

# CONGRESSIONAL APPORTIONMENT—PAST, PRESENT, AND FUTURE

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## INTRODUCTION

From the debates of the Constitutional Convention to those of the present Congress the question of congressional apportionment has been one of the most discussed problems in our national legislature. A mere reading of the debates on this question of apportionment reveals the conflicting interests of the large and small states and the extent to which partisan politics permeates the entire problem.

Our founding fathers believed they had obtained a solution to the conflict of interests of the large and small states in the compromise of equal representation in the Senate coupled with representation according to population in the House of Representatives.

However, the history of apportionment in the House of Representatives up to the present day clearly indicates that the solution of our founding fathers was just a compromise and not a real solution.

## CONSTITUTIONAL REQUIREMENTS AND EXISTING LAW

Article I, Section 2, paragraph 3, of the United States Constitution as amended by the Fourteenth Amendment provides that:

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.

The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

Thus the Constitution provides for the apportionment of representatives upon the census of population. While it does not state that a new apportionment is mandatory after each census, it appears that such a requirement may be inferred. The action of the Congress in providing for a new apportionment after each census except in the case of the census of 1920 supports such a conclusion.

The right of Congress to regulate the apportionment of representatives and the redistricting of congressional districts stems from the provision in the Constitution providing that the times, places, and manner of holding elections for Senators and Representatives shall be determined by the state legislatures subject to action by the Congress.<sup>1</sup> In its attempts to solve the problem of apportionment the Congress until

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<sup>1</sup> U. S. CONST. ART. I, §4.

1842 limited the exercise of its legislative power to changing the size of the House and left the election of its members from districts to the uncontrolled action of the various state legislatures. From 1842 to 1929 Congress not only legislated on the size of the House of Representatives but also, at various times, established standards for the election of its members from congressional districts.

In 1929 Congress, mindful of its failure to reapportion after the census of 1920, concentrated its efforts upon the avoidance of such a failure in the future. It enacted a plan for automatic reapportionment which is the existing law with minor amendments.<sup>2</sup>

Under the existing law the apportioning of the membership of the House of Representatives is automatic. The president is required to submit to the Congress on the first day of its convening or within a week thereafter, a statement showing the number of representatives each state is entitled to have on the basis of the decennial census of population. These figures which are presented to the Congress are based upon the statutory requirements that the size of the House will be 435 members and that the method of computation used is the method of equal proportions.

Unless the Congress changes either the size of the House or the method of computation, the law requires that within 15 calendar days after the reception of the president's message by the Congress, the Clerk of the House of Representatives shall submit to the governor of each of the states a certificate of the number of representatives that state is entitled to have in the ensuing Congress.

That procedure was followed in 1950 and the apportionment therein is the basis for current action by state legislatures.<sup>3</sup>

The existing statute further provides that until a state is redistricted in a manner provided by its laws after any apportionment, the representatives to which the state is entitled shall be elected in the following manner: (1) If there is no change in the number of representatives, they shall be elected from districts then prescribed by the law and if any run at large they shall continue to be so elected; (2) if there is an increase in the number of representatives, then these additional representatives run at large and the others are elected from the then prescribed districts; (3) if there is a decrease in the number of representatives but the number of districts is equal to such decreased number, then they shall be elected from the districts; (4) if the number of representatives is decreased but the number of districts is less than the number of representatives, then the excess of representatives are to be elected at large and the others from the existing districts; and (5) if the number of representatives is decreased and the number of districts in the state exceeds that number, then all are elected at large. It should be noted however that the Congress may at any time change the statutory provisions.

Furthermore the constitutional right of each House to be the judge of the elections and qualifications of its own members should be borne in mind.<sup>4</sup>

<sup>2</sup> 46 STAT. 21 (1929); 55 STAT. 761 (1941), 2 U.S.C. §2a (Supp. 1950).

<sup>3</sup> MESSAGE OF THE PRESIDENT, H. R. DOC. NO. 36, 82d Cong., 1st Sess. (1951).

<sup>4</sup> U. S. CONST. Art. I, §5.

## HISTORY OF CONGRESSIONAL ACTION

For many years the Congress escaped the full impact of the apportionment problem by enactments increasing the size of the House of Representatives. Those states that lose seats are naturally disposed to support legislation to increase the size of the House so that they would not lose their representation.

Article I, Section 2 of the Constitution specified the number of representatives that each of the 13 states was entitled to. The total of that allotment was 65 members. That apportionment has often been called the constitutional apportionment.

