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 establish 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

**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).

**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.

by mandating the counting of the "whole number" of persons in each state and by directing that a denial of voting rights proportionately reduces a state's basis of representation.

Congressional apportionment legislation adopted pursuant to these constitutional provisions allocates a certain number of seats in the House to each state, and also fixes the maximum numerical membership of the House.(12)

The census has been taken decennially since 1790,(13) and has been administered since 1889 by the Bureau of the Census, a subdivision of the Department of Commerce.(14) The data gathered through the census has been broadened to include information other than population statistics,(15) since reports prepared by the Bureau of the Census aid the Congress in the informed performance of its legislative function.(16)

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The 14th amendment was ratified in July of 1868.

**12.** For a historical analysis of the mathematical methods which have been used to apportion seats in the House based on census results, see § 1, supra.

**13.** Under 41 USC § 141, as amended by Pub. L. No. 94–521, 90 Stat. 2459, a mid-decade census is to be taken in 1985 and every 10 years thereafter, but information gained therein may not be used for apportionment or congressional districting.

**14.** For the establishment power, and duties of the Bureau of the Census and the Director of the Census, see 13 USCA §§ 1 et seq. For the scope of the census director's authority and the constitutionality of Congress' delegation of power to him, see the annotations to title 13, USCA. For the reasonableness of criteria used by the Census Bureau in computing the population of respective states, see *Borough of Bethel Park* v *Stans,* 449 F2d 575 (3d Cir. 1971).

**15.** The Constitution does not prohibit the gathering of statistics other than those affecting population, *United States* v *Moriarty,* 106 F 886 (Cir. Ct. S.D. N.Y. 1901), and the fact that many personal questions may be asked in order to provide statistical reports on housing, labor, health, and welfare matters (see 13 USCA §§ 141–146) does not render census questions an unconstitutional invasion of a person's right to privacy. *United States* v *Little,* 321 F Supp 388 (D. Del. 1971).

**16.** "While § 2 [article I, clause 3] expressly provides for an enumeration of persons, Congress has repeatedly directed an enumeration not only of the freed persons in the states, but also those in the territories, and has required all persons over 18 years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court [Legal Tender Cases, 79 U.S. (12 Wall.) 457, 536 (1870)]; it is one of the methods whereby the national legislature exercises its in-

Proposals related to the census fall under the jurisdiction of the Committee on Post Office and Civil Service.[17]

Although the 14th amendment provides that when the right to vote in certain elections is denied to any male inhabitants of a state, the basis of representation shall be proportionately reduced,[18] a reduction in the representation of a state in the House for denial of voting rights has never been made.[19] Unsuccessful attempts have been made by Members of the House[20] and by citizens to require that in taking the census the Census Bureau determine the number of disenfranchised persons in each state and make the reduction provided for in the 14th amendment.[1]

herent power to obtain the information necessary for intelligent legislative action." Constitution of the United States of America: Analysis and Interpretation, S. DOC. NO. 92–82, 92d Cong. 2d Sess., p. 106.

**17.** Rule XI clause (16)(a), *House Rules and Manual* § 711 (1973). The former Committee on the Census was consolidated into this committee by the Legislative Reorganization Act of 1946, 60 Stat. 812, Jan. 2, 1947.

**18.** Proportionate reduction of representation for denial of right to vote, under the 14th amendment, § 2, refers to the right to vote as established by the laws and constitution of the state. *Lassiter* v *Northampton County Bd. of Elections,* 360 U.S. 45 (1959); *McPherson* v *Blacker,* 146 U.S. 39 (1892); *Daly* v *Madison,* 378 Ill. 357, 38 N.E. 2d 160 (1941).

A collateral attack was made on the composition of the House, for alleged violation of the 14th amendment, in *Dennis* v *United States,* 171 F2d 986 (D.C. Cir. 1948), aff'd, 339 U.S. 162 (1950), where a defendant in a congressional contempt proceeding unsuccessfully claimed that committee action was invalid, one Member being an "interloper" rather than a Representative since his state was entitled to four instead of seven Representatives pursuant to the 14th amendment.

