[1964]

Wolfinger
"Reapportionment
Materials"

STATEMENT IN OPPOSITION TO (1) THE DIRKSEN-McCULLOCH MORATORIUM ON STATE LEGISLATIVE REAPPORTIONMENT AND (2) THE DIRKSEN-McCULLOCH AMENDMENT ON STATE LEGISLATIVE REAPPORTIONMENT

BY

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I am a member of the Bar of the District of Columbia. I was Counsel in the Supreme Court of the United States for the Tennessee voters in Baker v. Carr. I have also taken part in other cases involving the reapportionment problem and other cases involving constitutional questions, chiefly as counsel for states, cities and public agencies over the past 27 years.

I am opposed to the numerous proposed bills and resolutions pending before this Committee which are designed to amend a majority of the state constitutions and the Constitution of the United States so as to avoid reapportionment on substantially a "one man-one vote" basis.

Recent decisions of the Supreme Court of the United States, although the named target of these unwise proposals, in reality do no more than uphold this principle as expressly stated in these state constitutions and the equality clause of the Fourteenth amendment of the Constitution of the United States.

I must refute at outset the false idea that the "one man-one vote" idea for election of state legislatures originated with the recent Supreme Court decisions and the equally false idea that, previous to those decisions, state constitutions provided for election of one legislative house on a basis of population and the other on a basis of area. The fact is that throughout history, a majority of the states have required by constitutional provision or statute that representation in both houses of state legislatures be on a population basis. The pending proposals would write into law, in most instances for the first time, the current situation wherein state legislators have refused for 4, 10, 20, 30, 60, up to over 100 years to reapportion in order that these legislators may unlawfully hold onto their offices.

Under these circumstances, the proposed bills before this

Committee are in reality, not bills to protect or preserve "state rights" but bills to wipe out provisions of state constitutions and to preserve and protect the ill-gotten and maintained offices of entrenched rural politicians who seek by this means to flout both state constitutions and the Federal Constitution. These unsound bills thus seek to invade "states rights" by amending state constitutions and laws and thus legalize the most indefensible and inequitable part of our existing governmental machinery.

Many of the objectionable features of these bills and resolutions are contained in the two proposed measures which are evidently the major vehicles before this Committee by those who seek to end or prevent state legislative reapportionment: (1) the "Dirksen-McCulloch Moratorium on State Legislative Reapportionment" (S. 3069 and H. R. 12202); and (2) the so-called "Dirksen-McCulloch Constitutional Amendment on State Legislative Apportionment" (Amend. 1191 to H. R. 11380 and H. J. Res. 1055).

A. Dirksen-McCulloch Moratorium on State Legislative Reapportionment.

The first version of the Dirksen-McCulloch so-called "moratorium" is as follows:

> "Upon application made by or on behalf of any State or by one or more citizens thereof in any action or proceeding in any court of the United States, in which there is placed in question, the validity of the composition of either house of the legislature of that State or the apportionment of the membership thereof, such action or proceeding shall be stayed until the end of the second

regular session of the legislature of that State which begins after the date of enactment of this section."

A so-called compromise has been introduced but the compromise still effectively denies and nullifies existing state and Federal constitutional rights and guarantees. Both the original Bill and the compromise are therefore void as violative of the Tenth and Fourteenth Amendments to the Constitution as well as an unconstitutional interference with the judicial power as vested in the Supreme Court of the United States by the Constitution.

The effect of the Dirksen-McCulloch Moratorium Bill is to deny--albiet temporarily--many voters their constitutional right (given in most instances, as stated above, by both state and Federal Constitutions) to cast a vote equal in value with that of other voters in their state or community. The disparity ranges from 2 to 1 to 1000 to 1. For this reason, I am certain this proposal in all forms yet put forth, violates the Fourteenth Amendment requirement of equal protection of the law as well as the specific provisions of over half the state constitutions which require that both houses of their state legislature be elected on a population or "one man-one vote" principle.

Let us take the Tennessee Constitution of 1870 as an example of what a majority of the state constitutions provide. Tennessee's Constitution provides for mandatory reapportionment of both houses of the

state legislature every 10 years on the basis of equality of voters as "near as may be practicable." Yet the Tennessee Legislature has ignored this Tennessee Constitution and has not reapportioned itself since 1901--and, even in 1901, it failed to do so on a basis of equality of voters.

The idea of equal treatment of voters in reapportioning state legislatures was not therefore created by the Supreme Court of the United States. This idea was created by Constitutions like Tennessee's and ~~like~~ those/of Tennessee legislators who have chosen to keep themselves in office illegally by flouting their own state constitution caused the Court's decision

Since courts exist to vindicate constitutional rights, the Supreme Court had no choice but to uphold the constitutional rights of the complaining Tennessee voters. But let no one be misled into the false notion that the problem here was created by the Supreme Court when it did the only thing it could do and upheld the Tennessee voter's right to an equal vote. Tennessee's Constitution in 1870 had spelled out "one man-one vote" 94 years before the Supreme Court did in 1964.

Also, no one should conclude that this is just a case of the Federal Courts vs. the state legislatures. The Constitution provides in Article VI in clear terms that "This Constitution... shall be the Supreme law of the land, and the judges in every state shall be bound thereby". Congress therefore cannot take from state court judges by statute their constitutional duties and obligations. And most of the pending cases are

in state courts not Federal Courts. Even if the Dirksen-McCulloch Bill passes, state courts will still have a duty to enforce both state constitutions and the Federal Constitution. It is a flagrant error to assume state court judges are not as zealous in their enforcement of constitutional rights as are Federal judges - even though the spotlight is on the Federal Courts.

In reality the proposed legislation is nothing more (or less) than an act of constitutional amending by legislative fiat. The amending process prescribed in Article V of the Constitution of the United States is completely bypassed by the Dirksen-McCulloch Bill. And let there be no mistake about it, their bill amends both state constitutions and the Federal Constitution by denying to American citizens, the rights therein provided so that state politicians can hold onto illegally obtained and maintained jobs for a few more months during which it is hoped to enable these same legislators holding on wrongfully to offices to vote to approve a constitutional amendment freezing them into their offices forever. This is the real purpose, intent, and effect of the Dirksen-McCulloch Bill. No Federal legislation has ever interfered so flagrantly by nullifying so many state constitutional provisions.

Another consideration is the hasty way in which this legislation is being rushed through the Congress without committee hearings. The main reason being that it cannot stand exposure. But this Bill which

would frustrate and nullify constitutional rights of voters warrants full and open consideration by the Congress. That this legislation stripping away constitutional guaranties from voters is being stampeded through Congress in the form of a rider on a foreign aid bill is further proof that it could not stand on its own merits.

Why the haste? In every instance--in every case--in every court, Federal and state, the Courts have deferred to the state legislatures and given them ample and reasonable time to apportion before court action. Again, it is a false idea that the courts are rushing reapportionment. They are not. If one stops to study the facts, state by state this conclusion that the courts have not and are not rushing reapportionment is crystal clear. The rush Act here is not to protect state government against hasty action but to aid state legislators who have stalled reapportionment in the hope that given a few more years, they can so amend the Federal-not state constitutions-to hold onto offices now held wrongfully.

As now written, the Dirksen-McCulloch Bill could be applied to <u>both</u> houses of a state legislature. Simply stated, both houses of a state legislature could be grossly malapportioned like the 1000 to 1 example given above and the Federal Courts would be totally powerless to interfere. Thus, state legislative apportionment would undoubtedly revert to the pre-<u>Baker</u> v. <u>Carr</u> era where from less than 1/10 to 1/3 of

their rural resident voters control one or, in most states, both houses of the legislature. Pre-Baker v. Carr was an era when 27 states had not been reapportioned in 25 years and 8 states in 50 years, even though state constitutions like that of Tennessee require reapportionment every 10 years.

Why is the Congress working to aid members of state legislatures which have flouted both their state constitutions and the Federal Constitution for so many years? No one can refute the true facts and really defend the pre-Baker v. Carr era. That is a rotten situation created by and willfully maintained by the state legislatures. Their shocking violations of the law for so many years should not be condoned or blessed by the Congress through adoption of the inequitable Dirksen-McCulloch Bill.

If Congress will simply pause long enough to examine the reapportionment facts, state by state, I believe that all Congressmen must, in good conscience, conclude that those facts refute every argument now being made for the Dirksen-McCulloch Bill. Under these circumstances precipitous action can only serve to embarrass the members of this Congress for having wiped out, delayed, or denied temporarily in order that they could be denied permanently, the constitutional rights of a majority of American citizens in order to aid a few rural politicians to hold onto offices they are legally and morally not entitled to.

The current out-cry to Congress is not from the people. It comes from rural politicians and their lobbyist friends. Sure these are "potent" voices. They know how to reach members of the Congress, but for that reason alone, the members of Congress should look through this picture to the self-interest generating the false "emergency" which as been churned up.

Courts exist to protect and to enforce constitutional rights and guaranties. The grossly malapportioned state legislatures are the handiwork of rural state legislators who refuse to carry out state or federal constitutional requirements to reapportion because it means the inevitable loss of their offices and sometimes dependent jobs and other positions of power. The voters in Tennessee and other states denied a full vote by their legislatures, had nowhere to turn for relief except to the courts. Surely any right thinking person, who knifes through the smoke screen put up now to cover up the shocking facts (on failure to reapportion and why) will in good conscience come to the conclusion that a vote for the Dirksen-McCulloch Bill is a vote to perpetuate this long existing injustice and reject this Bill as factually, morally, and legally unsupportable.

Dirksen-McCulloch Amendment On State Legislative Reapportionment.

"Nothing in the Constitution of the United States shall prohibit a State, having a bicameral

> legislature, from apportioning the membership of one house of its legislature on factors other than population, if the citizens of the State shall have the opportunity to vote upon the apportionment."

The proposed Amendment nullifies a substantial part of the Equal Protection Clause of the Fourteenth Amendment as well as the provisions in most state constitutions similiar to that of Tennessee, referred to above. Under the Equal Protection Clause, the Supreme Court of the United States has held that both houses f a bicameral state legislature must be apportioned substantially on a "population basis," and this is exactly what the Tennessee and similiar state constitutions also provide. Implicit in the Court's decisions is the fundamental precept of judicial protection of a personal constitutional right to an equal vote. The most precious right of an American is his right to an effective franchise. This right is the bedrock of our democracy. The passage of the Dirksen-McCulloch Amendment is the first step in the history of our Nation toward chipping away the rock of constitutionally protected rights and guarantees.

