The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made....

The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. Id., at 693-94.

In Mistretta v. United States, 488 U.S. 361 (1989), the Supreme Court dealt with a claim that Congress had violated the delegation doctrine by delegating the power to promulgate sentencing guidelines for federal criminal offenses to an independent United States Sentencing Commission. In rejecting this claim, the Supreme Court held that Congress could make such a delegation to an expert body provided that sufficient statutory guidance was given to the Commission. The Court recognized that Congress "could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy." Id. at 372. In reviewing the history of the delegation doctrine, the Court took note of the fact that until 1935 it had never invalidated a challenged statute on delegation grounds. In 1935, the Supreme Court struck down two statutes on this basis.¹ Since then, however, delegations of power have continued to be upheld. While the practice of the lower courts may not have been so consistent in upholding statutes challenged on this basis, the Supreme Court's willingness to uphold delegations of legislative power in this context is demonstrative of the general acceptance that courts have given to delegations to expert commissions or panels to make findings and recommendations in factually complex areas, provided that the legislature gives the body sufficient statutory direction.

¹ Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). In both cases, the statutes were invalidated for failure to articulate any policy or standard that would serve to confine the discretion of authorities to whom the power was to be delegated.

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In Ackley v. Wicomico County Urban Services Commission, 233 Md. 196, 163 A.2d 122 (1960), the Court of Appeals was called upon to review a claim that a local law enacted by the General Assembly creating the Urban Services Commission in Wicomico County was invalid as an unconstitutional delegation of legislative power to a group of private citizens. The court rejected this argument. In Ackley, suit had been filed after the Urban Services Commission gave preliminary approval to the creation of a sewer service district after receiving a petition filed by the requisite number of residents and taxpayers in the proposed district, as provided in the statute. The fact that the Commission's action was taken in response to the initiative of private individuals was not found to constitute a delegation of legislative authority to private persons. The Court recognized that the petition was only a proposal which the Commission was not obligated to approve. At all times, the Commission retained the power to take action. The Court of Appeals found this to be significant, concluding that there is no improper delegation where the discretion to take legislative action is retained, even though that power may be invoked or initiated upon the petition of interested parties.

In addition to delegations to administrative entities to carry out the terms of legislative enactments, as discussed above, the Maryland Court of Appeals has also upheld delegations of legislative functions to private individuals under direct grants of authority contained in a county's governing charter. Under this type of delegation, legislative powers may be shared if the legislature retains primary responsibility for carrying out legislative functions. The Court of Appeals has held that legislative power may be shared directly with voters through referendum. Ritchmount Partnership v. Board of Supervisors of Elections, 283 Md. 48, 388 A.2d 523 (1978). The court in that case held that Article XI-A, Section 3, only requires that the elected council be the "primary" legislative entity.

This Office has also looked for guidance to the decision of the Maryland Court of Appeals in Legislative Redistricting Cases, 331 Md. 574, 629 A.2d 646 (1993). In that case, the court was asked to review the Governor's legislative redistricting plan for the General Assembly. In May 1991, the Governor had appointed a five member advisory committee, which submitted a redistricting plan to the Governor in December 1991. The Governor, in turn, accepted this plan and submitted it to the General Assembly in January 1992. The State Constitution permits the General Assembly to adopt a redistricting plan of its own, but further provides that if it fails to do so within the allotted time, the Governor's plan becomes law. Although the General Assembly considered several alternative plans, the Governor's redistricting plan became law in February 1992 after the General Assembly failed to enact a plan of its own.

While the delegation of power argument did not appear to have been directly brought to the attention of the court in that case, there is language in the court's opinion which indicates that the court would not have been receptive had such an argument been made. In response to an argument that there was no legal foundation for the Governor's Redistricting Advisory

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Committee and that the plan adopted did not reflect legislative policy determinations, the Court of Appeals stated:

When the General Assembly passes a bill which becomes law, the people of Maryland have articulated a legitimate state policy through their duly elected officials. That is no less true where, as here, the constitution specifies that the Governor shall develop the law in the first instance, which the General Assembly can then reject or endorse through its own action or inaction.²

