

**OPINION NO. 82-047****Syllabus:**

1. Those sections of R.C. Chapter 325 that set forth compensation classifications for county officers based upon population require changes in compensation for the officers named therein in accordance with changes in population as shown by the 1980 federal decennial census.
2. For the purposes of those sections of R.C. Chapter 325 that provide for the compensation of county officers based upon population, the population figures as shown by the 1980 federal decennial census were effective as of the date on which the Governor received the completed basic population tabulations transmitted by the Secretary of Commerce. (1941 Op. Att'y Gen. No. 3982, p. 551, overruled.)
3. Any excess compensation paid to county officers in reliance on 1941 Op. No. 3982 for the period from April 1, 1980 to the effective date of the 1980 federal decennial census population tabulations is not recoverable.
4. An officer whose term commenced prior to the effective date of the 1980 federal decennial census figures, but after the effective date of R.C. 325.22, and who would otherwise be subject to an in-term decrease in compensation as a result of a population decrease shown by the 1980 figures, is to be compensated throughout his term under the classification based upon the 1970 federal decennial census results which were in effect at the time his term commenced.
5. An officer whose term commenced prior to the effective date of R.C. 325.22 is subject to an in-term decrease in compensation if the 1980 federal decennial census figures show a population decrease which alters the officer's compensation classification.

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, July 2, 1982**

September 1982

I have before me your letter which asks the following questions:

1. Do Sections 325.01; 325.04; 325.06; 325.08; 325.09; 325.10; 325.11; 325.14 and 325.15, Revised Code, in conjunction with Section 1.59(D), Revised Code, require an increase or decrease in compensation for the officers named therein as a result of the 1980 federal decennial census? Your attention is directed to State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942); 1960 O.A.G. No. 1644, and Section 325.22, Revised Code, effective December 20, 1980, which may be relevant to this issue.
2. If the answer to the preceding question is in the affirmative, what is the effective date of the 1980 federal decennial census with regard to such changes in compensation?

The issue raised by your first question is whether the constitutional prohibition of in-term salary changes forbids a change in the salary of county officers as a result of population changes shown by the 1980 federal decennial census figures. The pertinent constitutional provision states that "[t]he General Assembly in cases not provided for in the constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." Ohio Const. art. II, §20. The sections of R.C. Chapter 325 which you enumerated in your first question set forth the manner in which county officers shall be paid, and fix these officers' salaries by providing compensation classifications according to the population of the various counties.<sup>1</sup> The legislature has defined the term "population" by providing that it "means that shown by the most recent regular federal census." R.C. 1.59(D).

The Supreme Court of Ohio has addressed the issue of in-term changes in compensation as a result of population changes, and has held as follows:

A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court "shall not be diminished or increased during his term of office." (Emphasis added.)

State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 39 N.E.2d 840 (1942) (syllabus, paragraph 3). The court reasoned that the objectives of such constitutional provisions are to ensure that electors and prospective officers are aware of what the salary for a particular position will be, to assure the officer that his salary will not be changed during his term, and to avoid pressure on legislators to change incumbent officers' salaries. Id. at 278, 39 N.E.2d at 843. The court declared that "there is no prohibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that basis. . . is fixed, certain, and unchangeable during his term." Id. at 283, 39 N.E.2d at 845. While the statute and constitutional provision at issue in Mack concerned only judges, the same reasoning is applicable to the laws concerning compensation for county officers. Id. at 283, 39 N.E.2d at 845-46. Thus, statutes which set forth compensation classifications for county officers according to population levels, and which result in a change in salary during an officer's term have been considered valid, if the statutes are effective before commencement of the term for which the officer is appointed or elected. See 1960 Op. Att'y Gen. No. 1644, p. 1160. I must conclude, therefore, that those sections of R.C. Chapter 325 which set forth

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<sup>1</sup>R.C. 325.03 provides classifications, based upon population, for the compensation of county auditors. While your question did not include this provision among the sections you enumerated, the analysis and conclusions set forth hereunder are also applicable to county auditors.

compensation classifications for county officers based upon population require changes in salary for the officers named therein, in accordance with changes in population as shown by the 1980 federal decennial census.

Your second question concerns the effective date of the 1980 federal decennial census for the purpose of determining changes in the compensation of county officers. There is no Ohio statute or case law that fixes an effective date for federal census results for compensation purposes. While this particular question has been the subject of holdings by the courts of numerous other states, the conclusions reached by these courts are inconsistent. See 43 A.L.R. 2d 1353 (1955).