The Dirksen-McCulloch Amendment would be in fact, the first amendment ever approved which cuts down on the constitutional rights of American citizens. That the cut is proposed to be made in a citizens most vital right, the right to vote, is all the more shocking.

The proposed Amendment in providing that a voter's vote value can be cut (or lessened by dilution to the point of worthlessness) by

a majority vote of the citizens of a state is an ill-conceived idea. The very purpose of our constitutional rights is to protect the minority as well as the majority. If a citizen's vote can be thus cut in value or so diluted as to be meaningless, the next proposal along this line could well be to dilute a citizen's right to freedom of speech or trial by jury.

Under our system of government, it is vital that a citizen's constitutional rights never be made to depend upon the will of the majority. As stated by the Supreme Court:

> "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause... 'one's right to life, liberty and property... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections'."

It has been wisely said that "Democracy has its own capacity for tyranny. Some of the most menacing encroachments upon liberty invoke the democratic principle and assert the right of the majority to rule." Thomas Jefferson said this and others repeatedly warned of the "tyranny of the majority." Indeed, it was to afford protection against a transitory "tyranny of the majority" that the Bill of Rights was engrafted into our Constitution.

The Dirksen-McCulloch proposed Amendment contains the seeds of this "tyranny of the majority" by allowing a majority of the

voters of a State to debase, dilute and thus effectively destroy the most sacred right of franchise.

The concept of one house based on population and the second house based on geography or other factors was not found in any of the original state constitutions. It is a false idea to put this forth as "traditional" in the makeup of state legislatures. In their inception state legislatures in both houses were based substantially on population. As any newly colonized area grew in population sufficiently to warrant representation in state legislatures, that representation was granted not on geography or area but on population. This was the picture in most state legislatures until recent years when the urban areas mushroomed in population and rural areas declined in population. With the shift and concentration of population in the urban areas, the politicians representing population depleted areas did not want to lose their offices, so they refused to carry out state constitutional mandates to reapportion on a population basis. Thus was the so-called "tradition" of denying an equal vote born.

City residents being denied effective representation in state legislatures, and thus being denied solutions on a state level of city problems, turned to the Federal Congress and the Federal Government for solutions. Thus was caused the great trek to Washington in the past 3 decades--all flowing directly from refusal of unrepresentative state legislatures to meet the needs of modern day living. Thus has denial of

fair representation in fact destroyed both the capacity and integrity of state government.

It is a mistaken notion that state constitutional provisions ordain that state governments are and must remain an agricultural commodity. This is just as false as the idea that country residents are smarter and more capable of operating state governments than city residents.

There is no question but that Baker v. Carr has had a cataclysmic and beneficial impact on state legislative apportionment, and upon state government itself. A long over due tidal wave of reform of representation in state legislatures has swept the nation and is sweeping the nation. Since the Tennessee case on Baker v. Carr was decided in 1962, 42 states have taken some form of action toward improving the fairness of their legislative apportionment system. This activity proves how bad the situation really was and how bad it still is.

By attempting to strip all courts, state and Federal, of their power to protect the ~~then~~ state and Federal constitutional right to an equal vote against dilution in state legislative apportionment matters, the Dirksen McCulloch Amendment infringes upon the Separation of Powers Doctrine. This principle, under which the judicial, legislative and executive branches of government are independent of one another, is engrained into our system of constitutional government. Our system of checks and balances whereby no one branch of government can so act alone as to achieve a

tyranny of unbridled power. Admittedly, the apportionment of state legislatures is a legislative problem. However, the state legislators have shirked their responsibility, failed to reapportion, and allowed a system of "rotten boroughs" and worse to come into being. With all other avenues of relief closed, the voters turned to the courts for the protection of their voting rights. Now, under the proposed Dirksen-McCulloch Amendment, the constitutional right of effective franchise will be effectively destroyed. Federal and state courts would be helpless to grant relief. The only reason for prohibiting the rule of law and reason as found in both state and Federal Constitutions to be applied by the courts is that the reapportionment situation is so bad the sponsors know that no reasonable men, no court, can in good conscience uphold it.

Some seek to justify the Dirksen-McCulloch Amendment by asserting that a state's apportionment of one house of its legislature on a population basis and the other house on some other standard is analogous to the manner of representation in the United States Congress. This analogy is midleading, false and contrary to both reason and history. Never before has this so-called "federal analogy" been used by rural politicians to maintain their control of state legislatures. As they know, most state constitutions now reject any such idea and provide for reapportionment every 10 years of both houses of state legislatures on a population basis. Up to now, the reapportionment of most state legislatures has been denied by state legislators in spite of this provision of their state

constitution. They do not seek approval of these state constitutions by this Congress. They seek approval of their own actions in refusing to carry out the law as set forth in those constitutions.

The underlying rationale upon which representation in the Congress is based is that the United States is a federation of independent sovereignties. The presently existing manner of representation provided for under the Federal Principle was demanded by certain of these independent sovereignties before they would agree to relinguish a portion of their sovereignity to establish a central government. On the other hand, a state is not truly a federation of counties and political subdivisions in the sense that the latter preceded the former. On the contrary, the state is the creator and the local governmental units are the created. Unlike the Federal Government and states, a state may abolish a county or a city at will.

The equality required by the Fourteenth Amendment is equality of people, not geography. But by no stretch of the imagination can the "Great Compromise", arrived at on a hot summer day in Philadelphia in 1787 by the Constitutional Convention, be held analogous to representation in state legislatures. The equality provision in the Equal Protection Clause of the Fourteenth Amendment does expressly apply to all state laws, including those laws fixing representation in state legislatures.

Article IV, Section 4, of the United States Constitution

provides that "The United States shall guarantee to every State a republican form of government..." Under the Dirksen-McCulloch proposed Amendment, neither Congress nor the Federal Judiciary could effectuate this constitutional provision. Within the narrow limitations prescribed in the proposed Amendment, the individual states would be on their own and the rural legislators now in control could reapportion their legislatures into a variety of rotten borroughs. The malapportioned branch of the legislature, instead of being an arm of fair compromise, would be a soul of frustration.

The ultimate thrust of the Dirksen-McCulloch proposed Amendment is a constitutional sanction of voter inequality. The very Congress which voted an end to discrimination by reason of color in the recently enacted Civil Rights Act would now by law prescribe and thus perpetuate discrimination among voters based on where the voter's home happens to be located. Such a proposal of perpetual injustice to so many Americans has never before been presented to the states by the Congress in the form of a proposed amendment to the Constitution. The Congress should not do so now.

Congress would never vote to approve voter discriminations based upon race, creed or nationalorigin. Yet, with the passage of the proposal now under discussion, Congress says to the whole world: "The United States condones--yes, even supports--a system of voting whereby an urban resident's vote is worth much less than his rural

neighbor's." This thesis is unsound and I do not believe it can be justified morally, legally or on any other reasonable basis.

Without question, the Supreme Court's most recent reapportionment decisions will accelerate the pace and widen the scope of the long-awaited, but long-ignored, reapportionment of state legislatures. Indeed, those States which failed to reapportion either one or both houses of their legislatures (awaiting Supreme Court clarification of Baker v. Carr) are now implementing the Supreme Court's latest decisions.

The Dirksen-McCulloch Bill provides an effective means of calling an abrupt halt to this necessary and long deferred reform activity. Those in favor of the Dirksen-McCulloch Bill claim that the reapportionment decisions have created considerable confusion. This is contrary to fact. Members of the state legislatures know what they must do. They have known for over 50 years in some instances, and for 40 or 30 or 20 or 10 years in others. Where action has been taken to reform in conformity with state and Federal constitutional requirements, state legislatures have made an orderly transition in remolding their composition. Usually, the first step has not been enough because state legislators are understandably reluctant to vote themselves out of office. Represenatives from sparsely settled areas have long entrenched positions of power in most state legislatures and often these positions mean much in emoluments. And as already stated, state legislative

lobbyists are also greatly upset over the changes which will flow from reform as they will lose "contacts" of long standing. These state legislative lobbyists are understandably bombarding the Congress in support of the Dirksen-McCulloch Bill.

The fact is that under the Dirksen-McCulloch Bill the situation would indeed be chaotic, with Federal Court actions being stayed and new state court actions being instituted (as the Congress cannot deprive state courts of their duty to enforce state constitutions and the Federal Constitution) together with the shelving and revision of the many legislative proposals aimed at complying with the Supreme Court's mandate. Uncertainties would arise because a shadow could be cast over the reforms already enacted. Thus would more problems be created---all, just for the purpose of keeping rural legislators in jobs to which they are not entitled.

The Supreme Court's reapportionment decisions reasserts the right to vote as the most basic right of Americans. Voting is the heart of our governmental process--our great trademark. So is equality. The cherished principle of equality cannot be denied to voters without destroying the spirit of our system of government and the purpose of our Constitution and the Declaration of Independence which in ringing words speaks of men as being created equal. The state constitutions and the Federal Constitutional requirement of equality

find proper expression in the "one man-one vote" principle as a Magna Carta for voters. The Dirksen-McCulloch Bill and proposed constitutional Amendment would abruptly prevent the use of this Magna Carta to secure equal votes.

I urge the Congress to reject both the Dirksen-McCulloch Bill and the Dirksen-McCulloch proposed constitutional amendment and all similiar proposals as totally lacking in merit. Congress must discharge its own oath to uphold the Constitution. Pursuant to this oath and constitutional mandates, it is the responsibility of Congress to insure voter equality rather than to sanction voter inequality.

[1964?]

"Upon application made by or on behalf of any State or by [one or more citizens] any qualified voter thereof in any action or proceeding in any court of the United States [, or before any justice or judge of the United States,] in which there is placed in question the validity of the composition of any house of the Legislature of that State, or the apportionment of the membership thereof, on the ground of inconsistency with the Constitution, the court may stay such action or proceeding [shall be stayed] until the end of the second regular session of the Legislature of that State which begins after the date of the enactment of this section, or for such other period as may be appropriate, and the court may make such orders with respect to the conduct of elections as it deems appropriate under all the circumstances [except that no order shall be inconsistent with any apportionment made pursuant to referendum]. The court shall not deny any [person or persons] qualified voter of the State in question the right to make such application."

appealable to circuit court

[1964?]