331 Md. at 595, 629 A.2d at 656, n.16. The state constitutional provision providing for the Governor's plan to automatically become law in the event that the General Assembly is unable to enact its own plan within the time provided is somewhat similar to Section 104 of the County Charter. The main difference is that at the state level, the redistricting plan of the advisory committee is transmitted to the Governor; the Governor is then charged with the responsibility for submitting a redistricting plan to the legislative body. The court implicitly approved a structure where a plan created by an advisory committee to the Governor could become law if the plan was accepted by the Governor and the legislature failed to act within the time allotted. In Montgomery County, Charter Section 104 makes it possible for a plan submitted by an advisory committee directly to the Council to become law. Through its own "action or inaction," the County Council may reject the plan created by the Commission by enacting one of its own or it may endorse the Commission's plan by deciding not to approve a competing plan.

A challenge under the delegation doctrine to the role of an appointed redistricting commission has been directly addressed by at least one other jurisdiction. In Grivetti v. Illinois State Electoral Board, 335 F.Supp. 779 (N.D.Ill. 1971), aff'd, 406 U.S. 913 (1972), and in People ex rel. Scott v. Grivetti, 50 Ill.2d 156, 277 N.E.2d 881 (1971), cert. denied, 407 U.S. 921 (1972), both the federal and state courts in Illinois rejected claims that a state constitutional provision providing for appointment of a legislative redistricting commission constituted an unlawful delegation of legislative power. Under the Illinois constitution, the state General Assembly had the initial responsibility for creating a redistricting plan. If the General Assembly failed to adopt a plan by a certain date, however, a Legislative Redistricting Commission was to be created. The Commission was comprised of two representatives from the House, two representatives from the Senate, and four representatives who were not members of the legislature. No more than four members could be from the same party. The Commission was required to file with the Secretary of State a redistricting plan approved by at least five members of the Commission. The state constitution provided that this redistricting plan "shall be presumed valid [and] shall have the force and effect of law".

² A County charter is akin to a constitution because it establishes the organic, fundamental law of the County. Cheeks v. Cedlair, 287 Md. 595, 415 A.2d 255 (1980).

In upholding the state constitutional provision, the Illinois court noted that the actions of the Legislative Redistricting Commission were constrained by the legal standards for redistricting set forth by the Supreme Court and by the standards contained in the state constitution. (It is, of course, equally true that Montgomery County's Commission on Redistricting is also constrained by the Supreme Court's standards and by the standards found in the County charter.) After reviewing the facts, the state court concluded that it was clear that no real delegation of power question under either the state or federal constitutions was involved.

The federal district court in Grivetti found that there was no federal cause of action because the Redistricting Commission was required to act only when the legislature failed to adopt a redistricting plan of its own and the legislature had control over this function. (Cf. Cheeks v. Cedlair Corp., 287 Md. 595, 415 A.2d 255, where the Maryland Court of Appeals held that an initiative violated Article XI-A because it robbed the Council of its primary legislative role.) The Illinois court also took note of the fact that Illinois was not alone in making use of redistricting commissions. The court stated as follows:

In reaching this conclusion, we are persuaded particularly by the fact that about one-third of the states have assigned legislative reapportionment outright to administrative agencies or commissions. About one-half of these states have removed the apportionment function completely from the legislature and the remaining states provide, as does Illinois, for use of the commission as a backstop in the event of legislative failure to redistrict. We have discovered no successful attempt to invalidate any of these agencies, either on the basis of unconstitutional delegation of power or violation of one-man-one-vote principles.

335 F.Supp at 790. Unfortunately, while the federal district court stated that it had not identified any successful attempts to apply the delegation doctrine to redistricting commissions, the court did not supply any case citations to indicate whether the courts of any other state had directly analyzed this issue. We have found no reported decisions, in either the federal or state courts, other than the two Grivetti opinions in which this specific issue was addressed.³

Under the redistricting process established in Section 104 of the County Charter, the County Council retains the power to determine what the councilmanic district boundaries will be. The only obligation imposed on the Council with regard to the Commission's plan is that it is required to hold a public hearing on that proposal. Thereafter, the Council is free to adopt or reject the Commission's plan and it is within the complete control of the Council to determine

³ This issue was raised in Ajamian v. Montgomery County, 99 Md. App. 665, 639 A.2d 157, cert. denied, 334 Md. 631, 640 A.2d 1132 (1994), but was not decided.