Some courts have settled on such nebulous dates as the date of availability of the census figures or the date that the census results could be considered a matter of public knowledge. See, e.g., Carter County v. Huett, 303 Mo. 194, 259 S.W. 1057 (1924). Other courts have held that the census figures are effective only after the occurrence of some official act. This date may be the date on which the Director of the Census or other qualified official publishes preliminary results, even though the published figures are subject to corrective adjustments. See, e.g., Excise Board, Washita County v. Lowden, 189 Okla. 286, 116 P.2d 700 (1941). Accord 1931 Op. Att'y Gen. No. 2856, vol. I, pp. 68, 70-71. The laws of some states require the secretary of state or the governor to certify and publish or otherwise promulgate federal census results. In such states, the date of certification or promulgation is considered the effective date of the census figures for compensation purposes. See, e.g., Cato v. Chaddock, 195 Ind. App. 514, 373 N.E.2d 172 (1978); State ex rel. Martin v. Ivins, 59 N.J.L. 364, 36 A.93 (1896).

Another alternative is the "decennial census date" which is defined by 13 U.S.C. §141(a) (1976) as April 1 of the year in which the census is taken. Selection of the decennial census date as the effective date for census results, however, has been the subject of controversy in Ohio as well as several other states. In 1931 Op. No. 2856 at 69-70, this date was expressly rejected as the effective date for census figures. The author of that opinion cited with approval the reasoning of the court in Lewis v. Lackawana County, 200 Pa. 590, 595-97, 50 A. 162, 163-64 (1901):

The census has no inherent force or application in the law of Pennsylvania. Its relevancy to state matters depends on the constitution and statutes of the state. In adopting it as the test, therefore, the courts proceed upon the general principle that it affords the best evidence attainable of the necessary fact. And upon the same principle, before the fact can become a part of the state law, and be made the basis of action it must be established by competent evidence. It follows therefore that it is not the mere existence of the fact that must govern its application, but its legal and official ascertainment.

. . . .

But it is argued that as the census was taken as of June 1, 1900, the fact must be taken to be established as of that date, without regard to when the result is made known. This will not help the difficulty. There is no retrospective force in the census act, nor was any such effect intended. A date certain was necessary to insure correctness, uniformity, the avoidance of duplication, etc., and this is all that was intended.

. . . .But, though it may have emanated from the census bureau, the press bulletin was not proof or even evidence. Newspaper bulletins are not evidence of anything. The question is not one of announcement, as the appellee has argued, nor of notice or knowledge on the part of the candidates or the electors. It is of the legal ascertainment of the fact.

The following statement by a subsequent Pennsylvania court is also pertinent:

Where the legislature has fixed no definite plan for establishing the fact. . .then it must be found from consideration of the best

available evidence. It may be by the certificate of the director of the census. . .or in such other manner as directed by law. But in no event is the classification to be altered until a legal ascertainment of the increase has been made to appear.

Commonwealth ex rel. Woodring v. Walter, 274 Pa. 553, 556, 118 A. 510, 512 (1922).

In 1941 Op. Att'y Gen. No. 3982, pp. 551, 555-57, however, it was concluded that the decennial census date should be considered the effective date of the census results for the purpose of compensation classifications based upon population levels. In contrast to the earlier opinion, the author of 1941 Op. No. 3982 relied on the statement of the Tennessee Supreme Court that adoption of any date other than the decennial census date "would result in irregularity and nonuniformity." Underwood v. Hickman, 162 Tenn. 689, 692, 39 S.W.2d 1034, 1035 (1931). This conclusion was based upon the federal statutes providing for a three-year period in which the Director of the Census could publish population tabulations for various regions as the computations were completed. The effect was that some counties would be notified in advance of elections of county officers, others afterward, with the resulting inequity of some county officers being paid according to population levels reflected in the most recent census while others were restricted to earlier, lower classifications. Id.

The current federal statutes, however, direct the Secretary of Commerce to transmit the completed tabulations within a reasonable period of one year after the decennial census date. 13 U.S.C. §§1(2), 141(c) (1976). It is my understanding that the completed 1980 census figures for the entire state were reported and transmitted to the Governor of Ohio in March, 1981. Thus, the primary concern expressed by the author of 1941 Op. No. 3982, and by the Tennessee court, i.e., uniformity in the application of the most recent census figures to compensation classifications for county officers, need not be a problem under the reporting provisions of the current federal statutes.

In addition to the changes in the federal statutes, the state statutes which provide for county officers' compensation have changed since the issuance of 1941 Op. No. 3982. The current formula defines "population" in terms of the numbers "shown by the most recent regular federal census." R.C. 1.59(D). In contrast, the 1941 formula entailed reference to the federal census next preceding election or appointment of an officer. The statutes effective at the time that opinion was issued, in conjunction with the pertinent constitutional provision, were interpreted to require that the census figures be effective prior to the election or appointment of the officer. Following the holding in Mack, however, it is clear that only the statute which sets forth the compensation schedule need be effective prior to the commencement of the term for which the relevant officer is elected or appointed. See 139 Ohio St. at 282-83, 39 N.E.2d at 845-46.