OK

Case
McGee
McGovern
Randolph
Metcalf
Fleming
Talmadge
Church
Bayh
McCarthy
Jarts
Yellow
Cooper 2.

Moss
Proxmire
Neuberger
Hennings
Mansfield
Clark
Douglas
Burdick
Hart
McNamara
Williams
Hartke
Pell (?)
Jackson

Report of Dec 1962

"Apportionment of State Legislatures"

Commission on Intergovt. Relations

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1. Courts would act before bill is passed.

2. Not affect outstanding orders -

3. Declare intent & go ahead -

[1964?]

MEMORANDUM

Re: S. 3069--To amend Title 28, U.S. Code, to provide for a temporary stay of proceedings in any action for the reapportionment of any State legislative body.

S. 3069, as amended and reported by the Senate Judiciary Committee, provides as follows:

> "Upon application made by or on behalf of any State or by one or more citizens thereof in any action or proceeding in any court of the United States, or before any justice or judge of the United States, in which there is placed in question the validity of the composition of any house of the Legislature of that State, or the apportionment of the membership thereof, such action or proceeding shall be stayed until the end of the second regular session of the Legislature of that State which begins after the date of the enactment of this section, and the court may make such orders with respect to the conduct of elections as it deems appropriate except that no order shall be inconsistent with any apportionment made pursuant to referendum. The court shall not deny any person or persons the right to make such application."

The explanation of the purpose of this bill by Senator Dirksen (Cong. Rec., Aug. 3, 1964, pp. 17189-91) makes it apparent that the bill is part of an effort intended to overcome the effect of the Supreme Court's decision on June 15, 1964 in Reynolds v. Sims, ____ U.S. ____, 32 Law Week 4535. The Court there held that the Equal Protection

Clause of the Fourteenth Amendment requires that the seats in both houses of a bicameral State legislature must be apportioned substantially on the basis of population.

Another decision of the Court on June 15, 1964, involving the legislature of Colorado, should also be mentioned since Senator Dirksen made a reference to it. In that case, Lucas v. Forty-Fourth General Assembly of Colorado, ____ U.S. ____, 32 Law Week 4565, it was held that an apportionment plan not based substantially on population is invalid despite the approval thereof by the electorate of the State. As stated by the Court, "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so."

S. 3069, as introduced by Senator Dirksen, ended with the words "date of enactment of this section," and therefore provided for a stay of proceedings, without more. The language now following those words, which was added in Committee, seems contradictory of what goes before since it authorizes literally everything a court may be able to do in an apportionment case at present, including actual redistricting, provided the court does not act inconsistently with an apportionment made pursuant to a referendum. It should be noted also that the last

sentence of the bill, read literally, would authorize an application for a stay to be filed by anyone in the world, a result which is no doubt unintentional.

It may be that the added language was intended to apply only in cases in which trials have been had and final decrees entered prior to the enactment of the bill. If so, the bill is defective for that purpose. At any rate, this memorandum is written on the assumption that the bill will accomplish, or will be further amended to accomplish, Senator Dirksen's goal of a general stay of apportionment proceedings in the Federal courts.

Effect of S. 3069

Senator Dirksen is critical of the Supreme Court's decisions in the cases involving State legislative apportionment and contends that they are producing chaos. He stated frankly that S. 3069 is designed to stay the effect of the decisions pending action by Congress, presumably during the next session, to formulate and propose a constitutional amendment dealing with apportionment. It is clear that he will urge an amendment limiting, to a greater or lesser extent, the Court's holding that both chambers of a State legislature must be apportioned according to population. Although he did not so

state, it is apparent that he hopes the periods of time to be afforded by S. 3069--varying from State to State, but apparently in the range of three to four years--will also be long enough to produce the ratification of an amendment. Such ratification, it is important to understand, would be accomplished, if the bill serves its purpose, largely through approvals by legislatures which are not now, and undoubtedly will not be at the time of approval, validly constituted on the population basis required by the Equal Protection Clause. In essence, therefore, S. 3069 is simply a holding operation in a bootstrap plan by which improperly constituted State legislatures are to hoist themselves into legitimacy.

Senator Dirksen's Haste

Senator Dirksen's comment that the Supreme Court's recent apportionment decisions are causing chaos is quite unfair. It is true that until they were handed down, the lower Federal courts had no clear guidance. The landmark case, Baker v. Carr, 369 U.S. 186, had opened the Federal courts to apportionment suits without setting a specific standard for their resolution. Now, Reynolds v. Sims, supra, has laid down a requirement which can be easily carried out if there exists the will to do so. Since the decision is less than two months old, it is somewhat

somewhat disingenuous of Senator Dirksen to posit only catastrophe ahead. It is certainly open to suspicion that his real distaste is for the increase in power for urban and suburban constituencies which strictly population-based representation in the State legislatures will inevitably bring about.

It should be added that Senator Dirksen's prediction of confusion and difficulty can of course be brought about by State legislatures themselves. If they fail to act promptly to meet constitutional requirements, or if they look for stratagems to avoid them, the result will be protracted litigation and trouble. To give weight to that possibility in considering S. 3069 would be somewhat like giving in to a bully without a fight.

Legality

S. 3069 raises at least two constitutional questions, each of an unusual nature. One has to do with Article III of the Constitution, which places the judicial power of the United States in the Supreme Court and the inferior courts established by Congress. By directing a stay in pending apportionment cases, Congress, through S. 3069, would be in essence purporting to exercise a judicial function, and the

bill thus would constitute a legislative intrusion on the power granted to the judicial branch of the Government. In short, it would violate the doctrine of separation of powers. It is important to note, in this connection, that apportionment suits seek the vindication of a constitutional right and do not rely on rights or relief granted by Congress. In the latter situation, Congress might well be able to control the nature and extent of the remedies to be granted or denied. But for Congress to order a stay in a judicial proceeding arising exclusively under a provision of the Constitution would seem clearly to be an attempted seizure and dispensation of equitable relief found only in the hands of the courts. Such action, in other words, would violate the integrity of the judicial branch and thus breach the constitutional wall between that branch and the legislative branch.

A necessarily brief search has revealed one precedent directly in point on this question. In 1926 the State of New York passed an act requiring its courts, upon application, to stay certain pending private suits arising out of contracts of insurance entered into prior to the Russion Revolution and either payable in Russian currency or to be performed in Russian territory. The stay was to endure until the expiration of thirty days after recognition of the Russian Government

by the United States. In Sliosberg v. New York Life Ins. Co., 217 App. Div. 67, 216 N.Y.S. 225 (1926), the court held that this statutory requirement of a stay, a form of relief which should be granted only on the merits, was an interference with the judicial department of the State of New York by the legislature in a matter which is wholly discretionary with the courts. The court pointed out in particular that the statutory prescription of a method of halting a particular class of cases was contrary to the New York constitutional provision granting all jurisdiction in law and equity to specified courts of the State. This holding plainly supports the conclusion that S. 3069 is of doubtful validity.

United States v. Klein, 80 U.S. 128, is also instructive. There an Act of Congress, the effect of which was to compel the Court of Claims and the Supreme Court to dismiss certain cases upon ascertaining the existence of certain facts, was held unconstitutional because it prescribed a rule of decision in cases pending before the Judicial Department of the Government. The Court took the view that Congress had passed the limit which separates the legislative from the judicial power. S. 3069 would seem to commit a similar trespass since it would bind the courts with regard to a matter within the province of their sole decision.

The second constitutional issue raised by S. 3069 derives not from a specific provision thereof but from the possible consequences of its enactment. As pointed out above, it would operate to leave invalidly constituted State legislatures in their present state of violation of the Fourteenth Amendment. If Congress, following the enactment of the bill, were to propose a constitutional amendment with regard to apportionment and specify that it come into effect upon ratification by three-fourths of the State legislatures, ratifying action would then be left to lawmaking bodies without standing under the Constitution. It is extremely doubtful that such action by those bodies could withstand an attack on the ground of ultra vires. To rule otherwise would be to say that assemblies outside our constitutional system in some way may acquire the power to participate in the process of changing the Constitution--a proposition which, to say the least, is startling on its face.

The Merits of a Constitutional Amendment on Apportionment

The proposal for a constitutional amendment to limit the apportionment decisions which seems to have received the most attention is H.J. Res. 1055, introduced by Congressman McCulloch. This proposed amendment would allow a State to apportion the membership of one chamber of its legislature on factors other

than population, "if the citizens of the State shall have an opportunity to vote upon the apportionment."

Whether this proposed constitutional amendment would be likely to receive significant support in Congress is of course unpredictable at the moment. However, it may well be that something like it will provide the focus for attention if Congress gives serious attention to recommendations for a constitutional amendment.

Attached for information is a memorandum on H.J. Res. 1055 which weighs the main arguments which might be urged in support of a change in the Constitution to limit the requirement of population-based apportionment in both houses of a State legislature. The memorandum expresses the conclusion that none of these arguments is valid or persuasive.

H.J. RES. 1055 AND H.R. 12016

H.J. Res. 1055 and H.R. 12016 must be read together.

In Reynolds v. Sims, ____ U.S. ____, 32 Law Week 4535, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. And in Lucas v. Forty-Fourth General Assembly of Colorado, ____ U.S. ____, 32 Law Week 4565, the Court held that a State apportionment plan not based substantially on population is invalid despite the approval thereof by the electorate of the State. As stated by the Court, "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so."

H.J. Res. 1055 seeks to amend the Constitution to permit a State with a bicameral legislature to apportion the membership of one house on factors other than population, "if the citizens of the State shall have an opportunity to vote upon the apportionment." The resolution provides that it shall be inoperative unless ratified by the legislatures of three-fourths of the States within seven years.

H.R. 12016 would remove from the jurisdiction of the Federal courts, for a period of seven years after its enactment, any action or proceeding to reapportion one house of a bicameral State legislature where (1) the other house is apportioned substantially according to population or (2) a suit to reapportion the other house is pending in any court. H.R. 12016 would also remove from Federal jurisdiction for seven years any action or proceeding to reapportion both houses of a State legislature. Thus, the bill would limit the Federal courts to ordering apportionment according to population in only one house of a State legislature pending efforts to accomplish the ratification of the Constitutional amendment proposed by H.J. Res. 1055. This bill is, of course, intended to increase the chances of ratification by reducing the impact of the decision in Reynolds v. Sims on the present make-up of State legislative bodies. It seems probable that as the effect of that decision spreads, the prospects for ratification will decline.

