

Elections and Election Campaigns

A. APPORTIONMENT; VOTING DISTRICTS

§ 1. In General; Functions of Congress and the States

The compromise reached at the original Constitutional Convention and approved by the ratifying conventions in the 18th century provided for one House of the national legislature to equally represent the states and for the other House to equally represent the people of the several states.⁽¹⁾ While the drafters of the Constitution provided for a periodic enumeration of the national population to be used in computing representation in the House of Representatives,⁽²⁾ and provided

for both state and federal regulation over elections,⁽³⁾ the specific mechanism by which Representatives would be allocated to states and by which they would be elected by the people were not described in the Constitution. The procedures for determining the size of the House, allocating seats to states, and equally distributing the right to vote for Representatives have gained form through congressional and state practice, federal statute, and judicial interpretations of the Constitution.⁽⁴⁾

Due to the recent proliferation of judicial decisions and collateral materials on the general subject of equality of political representation, important terms relating to

1. See *Wesberry v Sanders*, 376 U.S. 1, 14 (1964) for a discussion of the "Great Compromise." The composition of the House is dictated by U.S. Const. art. I, §2, clause 1, and the composition of the Senate is dictated by U.S. Const., 17th amendment. For a general discussion of the intention of the drafters of the Constitution as to House apportionment and districting, see Hacker, *Congressional Districting*, Brookings Institution (Washington, rev. ed., 1964).
2. U.S. Const. art. I, §2, clause 3.

3. U.S. Const. art. I, §4, clause 1.
4. Collateral matters relating to districts are not described in this chapter. For example, the allowances the Representative may use within his district and his power to send franked material outside his district are discussed in Ch. 7, *supra*.
For coverage of elections and election procedures prior to 1936, see 1 Hinds' Precedents §§ 756 et seq. and 6 Cannon's Precedents §§ 121 et seq.

the subject have become ill-defined and interchangeable. Therefore, such terms as “apportionment,” “reapportionment,” “census,” “district,” and “districting,” are defined and used herein in their strict constitutional meaning.

The taking of the census is the first step in the process of effecting equal representation in the House of Representatives.⁽⁵⁾ The U.S. Constitution (art. I, §2, clause 3) provided for the allocation of Representatives among the states in accordance with an enumeration to be made of the national population every 10 years. The 14th amendment altered that clause in requiring the enumeration of all persons including former slaves, and in requiring reduction in a state’s allocation of seats for denial of voting rights.⁽⁶⁾ Congress has sole authority under the Constitution to direct the manner in which the enumeration or census shall be taken and compiled.⁽⁷⁾ Although the taking of the census and its uses have broadened in scope, its primary purpose remains to enumerate the people

5. Taking the census, see §2, *infra*.

6. See §2, *infra*.

7. U.S. Const. art. I, §2, clause 3 states that the enumeration shall be made in such manner as Congress shall direct.

as the basis for the equal allocation of Representatives in the House.

Apportionment is the method by which seats in the House are distributed among the states in accordance with the results of the decennial census.⁽⁸⁾ The term has been used interchangeably in recent years to refer to the districting within a state for the election of the allotted number of Representatives.⁽⁹⁾ The terms apportionment and reapportionment have also been used to refer to the allocation of state legislators and other nonfederal officials among state subdivisions; that area of the law is not germane to this discussion and must not be confused with apportionment and districting for the U.S. House of Representatives.

The function of apportioning the seats in the House is vested exclu-

8. The 14th amendment of the U.S. Constitution states: “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.”

9. References in U.S. constitutional provisions relating to the House of Representatives and election of Members thereof, and to the enumeration of the population of the various states, have to do with apportionment of Representatives among the states, and not within them. *Meeks v Avery*, 251 F Supp 245 (D. Kan. 1966).

sively in Congress,⁽¹⁰⁾ and neither states nor courts may direct greater or lesser representation than that allocated by an act of Congress.⁽¹¹⁾ Before seats in the House can be apportioned, the number of seats in the House must be set at a fixed number; this determination is within the province of Congress and has been directed by federal statute.⁽¹²⁾

10. Although the power of Congress to allocate seats to the states is not expressly stated in the Constitution, the power is logically implied from the congressional power to direct the taking of the census. *Prigg v Pennsylvania*, 41 U.S. (16 Peters) 619 (1842).
11. For states' claims to greater representation, see § 2, *infra*. A court cannot reduce the number of Representatives allotted to a state by Congress pursuant to statute. *Saunders v Wilkins*, 152 F2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870, rehearing denied, 329 U.S. 825 (1946).
12. "The power to district a state, in accordance with the Federal apportionment, is by this section [art. I, § 4, clause 1] conferred upon the state, subject to the control of Congress, whereas the power to fix or alter the number of Members of the House of Representatives of the United States is vested exclusively in the Federal Government . . . there is no doubt that a state cannot exercise the power to fix the size of the Federal House of Representatives, whether through its ordinary legislature, or its constitutional convention, or in

Under the Constitution, each state is entitled to at least one Representative.⁽¹³⁾ Since the first Congress, a specific mathematical method has been used in the allocation of the remaining seats in the House to the states.⁽⁴⁾ The first such method, devised by Thomas Jefferson, called for a predetermined ratio of inhabitants per Representative and a rejection of all remaining fractions. Under the second method, beginning about 1840, major fractions were accounted for by the assignment of an additional Representative.