**19.** Congress has provided by statute that in case of apparent disenfranchisement by a particular state, certain steps be taken to regulate federal elections in such state. See 42 USCA § 1971(e), and the discussion thereof in *South Carolina* v *Katzenbach,* 383 U.S. 301 (1966).

**20.** See §§ 2.7, 2.8, infra.

For an analysis of legislative attempts to enforce the 14th amendment, § 2, since it was ratified, see Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93 (1961).

**1.** Some appellate courts have held that enforcement of the provision is within Congress' discretion and presents a nonjustifiable political question. *Saunders* v *Wilkins,* 152 F2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946); *Lampkin* v *Connor,* 239 F Supp 757 (D.D.C. 1965), aff'd, 360 F2d 505 (D.C. Cir. 1966).

Omission from a census form of a question relating to voter disenfran-

Results of the census are transmitted to Congress by the President, who is directed by law to compute the prospective allocation of Representatives to states pursuant to the mathematical method appointed by Congress.[2] Since 1941, the method of "equal proportions" has been used to determine reapportionment questions.[3]

Until 1920, at the time of the 16th census, congressional reapportionment legislation was adopted based on each new enumeration.[4] Following the 1920 census, however, no legislative action was taken, and Congress determined in 1926 that the constitutional provision providing for reapportionment following a census was directory rather than mandatory.[5] In 1929, Congress enacted into law a procedure whereby apportionment following and based upon a census would automatically take effect if Congress chose not to act.[6] Under

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chisement does not render the taking of a census unconstitutional notwithstanding the provisions of the 14th amendment. *United States* v *Sharrow*, 309 F2d 77 (2d Cir. 1962), cert. denied, 372 U.S. 949, rehearing denied 372 U.S. 982 (1963).

A New York resident had no standing to seek an injunction against the transmittal to the President by the Census Director of the 1970 census on grounds that the 14th amendment reduction had not been made, where the plaintiff failed to show that he had been injured thereby. *Sharrow* v *Brown*, 447 F2d 94 (2d Cir. 1971).

**2.** The power of Congress to direct how the enumeration shall be made and transmitted is derived from U. S. Const. art. I, § 2, clause 3: "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 10 years, in such manner as they shall by law direct."

The transmission of the census results to Congress is provided for by 2 USC § 2a.

Under the act of June 18, 1929, 46 Stat. 26, the President was required to ascertain the number of Representatives to which each state would be entitled under both the methods of equal proportions and of major fractions. For a description of those methods, see § 1, supra.

**3.** See § 2.6, infra.

**4.** Although art. I, § 2, clause 3 directs that Representatives be apportioned among the states according to their respective numbers, and expressly authorizes Congress to provide for an enumeration every 10 years by law, the power to allocate seats in the House to the states after the enumeration is not expressly stated within the clause but has always been acted upon by Congress as "irresistibly flowing from the duty" directed by the Constitution. *Prigg* v *Pennsylvania*, 41 U.S. (16 Peters) 619 (1842).

**5.** See 1.2, supra.

**6.** Act of June 18, 1929, 46 Stat. 26.

this procedure, reapportionment is based on the method of equal proportions, and the Clerk of the House notifies state officials of the number of seats in the House to which the state is entitled.[7]

Reapportionment legislation has no privileged status under the Constitution and cannot interrupt the regular rules of proceeding of the House. Reapportionment legislation has been considered in the Committee of the Whole,[8] and proposals on apportionment are within the jurisdiction of the Committee on the Judiciary.[9]

If a reapportionment of seats causes an increase or decrease in the number of seats to which a state is entitled, the state must redistrict itself into single-member districts consistent with constitutional requirements.[10]

Maximum numerical membership of the House was fixed at 435 by the act of 1911.[11] There was a temporary increase to 437 Members between 1959 and 1963 when two new states were added,[12] but the membership has returned to 435.