Since H.R. 12016 would suspend the jurisdiction of Federal courts in connection with rights stemming from the Federal Constitution, it is to a considerable extent subject to the same criticisms as H.R. 10181 and H.R. 11879, discussed separately. There is no need to consider those criticisms at

this point. The following discussion is therefore confined to an examination of H.J. Res. 1055.

Principles of Representative Government in the United States

It is not open to doubt, either in law or in political theory, that the fundamental principle of representative government in our States is that of equal representation for like numbers of people. One man's vote must be equal in value and power to that of another. Neither race, religion, sex, income, ownership of property, manner of making a living nor place of residence is properly a factor in determining whether a man is to vote or what weight is to be given his vote, once cast.

> "The purpose of legislative representation in a democratic system of government is just that--to represent. The legislature acts on behalf of the voters. The proper goal of the system of apportionment must, therefore, be to provide effective representation for the body politic.
>
> "The history of democratic institutions points compellingly in the direction of population as the only legitimate basis of representation today. The first parliamentary institutions reflected their feudal origins. Social, economic and political power were in the hands of a few families. Communications and transportation were primitive. Government itself had only a marginal effect on most men's lives. In those circumstances it was natural that parliaments should represent not people but great estates, titles, wealth, geographic strongholds. But as feudal concepts of

privilege ended and social and economic leveling took place, political responsibility spread also.

"Under generally accepted democratic theory, that responsibility falls today upon every citizen. At the same time, in an increasingly complex industrialized society, government becomes vastly more important and impinges more heavily on men's lives. . . .

". . . [at present,] no basis of representation other than population is defensible if candidly stated and examined for what it is. There is talk, for example, of 'area representation.' But acres do not vote; nor do trees. When a sparsely settled area is given as many representatives as one much more populous, it simply means that the people in the sparse area have more representation. No matter how stated, it is people who choose the representatives." (One Man-One Vote, statement of conference held by Twentieth Century Fund, 1962.)

The history of representation in State legislatures, as well as the theory of democratic government, points to the apportionment of those legislatures according to population. The original constitutions of no fewer than 36 states gave recognition to this principle by providing for representation in both houses completely or predominantly based on population.

"The government of the individual States is based on the theory of representative democracy. This means that legislative bodies must mirror the views of the citizens within the jurisdiction. This does not justify policy-making bodies being set up in such a way that minority interests of any type are represented in any way other than as justified by their relative numbers. They remain a minority interest until such time as they convince a majority of the people that their view is

the one that should prevail. The fact that this permits a majority to impose its will on the minority is of no consequence. Our form of government is based on the assumption that a majority of the people elect a majority of the legislators to enact laws and develop policies that the voters have supported.

"Except to the extent that they are represented according to their numbers and that they have an opportunity to present their views to that body, minorities are not entitled to protection in the State legislature. Protection of minority interests or views does not mean the minority should be in a position to veto the desires of the majority. The protection given minority views and interests should not be a veto power in the legislative process, since other adequate protections are offered by both Federal and State constitutions. . . ."

* * *

"The founders of this nation fully recognized that the nation and the States must be governed by the views of the majority of the voters. In enacting the Northwest Ordinance, the Congress affirmed the principle that representation in State and territorial legislatures was to be based on population. The new western States that entered the Union between 1790 and 1860 all apportioned seats in both houses of the State legislature according to population with but minor qualifications." (Report of Advisory Commission on Intergovernmental Relations entitled, "Apportionment of State Legislatures, 1962".)

In sum, the law, the theory of democratic government and the history of representation in State government all compel the conclusion that both houses of a State legislature should be apportioned on the basis of population. To stop with the full apportionment of one house on this basis, as H.J. Res. 1055 is designed to authorize, would, both in principle and in practice, be almost as violative of our democratic teaching

as neglecting the factor of population in both houses.

Provision in H.J. Res. 1055 for vote upon apportionment

As pointed out earlier, H.J. Res. 1055 would authorize apportionment of one house on factors other than population "if the citizens of the State shall have the opportunity to vote upon the apportionment." This language is uncertain, and, read literally, would permit apportionment on factors other than population even if rejected by a majority of the voters. Moreover, regardless of its ambiguity, the provision does not make the resolution worthy of support.

The resolution would place in the Constitution the means for a majority to inflict permanently on a minority any number of disabilities through manipulation of the seats in one house of a State legislature. Conceivably, districts with a predominance of individuals of a minority race or religion could be discriminated against in legislative apportionment--or districts with a greater share of wealth could be treated preferentially--or, as happens now, the residents of urban areas in a predominantly rural State could be greatly under-represented. All these possibilities, and others as harmful, could occur with the sanction of the Constitution. The present constitutional protection for minorities would be placed in jeopardy,

leaving them no effective relief against the exercise of tyranny by the majority.

That this is no idle fear is evident from the stranglehold which minority groups have been able to maintain through the years on State legislatures by one device or another. Only the protection afforded by the Fourteenth Amendment is serving to loosen the stranglehold. With a constitutional blessing replacing a constitutional restraint, as proposed by H.J. Res. 1055, it is not difficult to foresee abuses of minorities locked into State representational systems.

In short, H.J. Res. 1055 suffers from the defect of permitting majority groups in a State to trample on the minority with impunity. And curiously, it should be noted, it would even make possible the majority enthronement of a minority at any given time under circumstances which would leave the minority in charge virtually forevermore. That such a result is possible appears from the experience of the State of Colorado, where for one reason or another, a majority of the voters was induced to approve an apportionment arrangement substantially diluting majority representation in one house of the legislature.

Area Representation

The control of State legislatures by the representatives from rural areas, with resulting neglect of the needs of the people living in urban and suburban districts, gave rise to the litigation which elicited the Supreme Court's unqualified recognition of the tenet of one man, one vote. H.J. Res 1055 is obviously grounded on a partial dissent from that tenet and on the presumed desirability of giving a greater voice in at least one house to those who reside in rural areas.

Since it would be hard to support the argument that farmers and those who live at a distance from urban centers have a claim to preferential treatment because of superior wisdom or other personal characteristics, the effort to afford them such treatment must arise from the feeling that their needs entitle them to overrepresentation. Some persons argue, for example, that the rural population is a minority with special needs that would be disregarded in a legislature constituted strictly on the basis of population. This argument would be more appealing if rural controlled legislatures had not consistently neglected the needs of the urban majority in recent times and if the argument were accompanied by proposals to provide the means for preventing continued disregard of problems of the majority. Ironically,

the argument would logically lead to majority representation of Negroes in some State legislative bodies which systematically attempt to thwart their needs and rights.

To sanction effective minority control of State legislatures, by means of H.J. Res. 1055 or otherwise, would appear to do harm to majority rights to an extent far greater than any possible harm of minority rights which might arise from unrestricted application of the principle of apportionment according to numbers. Our constitutional safeguards amply provide for the protection of minorities by means other than giving them majority control of State legislatures.

Some believe that the inhabitants of thinly populated areas ought to be given greater representation because of the difficulty candidates have in campaigning there and, once elected, in making themselves accessible to their constituents. However, contentions of this kind are not convincing in an age of easy and swift communications and transportation. Moreover, it is not at all certain that a campaigner in a thinly populated district is any the less able to make an impact on its constituents than a campaigner in a metropolitan area.

It is of course true that regional interests exist within the States and that it is often wise to provide for the representation of such interests in State legislative bodies. But

regionalism can be recognized simply by drawing the boundary lines of districts to reflect it. It is obviously not necessary to go further by making particular areas the beneficiaries of extra weight in the legislature.

Weighting the votes of citizens differently, by whatever means, in a house of the legislature for reasons of residence is not justifiable under any fair analysis. To hold that a vote in one place is more valuable than a vote in another is simply to negate our central idea of self-government.

Analogy to the Federal System

Many of those who favor the structure which would be legalized by H.J. Res. 1055 find support for it in the Federal legislative structure. They see an analogy between the two systems and say, in effect, that what is proper in the national government is proper in State governments.

History provides no foundation for this position. The combination of the representation of States in one house of the Federal legislature with popular representation in the other was part of an historic compromise between sovereign States agreeing to form a federal union. It was not a compromise--as H.J. Res. 1055 must be deemed--over what constitutes a fair apportionment. The compromise in the constitutional convention was over the nature of the new union.

Those who favored a legislature made up of one house with each State represented equally--the same apportionment as in the Congress of the Confederation--uniformly believed that the new government should merely be a reconstruction of the old Confederation, although with additional power to meet the problems the Confederation had been unable to solve. Thus, they saw the new government as a Confederation of sovereign States with powers in areas in which the individual States had been ineffective. On the other hand, the advocates of a legislature, whether made up of one or two houses, apportioned entirely according to population invariably considered the proposed constitution as establishing an entirely new government operating directly on the people with the States in a decidedly subordinate role. Ultimately, because the deadlock over the basic nature of the government and the apportionment which depended on this question threatened to prevent the adoption of a new constitution, the delegates compromised. They deliberately decided to establish a government which operated directly on the people, but was composed of sovereign States. The House of Representatives was considered as representing the people, while the Senate represented the States. Thus, the apportionment of the Congress was seen as reflecting the

nature of the new government--a mixture of a national government, which would have required representation based on population, and a Confederation, which would have required equal representation from each of the States.

In contrast to the circumstances of the Federal Government, State legislative districts are not, and never have been, sovereign and independent. Whether or not they have functions in addition to the election of legislators, they are mere subdivisions created by the State for its purposes with no independent powers of their own. The government of a State is by no stretch of the imagination a mixture of a confederation of sovereign territories and a government operating directly on the people of the State. Therefore, there is no analogy to the Federal Government.

It should be noted also that the framers of the Constitution were in agreement that, as to a State Government, with full powers directly over the people, both houses must be apportioned on the basis of population. Thus, Madison repeatedly made clear at the Constitutional Convention and elsewhere that fairness demanded equal representation in a State legislature on the basis of population. Alexander Hamilton, James Wilson of Pennsylvania, Pierce Butler of South Carolina, Rufus King

of Massachusetts and others spoke to the same effect. And Jefferson repeatedly denounced the inequality of representation provided by the Virginia Constitution of 1776 and just as often proposed changing it to require that both houses be apportioned on the basis of population. Significantly, several States, other than Virginia, which were unequally apportioned during the colonial period, changed their constitutions after independence to remedy the unfairness. And, as noted above, the Northwest Ordinance, which was adopted by the Congress of the Confederation in the year of the Constitutional Convention, provided for representation by population in State and territorial legislatures.