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whether the Commission plan will become law. The only constraint on the Council is that it is required to take some action to adopt a redistricting plan within ninety days after it is presented with the Commission's plan. If it does not take action, then and only then does the Commission proposal become law. The Council is in no way obligated to adopt the recommendation of the Commission.

The differences between the structure approved in the Grivetti cases and the County Charter's Section 104 support our conclusion that Section 104 is valid. In Montgomery County, the Commission on Redistricting is convened before the Council takes up the subject of redistricting. In Illinois, the legislature loses all control over redistricting if it does not take timely action. Once it fails to act, the entire responsibility is shifted to the Legislative Redistricting Commission. In Montgomery County, the County Council has the final say over the redistricting plan. Therefore, there is less delegation of responsibility under the County Charter than that which was approved by both the state and federal courts in the Grivetti cases. This being the case, it is our opinion that under Ritchmount Partnership v. Board of Supervisors of Elections, 283 Md. 48, 388 A.2d 523 (1978), and Ackley v. Wicomico County Urban Services Commission, 233 Md. 196, 163 A.2d 122 (1960), there is no unlawful delegation of legislative power to the Commission.

We acknowledge that in the Legislative Redistricting Cases, 331 Md. 574, 629 A.2d 646, the power to submit a redistricting plan was given to the Governor, an elected official. In Grivetti the power to submit a plan was given to a commission composed of elected and appointed officials. Under Section 104, the Commission is composed entirely of appointed officials. We do not view this difference as legally significant. Administrative agencies, many of which are run by appointed commissions may be delegated legislative powers. Mistretta, 488 U.S. 361. In Ritchmount Partnership, 283 Md. 48, the Court of Appeals approved delegation of legislative power to those who vote in a referendum. In neither case is the "body" exercising legislative power elected.

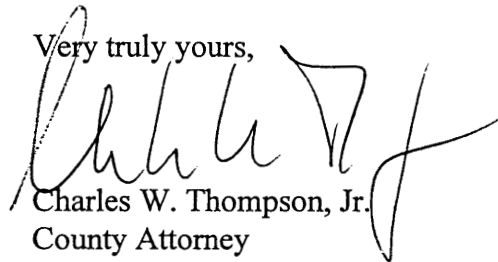
The line of Maryland cases cited above, as well as the decision of the Supreme Court in Mistretta v. United States, 488 U.S. 361, all uphold broad delegations of legislative power and support a conclusion that the role of the Commission on Redistricting in establishing a redistricting plan is constitutional whether the Commission is viewed as an administrative agency implementing a law or as a body directly exercising legislative authority. In carrying out its duties, the Commission is obligated to comply with the standards for permissible redistricting as set forth in the Charter and in the applicable case law explaining the parameters of permissible redistricting. These standards and guidelines satisfy the requirement that there be sufficient safeguards to guide the actions of the Commission as an administrative agency. Furthermore, the Commission as a legislative body does not usurp the council's primary legislative function because the council retains ultimate authority to enact a redistricting plan.

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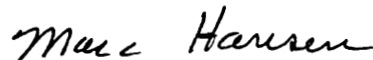
IV. CONCLUSION

There are no Maryland cases directly addressing the question presented by the Charter Review Commission regarding the delegation of legislative power to the Commission on Redistricting. However, our review of the applicable case law indicates that a court would be likely to uphold the validity of Charter Section 104 if that section were to be challenged under the delegation doctrine. The County Council retains at all times throughout the redistricting process the authority to control whether the Commission on Redistricting's plan will become law. The only constraint is that the Council must take action within 90 days; this constraint does not appear to be an undue burden on the Council. The Commission on Redistricting primarily serves as a fact-finder and information gatherer for the County Council.

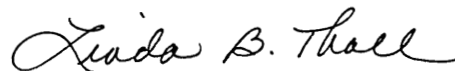
Very truly yours,



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