After the first census of 1790, which met the requirement of Section 2, Article III of the Constitution, Congress passed an apportionment bill. It is interesting to note in passing that the bill was the object of the first presidential veto. After a motion to override the veto had failed, a new bill, obviating the presidential objections, was enacted.<sup>5</sup> That act fixed the membership of the House at 105 under a ratio of one representative for every 33,000 persons; all fractions in that quota were disregarded. It further allotted a number of representatives for each state.

The next apportionment act after the second census in 1800 provided a House consisting of 141 members with a ratio of one for every 33,000 individuals.<sup>6</sup> It maintained the practice of disregarding all fractions in the quota.

In 1811 the third apportionment bill altered the ratio to 35,000 and allotted members to the several states so that the total was 181.<sup>7</sup>

The apportionment act enacted after the fourth census of 1820 provided for quotas which totaled 212 members under a ratio of 40,000.<sup>8</sup>

The act of May 22, 1832, which was based upon the fifth census of 1830, increased the ratio to 47,700, which resulted in a House of 240 members.<sup>9</sup>

After the sixth census of 1840 the Congress altered the procedure of its predecessors. The apportionment act of 1842 established a ratio of 70,680 for each member and provided further "one additional representative for each State having a fraction greater than one moiety of the said ratio." Under the specified method of computation the total membership of the House was reduced to 223 which was the total number of representatives specified in the act.<sup>10</sup>

The reduction in membership from 1832 was 17 but since 2 new states with 4 members were included, the membership of the previously admitted states was reduced by 21. After the census of 1850 the Congress adopted what is generally known as the Vinton method, under which the population of the country was divided by the number of members of the House, resulting in the number of persons for each district. Then that figure was divided into the population of each state in order to give the exact quota for each state. Then each state was assigned one representative to meet the constitutional requirement after which a representative was allotted to each of the other states for each whole number in its exact quota. The unassigned

<sup>5</sup> 1 STAT. 253 (1792).

<sup>3</sup> 3 STAT. 651 (1822).

<sup>6</sup> 2 STAT. 128 (1803).

<sup>4</sup> 4 STAT. 516 (1832).

<sup>7</sup> 2 STAT. 669 (1811).

<sup>10</sup> 5 STAT. 491 (1842).

representatives were then allotted in order to the states having the highest fractions.<sup>11</sup> The act fixed the size of the House at 233.

An attempt was made to fix the size of the House at 233 until the next apportionment, but a change occurred in 1852 when the size was increased to 234 with the provision that it should revert to 233 at the next apportionment.<sup>12</sup>

The attempt to limit the size of the House failed with the changes enacted in 1862.<sup>13</sup> This act of 1862 fixed the number of representatives at 241.

The act of February 2, 1872<sup>14</sup> continued the Vinton method and fixed the size of the House at 283.

The apportionment act of February 25, 1882<sup>15</sup> provided for a membership in the House of 325 and specified the number assigned to each state, following the Vinton method.

The act of February 7, 1891<sup>16</sup> provided for a House of 356 members, again employing the Vinton method.

In January of 1901 an apportionment act<sup>17</sup> increased the number of members to 386 and allotted them under the Vinton method.

The apportionment act of 1911<sup>18</sup> fixed the House at 433 members, with the proviso that should Arizona or New Mexico be admitted prior to the next apportionment it would be entitled to one representative. The admittance of both of these states subsequently raised the membership figure to 435. In this act the House adopted a new method of computation, popularly called "major fractions."

After the fourteenth census in 1920 serious question was raised as to the accuracy of the census figures. The net result was that no reapportionment occurred although some attempts were made. In all, 42 bills were introduced in the House of Representatives but none passed.

In 1928 an attempt was made to pass an automatic apportionment bill, but without success.

In June of 1929 an act<sup>19</sup> was passed which provided for an apportionment under: (1) the method of the last preceding apportionment; (2) the method of major fractions; and (3) the method of equal proportions. It provided that the president should submit to the Congress the apportionment population of every state showing the apportionment for each state according to the then existing membership of the House under each of the three methods. Then if the Congress did not enact a new act, each state was entitled in the second succeeding Congress and each subsequent Congress thereafter to the number of representatives shown by the method used in the last preceding census.

The requirements of the reapportionment act of 1929 were complied with in December, 1930 and the Congress took no action. Since the method used in the last preceding apportionment in 1910 was that of major fractions that method was followed. There was no change in the size of the House.

<sup>11</sup> 9 STAT. 432 (1850).

<sup>14</sup> 17 STAT. 28 (1872).