Effect on Bicameralism

Some see the requirement of representation according to population in both houses as a blow ending the effectiveness of bicameralism. But that requirement does not thwart the purpose of a two-chamber legislature--that is, for each chamber to act as a check upon the other so as to prevent the passage of hastily conceived or undesirable legislation. The very existence of two chambers provides a check since two separate bodies tend to develop different traditions and ideas and the necessity for concurrence of each slows down the legislative process. Moreover, there are ways of providing a different

composition for each body other than weighting one in favor of rural or other voters. The size of the bodies, derived from varying sizes of their members' constituencies, may differ. The length of terms of office may differ. And the fixing of boundaries for the seats in the upper house may take into account regional or other broad interests not adequately reflected in the lower.

Finally, experience has shown that bicameralism is not inconsistent with the same apportionment of both houses. The constitutions of ten States have identical methods of apportionment in each chamber (Indiana, Massachusetts, Minnesota, Oregon, South Dakota, Tennessee, Washington, West Virginia, Wisconsin and Wyoming) of which all but the constitution of Wyoming provide for population as the basis of apportionment in each.

There is no reason to believe therefore that malapportionment in at least one house is a prerequisite to a bicameral legislature.

States Rights

It may be suggested that H.J. Res. 1055 is desirable as a measure to check the swing away from the weakening of the powers of the States. This suggestion is not persuasive if only because the resolution involves not the rights or powers

of the States but the rights of individuals.

In the long run, the requirement that both houses of a State legislature be apportioned on the basis of population will strengthen the position of the States. One of the main reasons for calls upon the Federal Government to render assistance in fields where the States have power to act is that unfairly apportioned State legislatures have neglected the needs and problems of their urban and suburban communities. Adequate representation of those communities will bring with it adequate attention and responses to their needs. The consequence can hardly be anything but a greater role for the States and a lesser role for the Federal Government with respect to many activities where the trend has heretofore been the opposite.

One of the greatest virtues of our Federal system is its invitation to the States and their subdivisions to experiment and to devise their own solutions to problems of the day. Legislative willingness to tackle those problems can make a great contribution to the welfare of their electorates and of the whole nation. And legislatures fully representative of those who are affected by the problems will inevitably be led to tackle them.

Permissibility of some deviations from population-based representation

The Supreme Court decision in Reynolds v. Sims, supra, does not impose a precise and inflexible mathematical calculation as the rule for apportionment. Consequently, H.J. Res. 1055 cannot be deemed necessary to avoid such a rule.

The Court stated in Reynolds (32 Law Week 4548):

> History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. . . .
>
> A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivision, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained.

Conclusion

H.J. Res. 1055 takes a road leading away from the great democratic ideals of equality and majority rule which have served the country so well in the past and are of vital importance for the present and the future. None of the reasons frequently advanced for turning away from these ideals in the matter of constituting the membership of State legislatures is valid or persuasive. H.J. Res. 1055 therefore lacks a sound basis for approval.

February 19, 1964

Memo for John S.
From Senator

Jill WP Reapportionment

Have you read the text of the ruling on equal House representation by the Supreme Court? What is your view of it? What do the political scientists say about it? Has anyone made any comments about it? Should we do so? And if so, could we get someone in the political science community to help prepare us a good thoughtful statement? I leave this in your hands. Thanks.

Partial Text of Ruling on Equal House Representation

By the Associated Press

Following is a partial text of Justice Black's decision for the majority in which the Supreme Court held there should be equal representation for equal numbers of people in the House of Representatives:

The Majority

. . . We agree with Judge Tuttle (of United States District Court for Northern Georgia) that in debasing the weight of appellants' votes the State has abridged the right to vote for members of Congress guaranteed them by the United States Constitution, that the District Court should have entered a declaratory judgment to that effect, and that it was therefore error to dismiss the suit. The question of what relief should be given we leave for further consideration and decision by the District Court in light of existing circumstances. . . .

. . . We agree with the District Court that the 1931 Georgia apportionment grossly discriminates against voters in the 5th congressional district. A single Congressman represents from two to three times as many 5th district voters as are represented by each of the Congressmen from the other Georgia congressional districts.

The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

Rule Followed Automatically

We hold that, construed in its historical context, the command of Article I, Section 2 (of the Constitution) that Representatives be chosen "by the people of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.

This rule is followed automatically, of course, when Representatives are chosen as a group on a State-wide basis, as was a widespread practice in the first 50 years of our Nation's history.

It would be extraordinary to suggest that in such State-wide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated 9th district, could be weighed at two or three times the value of the votes of people living in more populous parts of the State, for example, the 5th district around Atlanta. . . .

We do not believe that the framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants.

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the people," a principle tenaciously fought for and established at the Constitutional Convention.

The history of the Constitution, particularly that part of it relating to the adoption of Article I, Section 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether State-wide or by districts, it was population which was to be the basis of the House of Representatives. . . .

Periodic Census Insured Idea

The debates at the (Constitutional) Convention make at least one fact abundantly clear: That when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.

The Constitution embodied Edmund Randolph's proposal for a periodic census to insure "fair representation of the people," an idea indorsed by (George) Mason as assuming that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.

The convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any reference to wealth. And the delegates defeated a motion made by Elbridge Gerry to limit the number of Representatives from newer Western States so that it would never exceed the number from the original States.

It would defeat the principle solemnly embodied in the great compromise — equal representation in the House of equal numbers of people — for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.

The House of Representatives, the convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter. . . .

Right Precious In Free Country

Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this court, gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said:

"All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the State, choose as many representatives, as are chosen by the same number of citizens, in any other part of the State. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."

It is in the light of such history that we must construe Article I, Section 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen "by the people of the several States" and shall be "apportioned among the several States . . . according to their respective numbers."

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Great Body Of the People

Our Constitution leaves no room for classification of people in a way that necessarily abridges this right. In urging the people to adopt the Constitution, Madison said in No. 57 of the Federalist:

"Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. . . ."

Readers surely could have fairly taken that to mean, "one person, one vote. . . ."

While it may not be possible to draw congressional districts with mathematical precision, there is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the founders set for us.

The Minority

Following is a partial text of Justice Harlan's dissent:

I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives.

It is not an exaggeration to say that such is the effect of today's decision.

The court's holding that the Constitution requires States to select Representatives either by elections at large or by elections in districts composed "as nearly as is practicable" of equal population places in jeopardy the seats of almost all the members of the present House of Representatives.

In the last congressional election, in 1962, Representatives from 42 States were elected from congressional districts. In all but five of those States, the difference between the populations of the largest and smallest districts exceeded 100,000 persons.

A difference of this magnitude in the size of districts the average population of which in each State is less than 500,000 is presumably not equality among districts "as nearly as is practicable," although the court does not reveal its definition of that phrase.

Thus, today's decision impugns the validity of the election of 398 Representatives from 37 States, leaving a "constitutional" House of 37 members now sitting. . . .

The unstated premise of the court's conclusion quite obviously is that the Congress has not dealt, and the court believes it will not deal, with the problem of congressional apportionment in accordance with what the court believes to be sound political principles.

Laying aside for the moment the validity of such a consideration as a factor in constitutional interpretation, it becomes relevant to examine the history of congressional action under Article I, Section 4. This history reveals that the court is not simply undertaking to exercise a power which the Constitution reserves to the Congress; it is also overruling congressional judgment. . . .

Is Political Field of Action

Today's decision has portents for our society and the court itself which should be recognized. . . . The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers.

In upholding that claim, the court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed, exclusively to the political process.

This court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the court blanket authority to step into every situation where the political branch may be thought to have fallen short.

The stability of this institution ultimately depends not only upon its being alert to keep the other branches of Government within constitutional bounds but equally upon recognition of the limitations on the court's own functions in the constitutional system.

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened.

By yielding to the demand for a judicial remedy in this instance, the court in my view does a disservice both to itself and to the broader values of our system of government.

A June 28, 1964 Washington Post article by Richard Scammon considered the probable effects of the Supreme Court's June 15th reapportionment decision. Scammon, the Director of the Bureau of the Census, wrote that although it is impossible to predict the precise consequences of the Court's ruling, there are some things which we can be relatively sure of. Implementation of the decision, according to Scammon, will be influencial in four principal areas of American political life.

1. Rural America will lose its dominant position in the state legislatures and political power will be transferred to our metropolitan areas. But, Scammon adds, "Most of this 'metropolitan' gain in representation will be a gain for the suburbs". The cities will profit some, but not nearly as much as the suburbs.

2. Reapportionment will not"produce a strong liberal trend in America" writes Scammon. Some people hold this erroneous view because they believe that the cities will be the big winners in reapportionment.

3. The probable effects on our two political parties are that the Republicans will lose rural representation and gain suburban representation. The Democrats stand to gain in the cities; but once again, the heaviest gains will accrue to the conservative areas which surrond the cities.

4. Scammond also writes that "a more representative apportionment system in the state legislatures might lead to a growth in the power and role of the states in our Federal system". If our state legislature become accurate reflections of population distribution, they will be receptive to the needs of our cities and suburbs

and thos e areas will no longer be forced to turn to Washington for the solution of their problems.

Director of the Bureau of the Census

THE JUNE 15 Supreme Court decisions on apportionment filled the one remaining gap in the way of final realization of "one man, one vote." The Court held that the states cannot apply to their legislatures the "Federal formula" in which one chamber represents people; the other, geography.

There are many examples of the kind of situation these decisions were intended to remedy. For example, the New Jersey Assembly has 60 members distributed according to population, and the distribution is accurate. But in the New Jersey State Senate, each of the state's 21 counties has a single member, so that five northeastern counties with more than half of the state's population have just five of the 21 senators.

California represents a different kind of problem. No California county may have more than one state senator. So Los Angeles County, with more than six million people, has one senator, and one senator represents Alpine, Inyo and Mono Counties, with a total population of 14,000.