Thus, the concerns that the most recent census results be given reasonably prompt effect and that these census figures be implemented uniformly under the compensation schedules can be resolved under current statutes and case law without resort to the decennial census date. I am inclined, therefore, to agree with the reasoning of the Pennsylvania courts that before federal census figures can be given effect, and used to alter a county's classification under a compensation schedule, there must be a legal ascertainment of the census results. Accord 1931 Op. No. 2856. The federal statutes provide that completed tabulations are to be transmitted to the Governor within one year of the decennial census date. 13 U.S.C. §141(c) (1976). The date on which the Governor receives these official tabulations thus appears to be the most reasonable date for the figures to become effective in Ohio.

Based upon the foregoing, I therefore conclude that, for purposes of those sections of R.C. Chapter 325 that provide for the compensation of county officers on the basis of population, the population figures as shown by the 1980 federal decennial census were effective as of the date on which the Governor received the completed basic population tabulations transmitted by the Secretary of Commerce.

I anticipate that this conclusion may raise questions concerning the increased compensation that county officers may have received in advance of the effective date of the census results. It is my understanding, based upon conversations between your office and a member of my staff, that after the preliminary results of the 1980 census became available some county officers were paid salary increases retroactive to April 1, 1980. Such payments were made in reliance upon the statutory interpretation expressed in 1941 Op. No. 3982. It, therefore, appears that the payments were made in good faith and under color of law. Accordingly, it is my opinion that any excess compensation paid to county officers in reliance upon 1941 Op. No. 3982 for the period from April 1, 1980 to the effective date of the 1980 federal decennial census population tabulations is not recoverable. Cf. State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 392, 348 N.E.2d 692, 694 (1976) (payments for health insurance premiums for county officers which were paid pursuant to a resolution of the county commissioners passed after commencement of the officers' terms, "having been made in good faith and under color of law, though erroneously" were not recoverable).

It is also my understanding that the figures shown by the 1980 federal decennial census reflect population decreases in some Ohio counties. Based upon conversations between your office and a member of my staff, I understand that officers in such counties have been paid according to population classifications using the figures from the 1970 federal decennial census. As a county classification clearly cannot be changed until the figures upon which the classification is based are effective, it was proper to pay the officers in those counties according to the classifications which were still in effect at the commencement of the officers' terms. Moreover, although Ohio Const. art. II, §20 would permit an in-term decrease as a result of the 1980 census figures, the legislature has expressed its intention that officers not be subjected to in-term decreases in compensation by providing as follows:

Notwithstanding anything to the contrary in this chapter, the compensation payable to a county auditor, county treasurer, county sheriff, clerk of the court of common pleas, county recorder, county commissioner, prosecuting attorney, county engineer, or county coroner shall not be reduced during the remainder of his term of office on account of a decline in the population of the county.

R.C. 325.22, effective December 20, 1980. This provision is effective for any officer named therein whose elective or appointive term commenced after the effective date of the statute. Cf. Mack, 139 Ohio St. at 283, 39 N.E.2d at 845 ("the weight of authority is that a statute effective before the beginning of the term of a public officer whereby his compensation is automatically increased or diminished during his term by reason of an increase or decrease of the population. . . as shown by a later census" is constitutionally permissible). See, e.g., R.C. 309.01 (prosecuting attorney is to commence office on the first Monday of January after his election); R.C. 311.01 (county sheriff shall hold office from the first Monday of January following his election). It is, therefore, my opinion that an officer whose term commenced prior to the effective date of the 1980 federal decennial census population figures, but after the effective date of R.C. 325.22, and who would otherwise be subject to an in-term decrease in compensation as a result of a population decrease shown by the 1980 figures, is to be compensated throughout his term under classifications based on the 1970 federal decennial census figures which were in effect at the time his term commenced.

However, as stated above, the basis for compensation of a county officer may not be changed by a legislative act taken after commencement of the officer's term. Thus, the basis for compensation of an officer whose elective or appointive term commenced prior to the effective date of R.C. 325.22 is unaffected by the provisions of that statute. I, therefore, conclude that such an officer is subject to an in-term decrease in compensation if the 1980 federal decennial census figures show a population decrease which alters the officer's compensation classification. Any alteration in his compensation classification would occur as of the effective date of the 1980 federal decennial census figures.

In summary, it is my opinion, and you are therefore advised, that:

1. Those sections of R.C. Chapter 325 that set forth compensation classifications for county officers based upon population require changes in compensation for the officers named therein in accordance with changes in population as shown by the 1980 federal decennial census.
2. For the purposes of those sections of R.C. Chapter 325 that provide for the compensation of county officers based upon population, the population figures as shown by the 1980 federal decennial census were effective as of the date on which the Governor received the completed basic population tabulations transmitted by the Secretary of Commerce. (1941 Op. Att'y Gen. No. 3982, p. 551, overruled.)
3. Any excess compensation paid to county officers in reliance on 1941 Op. No. 3982 for the period from April 1, 1980 to the effective date of the 1980 federal decennial census population tabulations is not recoverable.
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5. An officer whose term commenced prior to the effective date of R.C. 325.22 is subject to an in-term decrease in compensation if the 1980 federal decennial census figures show a population decrease which alters the officer's compensation classification.