The method of major fractions in use until 1940 employed a mathematical formula and a list of "priority values," based on the size of the population of each state, to allocate seats in the House. The priority list is also the principal feature of the present method of "equal proportions," which uses a different mathe-

any other way." H. REPT. NO. 51, Committee on Elections, 41st Cong. 2d Sess. (cited at 1 Hinds' Precedents § 318).

13. U.S. Const. art. I, § 2, clause 3.
14. See The Decennial Population Census and Congressional Apportionment, H. REPT. NO. 91-1314, 91st Cong. 2d Sess., Subcommittee on Census and Statistics, Committee on Post Office and Civil Service. See also Huntington, *Methods of Apportionment in Congress*, Government Printing Office (Washington, 1940).

mathematical formula to produce more evenly distributed apportionment than the major fractions method.⁽¹⁵⁾

Apportionment under the “equal proportions” method is complex. The problem is to allocate a finite number of seats (385, after each state has received one) among 50 states of widely varying population, where no seat can be shared between two states, and where the principal aim is to allot each seat to as nearly as practicable an equal number of constituents. The allotment is accomplished by dividing the population of each state by the geometric mean of successive numbers of Representatives ($n \times [n-1]$ where “n” is the number of the seat). For example, the population of state A is first divided by $2 \times (2-1)$ to establish its priority value for a second seat, then by $3 \times (3-1)$ to establish its priority value for a third seat, and so on. Priority val-

ues are computed for all the states, for successive numbers of seats, and then all the values are listed in descending order. If state A has a very large population, its claims for a second, third, and more seats will be listed ahead of the claim of state B for a second seat, if state B is sparsely populated. Thus the 385 seats are allotted to the states whose priority values are the first 385 on the priority list.⁽¹⁶⁾

If only one seat is allocated to a state under the method of equal proportions, the Representative is elected by and represents the total population of the state. If more than one Representative is allocated, the state must be divided into subdivisions which elect Representatives. Such subdivisions are called congressional districts, the formation of which is primarily a matter for the state government.⁽¹⁷⁾

15. For a technical comparison between the methods of major fractions and equal proportions in relation to apportionment, see *Shaw v Adkins*, 202 Ark. 856, 153 S.W.2d 415 (1941). The court discussed these and other contemporary formulas, such as the harmonic mean, smallest divisors, and greatest divisors, in order to choose the best method of apportioning state legislators. Federal experience was extensively discussed.

16. For a comprehensive discussion and examples of apportionment under the method of equal proportions, see *Guide to Congress*, p. 509, Congressional Quarterly Inc. (Wash., 1971).

17. Congress “apportions” Representatives among the states, while the states “district” by actually drawing congressional district lines. “Apportionment” in its technical sense refers solely to the process of allocating legislators among political subdivisions, while “districting” entails the

The function of the state in dividing itself into districts has been included within the label of "reapportionment." The decisions of the U.S. Supreme Court and of the federal courts since 1964 which have dealt with congressional representation and which have been termed "reapportionment" cases are in actuality decisions on the designation of congressional districts within a state and not on the apportionment of Representatives to states by Congress.⁽¹⁸⁾

Another term which the reader may encounter in this chapter is "at-large" elections.⁽¹⁹⁾ An at-large Representative was elected by and represented all the people of the state rather than a specific subdivision thereof. At-large elections and multi-member districts are

actual drafting of district lines. *Kilgarlin v Martin*, 252 F Supp 404 (D. Tex. 1966), reversed on other grounds, 386 U.S. 120, rehearing denied, 386 U.S. 999 (1967).

Congressional districting is a legislative matter for the several states. *Smiley v Holm*, 285 U.S. 355 (1932); *Carroll v Becker*, 285 U.S. 380 (1932); *Koenig v Flynn*, 285 U.S. 375 (1932).

18. For a discussion of those decisions, see § 3, *infra* (districting requirements) and § 4, *infra* (failure of states to redistrict).
19. See 2 USC § 2a(c) (superseded by 2 USC § 2c).

now prohibited by federal statute,⁽²⁰⁾ reflecting the prevailing view that such elections were not contemplated by the drafters of the Constitution.⁽¹⁾

Reapportionment and districting issues do not arise in relation to the elections of Delegates and Resident Commissioners, since the controlling constitutional provisions relate solely to Representatives of the states. Delegates and Resident Commissioners are created by statute, and each territory has been entitled to only one Delegate, elected by all the people of the territory.⁽²⁾

Collateral References

The Decennial Population Census and Congressional Apportionment, H. REPT. NO. 91-1314, 91st Cong. 2d Sess., Subcommittee on Census and Statistics, Committee on Post Office and Civil Service.