Closer to home, consider Maryland. Nine of its Eastern Shore counties have a total population of 244,000 and nine state senators. Baltimore City and County plus Montgomery and Prince Georges Counties also have a total of nine state senators and a population of 2,150,000. Though two-thirds of Maryland's residents live in those metropolitan areas, they have only one-third of the seats in the State Senate.

Farm Is Fading

IMPLEMENTATION of the Court's June 15 rulings would make impossible long-continued rural domination of either chamber of a state legislature in the great majority of our states. The basic reason is simple: ours has become an urban society.

Like it or not, the America of the farm and the small town is at best standing still in numbers. In the 1960 census, the percentages were 70 urban and 30 rural. The 1970 census will show a further trend toward urbanism, perhaps as high as 75 per cent.

Obviously, the June 15 decisions will result in greater representation (and thereby greater influence) for metropolitan areas in the state legislatures. But the metropolitan areas are complex entities, and relatively little of the increased representation will go to the cities that are the centers of these areas.

The Suburbs' Gain

AMERICA'S big cities aren't growing much, if at all. Most of this "metropolitan" gain in representation will be a gain for the suburbs.

To take one example: in 1962, 19 new members were added to the Maryland House of Delegates as a sort of "instant reapportionment" measure to meet the most obvious inequalities in representation. But of these 19 new members, only three went to the City of Baltimore. The other 16 went to suburban areas: Anne Arundel, Montgomery, Prince Georges and Baltimore Counties.

To take another case in point: if New York's two-chamber State Legislature were apportioned strictly by population, New York City would gain a little but the fast-growing suburban counties would gain more.

In Delaware, small Kent and Sussex Counties would lose nearly half their members of the state's House of Representatives on any people-based reapportionment. The city of Wilmington would gain, but its suburbs would gain a good deal more.

Exceptions Noted

ALL STATES would not be replicas of Maryland, or New York, or Delaware. Some already have apportionment plans which provide generally equal arrangements for representation. In others, the city would be big gainers, along with the suburbs.

In a few, the drift of population away from the city center has been so great that the cities would actually lose members in the legislature, as would the farming and small-town counties. But the general rule is that the big gains would come in the suburbs, the big losses in rural areas.

It would be a good deal more difficult to predict what such shifts might eventually mean. Many political scientists have felt that a more representative apportionment system in the state legislatures might lead to a growth in the power and role of the states in our Federal system.

It is certainly true that the domination of state legislatures by a rural minority has led many city and suburban governments to seek answers to their problems in Washington rather than at the state capitals. If a people-based state legislature proves more responsive to metropolitan needs than an acre-based legislature, it may well turn out that states will gain increased authority.

The Partisan View

FROM A PARTY viewpoint, some Republicans have suggested that since these shifts in power will benefit the suburbs most, they may be expected to produce Republican gains in the state legislatures. Even if they admit this possibility, however, most Democrats would argue that Republican suburban members will simply be replacing Republican rural members.

Actually, America's suburban communities are becoming more and more pluralistic, less and less the upper-middle-class picture-window dormitories described by novelists. The "suburban vote" in America, while still more Republican than that of the whole country, seems to be tending more and more toward the national average—because the national average is becoming more and more suburban.

Photo courtesy Fairchild Aerial Surveys, Inc., and American Heritage.

"Now the suburbs are going to be getting the biggest share of the attention, because that is where the voters are."

In terms of liberalism and conservativism, some observers have thought that reapportionment based on population would produce a strong liberal trend in America—often because these observers erroneously felt that most of the gains would be in the big cities. But the big gains will be in the suburbs, and the suburbs are more and more the front line of both philosophical and political conflict.

Where the Boys Are

ABOUT ALL we can be sure of is that more metropolitan representation and less rural representation will mean more attention to metropolitan problems and less to rural ones. In the everyday business of legislation, very little work is done on a philosophical basis; most of it is on the very practical side of who gets what, when and how.

In the rural-elected state legislatures of the past, the "who" was much more likely to be rural than urban. Now the cities, and especially their suburbs, are going to be getting the biggest share of attention. If it be true that the girls go where the boys are, it is equally true that the attention of government goes where the voters are. If the voters dominate the state legislatures, then the main business of the states will increasingly become the business of Metropolitan America.

[Aug. 1964]

SS 461. Stay of Proceedings for Reapportionment of State Legislative Bodies

(a) Any court of the United States having jurisdiction of an action in which the constitutionality of the apportionment of representation in a State legislature or either house thereof is drawn in question shall, upon application, stay the entry or execution of any order interfering with the conduct of the State government, the proceedings of any house of the legislature thereof or of any convention, primary or election, for such period as will be in the public interest.

(b) A stay for the period necessary --

(i) to permit any state election of representatives occurring before January 1, 1966, to be conducted in accordance with the laws of such State in effect immediately preceding any adjudications of unconstitutionality and

(ii) to allow the legislature of such State a reasonable opportunity in regular session or the people by constitutional amendment a reasonable opportunity following the adjudication of unconstitutionality to apportion representation in such legislature in accordance with the Constitution shall be deemed to be in the public interest in the absence of highly unusual circumstances.

(c) An application for a stay pursuant to this section may be filed at any time before or after final judgment by any party or intervenor in the action, by the State, or by the Governor, or Attorney General or any member of the legislature thereof without other authority.

(d) In the event that a State fails to apportion representation in the legislature in accordance with the Constitution within the time allowed by any stay granted pursuant to this section the district court having jurisdiction of the action shall apportion representation in such legislature among appropriate districts so as to conform to the Constitution and laws of such State insofar as is possible consistent with the requirements of the Constitution of the United States, and the court may make such further orders pertaining thereto and to the conduct of elections as may be appropriate.

(e) An order of a district court of three judges granting or denying a stay shall be appealable to the Supreme Court in the manner provided under Sec. 1253 of this title, and in all other cases shall be appealable to the court of appeals in the manner provided under Sec. 1294 of this title. Pending the disposition of such appeal the Supreme Court or a Justice thereof, or the court of appeals or a judge thereof, shall have power to stay the order of the district court or to grant or deny a stay in accordance with subsection (a) and (b).

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8/13/64

August 13, 1964

Info from Bill Boyd, National Municipal League

In Oklahoma, Colorado, Delaware, Michigan - court orders have already been implemented and any stay now would mean that those states would xxxxxxxxxx chaotic situations. In Colorado the action was the result of a Federal District Court order resulting from the Supreme Court decision. In Delaware the legislature met as a direct result of the S.C. decision and passed a new apportionment plan. In Michigan both result of the S.C. decision and part of the process set up by the new constitution. Oklahoma- the Federal District Court took a constitutional amendment approved by the people on May 26, 1963 and struck those parts in conflict with the S.C. decision and otherwise implemented it.

Washington - Federal court ordered that next session of legislature use weighted voting.

Conn - special session of legislature in process of reapportioning.

NY - Court order allows delay until regular session next year. Republic Party in NY wants however to have a special session after the election so lame duck legislature can do the reapportioning.

VT - Federal District Cour has ordered either reapportionment now or that the new legislature xxx prohibited from doing anything but reapportion. Dirksen bill would reduce chaos in this state.

Elections held in 1965 in Miss, Ky, and Va. Va. would have to call special session of legislature in order to reapportion before the 1965 election--so Dirksen bill would conceivably save them the trouble of a special session.

Idaho - court granted a stay until after regular session in 1965.

Iowa - a temporary and limited reapportionment by a regular sesion of the legislature will be in effect this fall. Next regular session can reapportion.

There are 27 states which have in one or or another already reapportioned since Baker v. Carr and theoretically this bill could invalidate those actions.xxxx Alabama, Colorado, Conn (now in process), Delaware, Flordda, Georgia (Senate), Idaho (limited apportionment), Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Nebraska, New Mexico, N.C. (this not done as result of any court action), Oklahoma, Pa., Tennessee, Vermont, Virginia, Washington (order for wéighted voting in legislature), West Va., Wisconsin, Wyoming.

Might look at statement of David Wells before House Judiciary Committee today - ILGWU.

August 17, 1964

WHITE HOUSE FOLDER

Memorandum: Dirksen-Mansfield reapportionment situation.

From: John Stewart

1. The AFL-CIO has been unable to devise any amendments which could possibly satisfy Senator Dirksen. Their suggestions are all long the line of a "sense of the Senate" resolution similar to the McCarthy-Javits proposal: namely, that the Senate hopes the courts will move carefully in this area, etc.

2. A meeting in Senator Mansfield's office on Monday afternoon with Katzenbach, Cox, Mansfield, Clark, Hart, Pastore, McCarthy, etc. failed to produce any new possibilities. The Senators did not accept the Katzenbach-Cox thesis that the Dirksen-Mansfield compromise was "meaningless." Also, the President has received calls from Mayor Daley, Walter Reuther, etc. urging him not to accept the D-M compromise.

3. Recommendations: I strongly recommend the following course of action.

a. Senator Mansfield go to the floor on Wednesday with the following statement: that the issue is far more controversial than first thought, that the degree of opposition is far deeper than first imagined, that we have tried to find a middle-ground and failed, that serious problems in 27 states would result from passage of the Dirksen-Mansfield compromise, that the President's program must move forward, etc. and that, therefore, I move reluctantly to table the Dirksen-Mansfield compromise.

b. Immediately following the tabling motion by the majority leader, he should offer a "sense of the Senate" resolution--perhaps the McCarthy-Javits proposal, or something similar--so that Senators will be able to cast a positive vote on the same day. This would, I believe, be helpful in lining up support among such Senators as Symington.

c. The majority leader could also pledge that full hearings would be held after the November elections and that the item would be the first business brought up in January.

d. The Senators opposed to the Dirksen-Mansfield compromise are prepared to continue their filibuster after the Convention, if necessary. Therefore, I believe that the issue must be disposed of in some definite fashion. The procedure outlined above seems to offer the best alternatives in the existing circumstances.

MINUTES ON REAPPORTIONMENT MEETING

Monday, August 17, 1964, Room S-208, U. S. Capitol, 2:00 P.M.

In opening the meeting, the Majority Leader stated that his only reasons for going along with the compromise was a hope to resolve the differences, promptly, and a belief that the states should be given a little time to meet the requirements of reapportionment while upholding the Court. There subsequently ensued a lengthy discussion of the legal significance of the Dirksen Amendment. In general, the opponents felt that it was a challenge to the Court, a measure of doubtful constitutionality which would delay and even throw back the whole process of reapportionment. Senator Douglas' view was that Senator Dirksen, in the interim, intended to get a Constitutional Amendment to take the Courts out of the subject altogether. There was no quarrel with this view but it was pointed out that his interpretations and intentions did not have to prevail.