A state has no claim to seats additional to those allotted by Congress, and attempts by states to send to Congress more than its allotted number of Representatives have been unsuccessful.[13]

**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.

Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33 (1965).

Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93 (1961).

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**7.** 2 USC § 2a (the act of 1929 as amended by the act of Apr. 25, 1940, 54 Stat. 162 and the act of Nov. 15, 1941, 55 Stat. 761).

**8.** See § 2.5, infra.

**9.** Rule XI clause 14(b), *House Rules and Manual* § 707 (1973).

**10.** See 2 USCA §§ 2a and 2c. For redistricting in general, see § 3, infra.

**11.** The act of Aug. 8, 1911, 37 Stat. 13 provided, under the 13th census, for 433 Members, with the stipulation that if the Territories of Arizona and New Mexico should become states they should have one Representative each. Arizona and New Mexico became states in 1912; see the Presidential proclamation set out in 37 Stat. 1723.

**12.** Alaska and Hawaii were admitted as states and granted one Representative each. See 2 USCA § 2a.

**13.** See 1 Hinds' Precedents §§ 314–319. For a discussion of the supremacy of congressional authority over allocation of seats in the House to the several states see 1, supra.

### *Taking the Census*

**§ 2.1 When providing for the taking of the census and submission of results to Congress, Congress may also provide for the taking of other statistics.**[14]

On June 4, 1929, when the House was considering in the Committee of the Whole a bill dealing with the taking of the census and the submission of the results to Congress, Chairman Carl R. Chindblom, of Illinois, ruled that amendments to take additional statistics, such as to take a census of aliens,[15] and to take a census of qualified voters whose right to vote has been denied or abridged,[16] were germane.

**§ 2.2 The President transmits to the Congress the results of the decennial census and the proposed reapportionment of Representatives among the states.**

On Jan. 2, 1961,[17] the President sent to the Congress a message relating to the census of 1960 and to a reapportionment of House seats:

*To the Congress of the United States:*

Pursuant to the provisions of section 22(a) of the act of June 18, 1929, as amended (2 U.S.C. 2a), I transmit herewith a statement prepared by the Director of the Census, Department of Commerce, showing (1) the whole number of persons in each State, as ascertained by the Eighteenth Decennial Census of the population, and (2) the number of representatives to which each State would be entitled under an apportionment of the existing number of representatives by the method of equal proportions.

DWIGHT D. EISENHOWER,
*The White House,*
*January 10, 1961.*

**§ 2.3 Since 1940, all Indians have been included in the census enumeration, with the acquiescence of Congress, because they are subject to federal taxation.**

On Jan. 8, 1941, the Presidential message transmitting the results of the 1940 census and the projected allocation of seats in the House to the states was laid before the House.[18]

The last paragraph of the President's message read as follows:

The Director of the Census has included all Indians in the tabulation of

**14.** See generally 13 USC §§ 1 et seq.

**15.** 71 CONG. REC. 2338, 2339, 71st Cong. 1st Sess.

**16.** *Id.* at p. 2348.

**17.** 107 CONG. REC. 649, 87th Cong. 1st Sess., Jan. 12, 1961. See also 97 CONG. REC. 114, 82d Cong. 1st Sess., Jan. 9, 1951; and 87 CONG. REC. 70, 77th Cong. 1st Sess., Jan. 8, 1941.