Hacker, *Congressional Districting*, Brookings Institution (Wash., rev. ed., 1964).

Keefe and Ogul, *The American Legislative Process: Congress and the States*, Prentice-Hall (1964).

20. See § 3, *infra*.

1. See *Norton v Campbell*, 359 F2d 608 (10th Cir.), cert. denied, 385 U.S. 839 (1966). See also Hacker, *Congressional Districting*, Brookings Institution (Washington, rev. ed., 1964).
2. For the nature of the office of Delegate and Resident Commissioner, see Ch. 7, *supra*.

Congressional Power Over Taking the Census

§ 1.1 The manner of taking the census is for Congress to decide.

On Jan. 8, 1941, the results of the 1940 census were laid before the House, accompanied by a Presidential message stating that all Indians had been included in the enumeration since they had become subject to federal taxation.⁽³⁾ The President's message read in part as follows:

The effect of this [enumeration of Indians] upon apportionment of Representatives, however, appears to be for determination by the Congress, as concluded in the Attorney General's opinion of November 28, 1940, to the Secretary of Commerce, a copy of which is annexed hereto.

No objection was made to the inclusion of Indians within the enumeration.

The opinion of the Attorney General referred to by the President stated that "what construction the Congress will now give to the phrase 'Indians not taxed' is a question for it to decide, and action taken by it with respect thereto will be final, subject only to review by the courts in proper cases brought before them."

3. 87 CONG. REC. 70, 77th Cong. 1st Sess. The 14th amendment excludes from the enumeration all Indians not taxed.

Pursuant to Congress' sub silentio ratification of the enumeration, Indians have been counted in the census since 1940.

Congressional Power to Allocate House Seats

§ 1.2 The House has determined that the constitutional provision requiring Congress to reapportion seats in the House to the states after the taking of the census is directory and not mandatory.⁽⁴⁾

On Apr. 8, 1926, the House determined by a ye and nay vote a question submitted to the House by Speaker Nicholas Longworth, of Ohio, pertaining to the constitutional privilege of a motion to consider reapportionment legislation.⁽⁵⁾ Preceding the vote on the question, there ensued a lengthy debate in the House on the nature of the requirement of the Constitution that Congress order a reapportionment of seats in the House to the states following each decennial census.⁽⁶⁾ By finding that the motion was not constitu-

4. For a prior elections committee report reaching the same conclusion, see 6 Cannon's Precedents § 54.

5. 67 CONG. REC. 7148, 7149, 69th Cong. 1st Sess.

6. *Id.* at pp. 7138-48. See § 2.4, *infra*, for more detailed discussion of this precedent.

tionally privileged, the House overruled prior precedents holding to the contrary and determined that the House could not be forced to consider reapportionment legislation.⁽⁷⁾

Congressional Power Districting

§ 1.3 Congress has constitutional authority to establish congressional districting requirements for the states and to compel compliance therewith.

On Jan. 9, 1951, the results of the 1950 census were transmitted to Congress, accompanied by a Presidential message recommending the enactment by Congress of congressional districting standards to correct wide variances in the size and composition of districts.⁽⁸⁾ The message cited Congress' power to preempt state regulation over the times, places, and manner of congressional elections in order to estab-

7. Congress thereafter provided for an automatic system of reapportionment. See the act of June 18, 1929, Ch. 28, §22, 46 Stat. 26, as amended, 2 USC §2a.

8. 98 CONG. REC. 114, 82d Cong. 1st Sess. Prior to 1929, Congress had enacted statutes regulating the size and composition of congressional districts (see §3.3, *infra*).

lish standards for congressional districting and to compel state compliance therewith.⁽⁹⁾

§ 2. Census and Apportionment; Numerical Allocation of Representatives

Article I, section 2, clause 3 of the U.S. Constitution requires that an enumeration of the people be made every 10 years in order that seats in the House may be apportioned among the states according to the number of persons counted in each state. As originally adopted, this provision made certain distinctions between free persons, slaves, and "Indians not taxed."⁽¹⁰⁾ The 14th amendment, ratified after the emancipation of slaves,⁽¹¹⁾ altered that provision

9. *Id.* Districting legislation was passed in later years (see §3.3, *infra*).

10. The original constitutional provision provided that three-fifths of the persons not freed be counted to compute a state's basis of representation. Enumeration was excluded, both in that provision and in the 14th amendment, for "Indians not taxed." Indians are now included in the enumeration since they are subject to federal taxation (see §2.3, *infra*).

11. The Emancipation Proclamation was issued on Jan. 1, 1863, and, although of no binding force, was sanctioned by the ratification of the 13th amendment in December of 1865.