The Justice Department people made clear that they would prefer no bill but if one were necessary, the Dirksen Amendment was not nearly as bad as the opponents tended to describe it. They pointed out, among other things, that (1) it did not affect state court decisions on reapportionment; and (2) it would not mean the undoing of most of the reapportionment which had already taken place. In their judgment, all the amendment would do would be to provide a stay in Court procedures which had not already gone too far and in those few instances where the state

elections occurred in November 1965. It was estimated that not more than 3 or 4 states would be affected. They agreed to prepare a state by state analysis of the precise effect of the Amendment.

The only tangible suggestions insofar as the procedural bind is concerned were the following: Senators Proxmire and Burdick suggested exploring the possibility of the Proxmire amendment which involves adding the word "not" in order to reverse the whole implication of the amendment. Clark and Hart addressed themselves to the possibility of a tabling motion. Senator Hart, in particular, stated that the Leadership should be advised that "there are enough voices to stop the measure and enough votes to pass it." He thought in the circumstances the Leadership should consider the possibility of a tabling motion with perhaps the promise to take the matter up separately before the end of the session. He felt that if the tabling motion were linked with the desire for adjournment it might prevail.

Senator Proxmire noted that there were 5 or 6 members "determined to talk for weeks" and that the Leadership might consider the appropriations route for foreign aid without an authorization bill.

Senator Muskie seemed to be inclined to favor the insertion into the Dirksen Amendment of the words "prima facie" in connection with "deemed to be."

NFR AFL-CIO AFL-CIO

AUGUST 13, 1964

TO ALL MEMBERS OF U. S. SENATE
AS PER ATTACHED LIST:

PENDING PROPOSAL TO STAY COURT ORDERS AFFECTING REAPPORTIONMENT OF STATE LEGISLATURES IS DEROGATORY OF U. S. CONSTITUTION WHICH PROVIDES FOR SEPARATION OF POWERS BETWEEN BRANCHES OF FEDERAL GOVERNMENT. IT IS UNTHINKABLE THAT THE CONGRESS SHOULD DEEM A SUSPENSION OF CONSTITUTIONAL RIGHTS TO BE IN THE PUBLIC INTEREST, AS THIS AMENDMENT SPECIFICALLY STATES. THE SENATE IS CONSIDERING THIS REVOLUTIONARY PROPOSAL WITHOUT ANY HEARINGS WHATSOEVER. THE MOST ELEMENTARY CONSIDERATIONS OF DUE PROCESS REQUIRE THAT INTERESTED CITIZENS BE GRANTED AN OPPORTUNITY TO PRESENT THEIR VIEWS TO THE APPROPRIATE COMMITTEE. AFL-CIO EXECUTIVE COUNCIL IS UNANIMOUSLY ON RECORD OPPOSING ANY LEGISLATIVE INTERFERENCE WITH THE JUDICIAL BRANCH. THEREFORE I STRONGLY URGE YOU TO VOTE AGAINST ANY SUCH PROPOSAL AND TO EXERT EVERY EFFORT TO ASSURE ADEQUATE HEARINGS ON THIS HIGHLY IMPORTANT QUESTION.

Andrew J. Biemiller
Director, Department of Legislation
AFL-CIO

REPUBLICAN NATIONAL COMMITTEE
1625 EYE STREET, NORTHWEST WASHINGTON 6, D.C. NAtional 8-6800

NEWS

FOR RELEASE

ON DELIVERY
AUGUST 10, 1964, 11:00 A.M.

REMARKS BY SENATOR BARRY GOLDWATER,
NATIONAL ASSOCIATION OF COUNTIES,
WASHINGTON, D.C., August 10, 1964

I've just had the very great pleasure of reading the basic governmental philosophy plank of your American County Platform.

"Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative inter-governmental agreements where appropriate to attain economical performance and popular approval; reserve national action for residual participation where state and local governments are not fully adequate, and for the continuing responsibilities that only the national government can undertake."

I know that not all of us here agree on partisan matters or affiliation. But, if you subscribe to that platform, I can tell you very flatly that we agree absolutely in our philosophy of government.

And, as I have been saying for some time now, it is to give America a chance truly to choose that philosophy of government that I am seeking the Presidency of the United States.

All of you can see this choice from a true vantage point--the county government. You have first-hand experience of a growing tendency to by-pass various levels of local and area government and to hand problems directly over to the Federal government.

You have confident reason to know that this is not necessary; that local governments, governments close to the people, can bear the primary governmental responsibility for meeting our nation's major domestic needs.

You may judge, also, who in public life just talk about the prerogatives of local government and who in public life actually match deeds to their words.

(more)

I submit to you that at the very heart of the domestic difference between the two great American parties is their performance in regard to local governments. And I urge that, because of your particular position in the structure of our government you judge the parties most carefully on this basis.

Nowhere is the dynamic conservatism of the Party I am proud to represent more clearly evident than in this concept of government. I say conservative because we believe in building upon the best of the past. I say dynamic because we believe that tomorrow belongs to those who will work to build it and not just to those who talk about it.

County governments have the opportunity to be keystone contributors in the re-building of a balanced governmental structure in this country--a structure that can serve people best by serving the people it knows best, in the localities it knows best.

Not only are county governments area-wide in scope, and yet very local in nature, but two-thirds of our total population increase in the past decade has occurred in suburban areas which, in many instances, do not lie within the jurisdiction of any municipality.

Here, dramatically, we can see where a local segment of government can clearly fill a pressing need in our nation.

And I suggest that the public demand for and desire for local leadership is crystal clear. The equally clear danger, however, is that whenever and wherever local governments fail to respond, then Washington's ever eager fingers of bureaucracy are right there, waiting to grab the defaulted responsibility.

In stressing the local need and the national danger I do not for a moment suggest that the Federal government has no role in the problems of shifting patterns of urban, suburban, and rural population.

The Federal government must have effective powers efficiently to meet its Constitutional responsibilities in working cooperatively with state and local governments and, in some instances, to coordinate or provide research data and stimulation for local programs.

Also, it should be a prime role of the executive branch of government to see to it that local governments have the tools with which to do their jobs, and thus preclude the need for Federal take-overs.

(more)

We have, far too long, seen a Federal establishment obsessed by the enlargement of its role and its personnel.

We can, instead--and I am dedicated to this proposition--have a Federal establishment just as properly and prudently concerned with turning power over to the people, rather than taking it away from them.

And I suggest that we'll all be better off, from the village to the nation, as a result!

This isn't turning back the clock. Is freedom and local responsibility going backward? Not at all.

The people who look backward are those who seek solutions only by concentrating more and more power in fewer and fewer hands.

That's not a new idea. That's the oldest, worst idea in governmental history!

The meaning of the American revolution was the rejection of that idea. And if we are to keep that revolution alive and ongoing, we must in our time also reject absentee government and the centralization of power.

In practical terms, I suggest that we need such action as:--
a critical re-examination of federal, state, and local tax revenues to find feasible and equitable methods of effectively redistributing them to keep local monies closer to local projects.

--a critical re-examination also is needed of Federal grant-in-aid programs, with a view to eliminating those no longer necessary, and channeling the remaining ones through the states.

--we would be well served, also, by a hard look at the system of federal payments to state and local governments for Federal lands. With an increased citizen demand for services from the rural governments where much of this land is located, the exemption of it from local tax rolls can pose serious financial hardships.

But now let me ask you the most important question of your political life.

Of what use would be the solutions to all of those problems, or any domestic problems, if we cannot solve the crucial problem of peace in the world itself?

The very existence of a world or a freedom in which to solve all the other problems is dependent upon the outcome of this crucial issue.

(more)

And I submit to you this plain but fateful proposition; this nation and the entire free world risks war in our time unless free men remain strong enough to keep the peace!

Many of us have worked so very hard in the past years on behalf of the preparedness of this nation that some critics try to make it appear that we are preoccupied by war, or eager to start one.

There is no greater political lie.

We are preoccupied by peace.

We are fearful that the peace is being permitted to slip away, as it has three times in the past, by leadership that misjudges our enemies, mistrusts our own destiny, and misuses or fails to use our great national power.

This nation has been prosperous under both political Parties. But this nation has gone to war under only one Party--and that is not the Party I represent.

And today, as it has before three wars in the past, our guard is dropping in every sense.

We are disarming ourselves and demoralizing our allies.

Despite a ludicrous bookkeeping exercise in which the present Administration claims to have more than doubled defense research and development, the hard fact is that our R & D program has increased by less than 15% in each of the past three years and by only close to 10% this year. This is scarcely enough to keep pace with rising prices, much less with the awe-inspiring technology of modern defense.

Even our everall defense budget, as compared with the growth of non-defense spending, has been declining.

Make no mistake -- I don't want defense spending to go up. But I am convinced that Americans are prepared to pay for every dollars' worth of defense we actually need.

This Administration, which inherited the mightiest arsenal for the defense of freedom ever created on earth, has so depleted it that we face the prospect of going into the decade of the 1970's without a single new manned bomber.

We face the prospect of going into that decade with a worn and obsolete force composed only of those left-over planes still able to fly.

At worst we could find ourselves in the 1970's without a single one of the flexible, manned weapons which give us the vital scale of a controlled, graduated deterrent rather than only a capacity for all-out, intercontinental nuclear confrontation.

Let me also warn you against the public relations gimmick of parading versions of a single reconnaissance aircraft before the public and representing them as a whole series of new weapon systems!

I am afraid that this device is as pure bunkum as when we tried to fool ourselves into believing that our men could train with wooden rifles and in cardboard tanks, and that this would impress the enemy.

It didn't then and it won't now.

Nor will our enemies in the world be tempted to turn from the ways of war by such facts as this: our appropriations for strategic deterrent forces of all sorts have been declining steadily. In the current fiscal year they are hardly half of what they were three fiscal years ago.

And what of this, the most perilous statistic of all? Under our present defense leadership, with its utter disregard for new weapons, our deliverable nuclear capacity may be cut down by 90% in the next decade!