<sup>17</sup> 31 STAT. 733 (1901).

<sup>12</sup> 10 STAT. 25 (1852).

<sup>15</sup> 22 STAT. 5 (1882).

<sup>18</sup> 37 STAT. 13 (1911).

<sup>13</sup> 12 STAT. 353 (1862).

<sup>16</sup> 26 STAT. 735 (1891).

<sup>19</sup> 46 STAT. 21 (1929).

Due to the enactment of the Twentieth Amendment, it was impossible for the president in 1940 to comply with the requirements of the act of 1929 to submit a report since the census had not been taken in January of 1940. Remedial legislation was enacted<sup>20</sup> by requiring the report to be submitted within one week of the beginning of the first session of the Seventy-seventh Congress, and each fifth Congress thereafter.

The automatic reapportionment act of 1929 was amended in 1941 by changing the method to that of equal proportions.<sup>21</sup>

The President transmitted a reapportionment message to the Eighty-second Congress on January 9, 1951.<sup>22</sup> At the present time the Congress has taken no action on the census of 1950 so that the size of the House remains 435 under the method of equal proportions.

Prior to 1842 the Congress in the exercise of its power under Section 4 of Article I of the Constitution limited itself to the apportionment of the membership of each state and did nothing concerning the election of the members making up the quotas. This policy was maintained even though some of the states went so far as to petition Congress for an amendment providing for congressional elections by districts. By 1842 22 states were employing the method of election from districts.

Finally the apportionment act of June, 1842<sup>23</sup> contained a provision that the representatives under that apportionment should "be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative." In approving the enactment of this bill President Tyler expressed misgivings as to the power of Congress to command states to make or alter their existing regulations. In 1850 the act enacted deleted the provision concerning election from districts. However, in 1862 Congress restored the requirement that districts be composed of contiguous territory<sup>24</sup> and repeated that same requirement ten years later with a further proviso that the districts should contain "as nearly as practicable an equal number of inhabitants."<sup>25</sup> These requirements were renewed after 1880 and again in 1891.

In 1901 an additional requirement was added, to those previously written, by the act of January 16, 1901 which provided that districts be composed of "compact territory."<sup>26</sup> In 1911 these requirements were repeated.<sup>27</sup> Since 1911 all the apportionment acts failed to renew or continue the requirements of compactness, contiguity, and equality of population.

The question of congressional control over the acts of the state legislatures regarding apportionment was first met in 1843 when objections were raised concerning the election of certain members from states wherein the elections were not held by

<sup>20</sup> 54 STAT. 162 (1940).

<sup>21</sup> 55 STAT. 761 (1941), 2 U. S. C. §2a (Supp. 1950).

<sup>22</sup> MESSAGE OF THE PRESIDENT, H. R. Doc. No. 36, 82d Cong., 1st Sess. (1951).

<sup>23</sup> 5 STAT. 491 (1842).

<sup>24</sup> 12 STAT. 572 (1862).

<sup>25</sup> 17 STAT. 28 (1872).

<sup>26</sup> 31 STAT. 733 (1901).

<sup>27</sup> 37 STAT. 13 (1911).

districts. By parliamentary maneuver the House avoided the direct issue and the members in question retained their seats. In 1901 the power of Congress to regulate districts was challenged in an election case, but this time the House took no action and the member retained his seat. In 1910 the House was faced with a similar issue, but no action was taken.

Although the most direct attack upon the power of the Congress to regulate redistricting under Article I, Section 4 of the Constitution is found in the reports of the House itself, it appears to be well-established by the decisions of the United States Supreme Court that the Congress has general supervisory power over the subject of the elections of the representatives, including the manner in which a state is divided into congressional districts.<sup>28</sup>

It should be noted that while it appears from these decisions that Congress has the power to regulate districting in the states of congressional districts the Supreme Court has never passed directly on the point. The Court, however, at no time in passing on these various reapportionment acts ever intimated that they were unconstitutional. In the case of *Colegrove v. Green* Mr. Justice Frankfurter in a majority opinion seems to invite Congressional action in the following statement:<sup>29</sup>