**18.** 87 CONG. REC. 70, 77th Cong. 1st Sess.

total population since the Supreme Court has held that all Indians are now subject to Federal taxation (*Superintendent* v *Commissioner,* 295 U.S. 418). The effect of this 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.(1)

The President's message was ordered referred and printed, and no challenge or objection was made to the inclusion of Indians within the enumeration.(2)

### *Consideration of Apportionment Legislation*

**§ 2.4 The House has determined that a motion to consider reapportionment legislation following the taking of a census is not privileged under the Constitution.**

On Apr. 8, 1926, Mr. Henry E. Barbour, of California, rose "to present a privileged question under the Constitution of the United States." The purpose of the motion was to discharge the Committee on the Census from further consideration of a bill for the apportionment of Representatives in Congress among the several states under the 14th census and to provide that the House proceed to the immediate consideration thereof. Mr. Bertrand H. Snell, of New York, made a point of order against the motion, contending that it was not privileged under House rules or procedures. He stated that there was "no mandatory provision in the Constitution itself which provides for immediate apportionments; and, furthermore, if we did grant there was such a provision, that there is no mandatory provision in the Constitution which provides that it shall be done contrary to the rules and procedure of the House."

Mr. Snell analyzed a long line of precedents which had held that motions to consider reapportionment legislation were privileged under the Constitution but stated that those decisions should be overruled, since the requirement in the Constitution that the House reapportion Representatives following a census was directory and not mandatory.(3)

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**1.** The U.S. Constitution, amendment 14, § 2 provides that all persons be counted in the census except "Indians not taxed."

The Attorney General has stated that whatever "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." 87 CONG. REC. 71, 77th Cong. 1st Sess.

**2.** See also 97 CONG. REC. 114, 82d Cong. 1st Sess., Jan. 9, 1951 (Indians included in 1950 census).

**3.** 67 CONG. REC. 7138–48, 69th Cong. 1st Sess.

After lengthy discussion, Speaker Nicholas Longworth, of Ohio, stated that in his opinion the prior precedents, according constitutional privilege to reapportionment legislation, should be overruled. He declined to rule on the question, however, stating that the question should be submitted to the House. The House then voted that the consideration of the bill called up by Mr. Barbour's motion was not in order as a question of constitutional privilege.

### § 2.5 Bills pertaining to the apportionment of seats to the several states have been considered in the Committee of the Whole.[4]

Reference was also made to a report of the Committee on Elections No. 3, 68th Cong. 1st Sess., Mar. 29, 1924, indicating that a person could not claim a seat in the House that was not allotted to the state by the House where reapportionment following a census had not been made, since reapportionment following the taking of a census is a customary practice but not a constitutional requirement (see 6 Cannon's Precedents § 54).

**4.** 71 CONG. REC. 2258, 2259, 71st Cong. 1st Sess., June 3, 1929; 111 CONG. REC. 5080, 5084, 89th Cong. 1st Sess., Mar. 16, 1965; 87 CONG. REC. 1071–89, 77th Cong. 1st Sess., Feb. 17 1941; and 86 CONG. REC. 4373, 76th Cong. 3d Sess., Apr. 11, 1940.

## *Method of "Equal Proportions"*

### § 2.6 In 1941, Congress determined that seats for Representatives should thereafter be allotted to the states under the method of "equal proportions."

Following the census of 1940, Congress determined, based on reports of the House Census Committee incorporating recommendations of prominent scientists, that seats for Representatives should thereafter be allotted to the states under the method of equal proportions.[5] If Congress passes no reapportionment legislation following a census, the equal proportion method is automatically used and the Clerk notifies the state of the number of seats to which it is entitled in the House.[6]

See also 6 Cannon's Precedents §§ 51, 52.

**5.** Act of Nov. 15, 1941, 55 Stat. 761, codified as 2 USC § 2a. For detailed discussion of the mechanics of the method of equal proportions, see § 1, supra (summary).

In 1929, Congress provided that in submitting the results of the decennial census to Congress, the President should direct to be ascertained the number of Representatives to which each state would be entitled under both the method of major fractions and the method of equal proportions. Act of June 18, 1929, Ch. 28, § 22, 46 Stat. 26.

**6.** 2 USCA § 2a(b).

### *Reduction of Representation for Denial of Voting Rights*

**§ 2.7 To a bill dealing with the date for the periodic apportionment of Representatives in Congress, an amendment providing that, in submitting the statement to Congress and making the apportionment, the reduction provided in section 2 of the 14th Amendment to the Constitution shall be made, was held not germane.**

On Apr. 11, 1940, the House was considering, in the Committee of the Whole, S. 2505 to amend the 1929 apportionment bill in order to change the date of subsequent apportionments. The change in date was considered necessary in light of the 20th amendment to the Constitution, which had changed the convening date of Congress and the Presidential inauguration day.(7)

Mr. John C. Schafer, of Wisconsin, offered an amendment directing that in submitting the census to Congress, the President reduce the basis of representation for states where required by the 14th amendment of the U.S. Constitution.(8)

Chairman Marvin Jones, of Texas, ruled that the amendment was not germane to the pending bill, since the bill dealt only with the mechanics of the apportionment and not with the census itself. He cited a past precedent where a similar amendment, providing for a proportionate reduction in the number of Representa-

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For House debate on H.R. 2665, on Feb. 17 and 18, 1941, to adopt the method of equal proportions for apportionment of Members to the states, see 87 CONG. REC. 1071–89, 1123–30, 77th Cong. 1st Sess. The method of equal proportions had been preferred by the National Academy of Sciences (at p. 1072), and extensive hearings were held by the Committee on the Census in 1940 on comparison between the various mathematical methods of reapportionment and the degree to which they produced equal representation in the House of Representatives.

By adoption of the equal proportions method retroactive to the 1940 census, the apportionment in 1941 caused the State of Arkansas to lose one seat and the State of Michigan to gain one seat.

**7.** 86 CONG. REC. 4373, 76th Cong. 3d Sess. The bill was passed and became law (act of Apr. 25, 1940, Ch. 152, §§ 1, 2, 54 Stat. 162); see 2 USC § 2a, as amended.

**8.** The 14th amendment, § 2, provides that where the right to vote is denied by a state, the basis of representation in the state shall be reduced in the proportion which the number of male citizens denied the vote shall bear to the whole number of such citizens in the state.

tives allotted to a state pursuant to the 14th amendment, was held not germane to reapportionment legislation.[9]

**§ 2.8 To a civil rights bill, an amendment establishing a "Commission on Voting" to report the number of citizens in each state denied the right to vote and to calculate a new apportionment of Representatives on the basis of such findings, was ruled out as not germane.**

On Feb. 4, 1964, while the House was considering title I of the Civil Rights Bill of 1963, an amendment was offered to establish a Commission on Voting to report the number of citizens in each state denied the right to vote and to calculate a new apportionment of Representatives on the basis of such findings.[10]

Chairman Eugene J. Keogh, of New York, ruled that the amendment was not germane, citing the precedent of July 19, 1956, wherein Chairman Aime J. Forand, of Rhode Island, held not germane a similar amendment to a similar bill.[11]

## § 3. Districting Requirements; Duty of States

After Congress has allocated a certain number of Representatives to a state following a census,[12] some method must be appointed by the state legislature for the election of such Representatives. The power of a state legislature under article I, section 4 of the U.S. Constitution, to divide the state into districts to elect and to be represented by Members of the House is unquestioned, although the way in which the state districts itself may be directed by federal statute or by court order. A state must redistrict itself to reflect changes in its allocated representation in the House as well as population shifts indicated by the census.[13]

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**9.** See also 8 Cannon's Precedents § 2996 for a ruling that, to a bill providing for reapportionment of Representatives in Congress, an amendment authorizing redistricting of states in accord with such apportionment was not germane.

**10.** 110 CONG. REC. 1899, 88th Cong. 2d Sess.

**11.** For unsuccessful proposals to create a joint congressional committee to implement the 14th amendment of the U.S. Constitution by providing for reduction in representation for denial of voting rights, see S. 2709, 85th Cong. 1st Sess. (1957) and S. 1084, 86th Cong. 1st Sess. (1959).

**12.** See 2, supra.

**13.** See § 1, sup a, for a discussion of the delineations of power between Con-