The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives "among the several states . . . according to their respective Numbers, . . ." Article I, §2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. "What might not be done directly by mandamus, could not be attained indirectly by injunction." Chafee, *Congressional Reapportionment* (1929) 42 Harv. L. Rev. 1015, 1019. Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting. 5 Stat. 491. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned; it was still doubted by a Committee of Congress as late as 1901. See *e.g.*, Speech of Mr. (afterwards Mr. Justice) Clifford, Cong. Globe, April 28, 1842, 27th Cong., 2d Sess., App. p. 347; 1 Bartlett, *Contested Elections in the House of Representatives* (1865) 47, 276; H. R. Rep. No. 3000, 56th Cong., 2d Sess. (1901); H. R. Doc. No. 2052, 64th Cong., 2d Sess. (1917) 43; *United States v. Gradwell*, 243 U. S. 476, 482, 483. The Reapportionment Act of 1862 required that the districts be of contiguous territory. 12 Stat. 572. In 1872 Congress added the requirement of substantial equality of inhabitants. 17 Stat. 28. This was reinforced in 1911. 37 Stat. 13, 14. But the 1929 Act, as we have seen, dropped these requirements. 46 Stat. 21. Throughout our history, whatever may have been the controlling Apportionment Act, the most glaring disparities have prevailed as to the contours and the population of districts. . . .

Although doubt may exist as to the constitutional power of Congress to legislate

<sup>28</sup> *Smiley v. Holm*, 285 U. S. 355 (1932); *Ex parte Siebold*, 100 U. S. 371 (1879); *Ex parte Yarbrough*, 110 U. S. 651 (1884); *Wood v. Broom*, 287 U. S. 1 (1932); *Colegrove v. Green*, 328 U. S. 549 (1946).

<sup>29</sup> *Colegrove v. Green*, *supra*, at 554-555.

on the question of state redistricting and as to the extent to which Congress may go in the exercise of such power, the decisions of the Supreme Court clearly indicate that at the present time there are no federal statutes limiting the actions of a state legislature in drawing congressional districts.<sup>30</sup>

A question has been proposed as to whether or not the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," is a limitation upon the state legislatures in creating unequal congressional districts. The case of *Nixon v. Herndon*<sup>31</sup> tends to support such a view. The best that may be said of that argument at the present time is that there is hope balanced by uncertainty.

#### CONCLUSION

In the light of the court decisions and the legislative enactments the importance of the problem of fair, equitable apportionment both by the federal and state legislatures is one that demands a final and prompt solution. It must be a solution which goes to the very root of the problem and eradicates the sources of the evil. A mere glance at the contours of various congressional districts and the wide variances in the populations of these districts compels the conclusion that the drawing of congressional districts cannot be left to the whims and uncontrolled discretion of the state legislatures. The problem is one which involves the fundamental principle of equality which permeates our entire Constitution so that its denial imperils the very heart of our democracy.

In the hope that a fair and equitable solution to the problem of apportionment and redistricting may be obtained in a manner consonant with both the rights of the states and the congressional power granted in the Constitution I introduced a bill in the first session, Eighty-second Congress, H. R. 2648.

That bill simply restores to the federal law the requirements of contiguity, compactness, and equality of population, with the addition of a more specific requirement for the latter. That requirement is that the population of any congressional district cannot vary more than 15 per cent above or below the average population for each district within the state; the average district is determined by dividing the population of the state by the number of representatives to which it is entitled.

The requirement of contiguity is one which is simply defined and should raise no problem. As to the requirement of compactness, such elements as economic and social interests of an area, its topography, means of transportation, the desires of the inhabitants as well as of their elected representatives and finally the political factors should all be considered. In that regard it appears that the state legislatures are far better equipped to determine those factors than either the Congress or any national agency it might designate to do so.

The history of apportionment in the United States, particularly since 1842 when

<sup>30</sup> *Smiley v. Holm*, *supra* note 28; *Wood v. Broom*, *supra* note 28; *Colegrove v. Green*, *supra* note 28.

<sup>31</sup> 273 U. S. 536 (1927).

standards were established for congressional districts, indicates conclusively that the one single factor that has always been lacking has been that of enforcement. Congressional documents and court cases clearly indicate and support that conclusion. The bill H. R. 2648 as originally introduced provides that no member shall be seated if elected from a district which fails to conform to the requirements of the bill. Further study has indicated that such enforcement would still be found wanting. Therefore an amendment has been proposed which would provide for judicial review of the apportionment acts of state legislatures in the United States district courts. To date the exact wording of such an amendment has not been decided. It has been suggested that any citizen should have the right to have a state apportionment act invalidated where it violated federal standards. A proposal has been mentioned that should not be a defense for a judicial objection that the issues therein are of a political nature.

Whatever the final draftsmanship of such a provision may be, the all-important result that will ensue is that the threat of judicial review may have a salutary effect on the legislatures so as to produce a fair and equitable redistricting.