Let me repeat that. The figure is startling, and yet undeniable. Sometime in the decade ahead, unless present plans are changed by the demand of an aroused public, America's deliverable nuclear capability may be cut by 90%

This will not serve the cause of peace. This will merely tempt the forces of aggression--just as weakness has tempted them to war three other times in our century.

To insist on strength is not war mongering. It is peace-mongering--the only kind that ever has worked in the whole history of the world!

Winston Churchill once was called an extremist because he spoke up for Britain's defenses at a time when appeasement was popular. Had he, rather than those who called him names, been listened to there is every reason to believe that the second world war could have been prevented.

Only with the strength to keep the peace can we ever hope for the time in which the ideological obsession of Communism will be abandoned by the leaders of the nations which today we call Communist. Yet, there are those who fear that strength may only provoke the enemy. Was it strength that was responsible for the attacks on our destroyers in the Gulf of Tonkin? Or was it the enemy's doubt of our strength and our will to use it?

I charge that our policies have become so involved, so twisted with diplomatic red tape that the enemy might well have wondered if we would accept their attacks at sea on the same basis that we have been accepting their attacks on land.

I support, as does my Party, the President's firm action in response. But I must point out that it was just that, a response--an incident, not a program or a new policy; a tactical reaction, not a new winning strategy.

Yes--we support the President in this strong, right action. No--we will not let this one action obsure a multitude of other needed actions.

And, no--we will not let our support today silence our basic criticism; that the war in Vietnam--and let's call it what it is, a war--that the war in Vietnam is being fought under policies that obscure our purposes, confuse our allies, particularly the Vietnamese, and encourage the enemy to prolong the fighting.

We must, instead, prosecute the war in Vietnam with the object of ending it, along with the threats to the peace that it poses. Taking strong action simply to return to the status quo is not worthy of our sacrifices, our ideals, or our vision of a world of peace, freedom, and justice.

This does not mean the use of military power alone. We have vast resources of economic, political, and psychological power which have not even been tapped in our Vietnamese strategy.

These can be the peaceful means of waging war on war itself. I say let us use them!

As it is, we seem forever to be making crisis decisions in the middle of the night--crisis decisions for supposedly isolated outbreaks of fire. Actually Communism remains a global, not an isolated threat, and we must face it as such or risk, in some uninformed response to a supposedly isolated crisis, the misstep that could bring us closer to the nuclear war we all want to avoid.

(more)

Those who remember that the final defeat of free China occurred while our eyes were riveted on the Berlin blockade, cannot help but realize that today--while our eyes are fixed on Vietnam--we face another disaster in the heart of Africa, the Congo.

We need to understand that a devotion to preparedness is a devotion to peace--and that those who rashly would disarm us unilaterally, risk tempting our enemies to war, just as they have before every other war of this century.

In my campaigning across this nation I can hope to sound no more clear message than that of peace through preparedness.

And you, in turn, regardless of the other interests which may absorb you, face no greater challenge.

If we cannot remain strong enough and skillful enough to keep peace in the world, the prosperity of our nation will avail us little at all.

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EVERETT McKINLEY DIRKSEN
ILLINOIS

MINORITY LEADER

United States Senate

August 4, 1964

re: Reapportionment

Dear Colleague:

The decision by the Supreme Court last month declaring the composition of six State legislatures invalid and casting doubt on the composition of all other State legislatures has resulted in a number of Members of both Houses proposing constitutional amendments dealing with the apportionment of State legislatures.

Bearing in mind the possibility that the time remaining in this session may not afford an opportunity to complete the careful study of these proposals which they merit and considering the fact that the federal courts have indicated an intention to immediately apply this decision so as to give a State as little as fifteen days to comply, as in the case of Colorado, I will introduce today a bill to provide a breathing spell and adequate time for serious consideration of these amendments.

A copy of this bill and of my statement is enclosed for your consideration. It is my intention to offer the bill as an amendment to appropriate legislation at the earliest opportunity.

Sincerely,

Everett McKinley Dirksen

Everett McKinley Dirksen

enclosure

Mr. President:

On June 15, 1964, the Supreme Court handed down a threatening series of decisions. Concentrating on Reynolds v Sims the Court said that unless the membership of each House of a State legislature is selected on the basis of one man, one vote the legislature is unconstitutionally constituted. The States involved were ordered to reapportion immediately.

Consider the case of Colorado. The people of the State of Colorado had by referendum accepted one apportionment plan and overwhelmingly rejected another. Yet the Court refused to accept the plan approved by the people. Under the law laid down by the Supreme Court, the Federal District Court then ordered Colorado to reapportion within two weeks. A hastily assembled General Assembly complied only to have the State Supreme Court declare the new reapportionment act unconstitutional.

Another district court has ordered New York to reapportion and has in addition completely disregarded the State constitutional provision providing for two year terms of members and directed that those members elected this fall serve only during the session next spring. Then there must be another election next fall for members who will serve only one year and the year after that a third election. This chaos is but typical of the kind that results when the courts assume the role and function of the legislative branch of government.

These actions prompted many members of the House and Senate to introduce legislation or to propose constitutional amendments designed to retain in the people of a State the power to determine the composition of their State legislature. Hearings are now being held on some of these measures.

But obviously, Mr. President, there is not sufficient time remaining to us in this session to complete action on a constitutional amendment. We cannot act in haste on such measures.

Consequently, Mr. President, I feel that we have but one alternative and that is to provide for a stay of proceedings in all cases involving the composition of State legislatures upon the request of a State or the people of a State. Only by this action will we be able in my judgment, to give this matter the consideration it deserves.

I send to the desk Mr. President a bill designed to give us some little time in which to treat with this problem, and I ask that it be referred to the proper committee.

88th CONGRESS
2d Session

S._____

IN THE SENATE OF THE UNITED STATES

Mr. Dirksen (for himself,

introduced the following bill; which was read twice and referred to the Committee on Judiciary

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A BILL

To amend title 28, United States Code, to provide for a temporary stay of proceedings in any action for the reapportionment of any State legislative body

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 21, title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 461. Stay of proceedings for reapportionment of State legislative bodies

"Upon application made by or on behalf of any State or by one or more citizens thereof in any action or proceeding in any court of the United States, or before any justice or judge of the United States, in which there is placed in question the validity of the composition of either house of the legislature of that State or the apportionment of the membership thereof, such action or proceeding shall be stayed until the end of the second regular session of the legislature of that State which begins after the date of enactment of this section."

(b) The chapter analysis of that chapter is amended by adding at the end thereof the following new item:

"461. Stay of proceedings for reapportionment of State legislative bodies."

CONGRESSMAN JAMES C. CORMAN
22nd District of California
Room 238 House Office Building
Washington 25, D.C.
CApitol 5-5811

FOR IMMEDIATE RELEASE

August 6, 1964

More than 60 members of the House--all supporters of the foreign aid program--today threatened to vote against the foreign aid authorization if it includes the so-called Dirksen amendment.

The amendment proposed by Senate Minority Leader Everett Dirksen would delay implementation of the Supreme Court's decision that state legislatures must be apportioned on a "one man, one vote" basis.

Dirksen has indicated he will offer his amendment to the foreign aid authorization legislation which is currently before the Senate. The House passed the foreign aid bill on June 10 and must reach an accord with the version to be passed by the Senate this week.

The statement signed by the House members declares:

"We have supported the Mutual Security Program of Presidents Eisenhower, Kennedy and Johnson. We voted to authorize the appropriation of funds for the operation of this program in the current fiscal year. With our help, the Foreign Aid authorization passed the House, 230 to 175. It is now pending before the Senate.

"The Minority Leader of the Senate has indicated he will offer an amendment to that bill which would deny full equal protection of the law to American citizens for a period of four years. We continue to support foreign aid as one of the ways this nation promotes the cause of freedom and self-government throughout the world. If, however, this effort is to be at the expense of the right of Americans to govern themselves and their entitlement to equal protection of the laws with reference to state reapportionment, it is a price we will not pay.

"We will vigorously oppose and vote against the Mutual Security authorization if it includes the Dirksen amendment or any similar provision."

House members who signed the statement include:

Emanuel Celler (N.Y.), Joseph P. Addabbo (N.Y.), Thomas L. Ashley (Ohio), John A. Blatnik (Minn.), Edward P. Boland (Mass.), John Brademas (Ind.), George E. Brown Jr. (Calif.), Everett G. Burkhalter (Calif.), Phillip Burton

(Calif.), Ronald Brooks Cameron (Calif.), Hugh L. Carey (N.Y.), Jeffery Cohelan (Calif.) and James C. Corman (Calif.).

Dominick V. Daniels (N.J.), William L. Dawson (Ill.), Thaddeus J. Dulski (N.Y.), Don Edwards (Calif.), Leonard Farbstein (N.Y.), Edward R. Finnegan (Ill.), John E. Fogarty (R.I.), Donald M. Fraser (Minn.), Cornelius E. Gallagher (N.J.), Sam Gibbons (Fla.) and Jacob H. Gilbert (N.Y.).

Thomas P. Gill (Hawaii), Henry B. Gonzalez (Tex.), Kenneth J. Gray (Ill.), Martha W. Griffiths (Mich.), Julia Butler Hansen (Wash.), Augustus F. Hawkins (Calif.), James C. Healey (N.Y.), Ken Hechler (W. Va.), Chet Holifield (Calif.), Elmer J. Holland (Pa.), Joseph E. Karth (Minn.), Robert W. Kastenmeier (Wis.), Edna F. Kelly (N.Y.) and Eugene J. Keogh (N.Y.).

Cecil R. King (Calif.), Roland V. Libonati (Ill.), Torbert H. Macdonald (Mass.), Ray J. Madden (Ind.), George P. Miller (Calif.), Joseph G. Minish (N.J.), William S. Moorhead (Pa.), John M. Murphy (N.Y.), Lucien N. Nedzi (Mich.) and James G. O'Hara (Mich.).

Claude Pepper (Fla.), Melvin Price (Ill.), Roman C. Pucinski (Ill.), Henry S. Reuss (Wis.), Peter W. Rodino Jr. (N.J.), James Roosevelt (Calif.), Benjamin S. Rosenthal (N.Y.), Dan Rostenkowski (Ill.), Edward R. Roybal (Calif.) and William Fitts Ryan (N.Y.).

Fernand St. Germain (R.I.), Carlton R. Sickles (Md.), Neil Staebler (Mich.), Frank Thompson Jr. (N.J.), Charles A. Vanik (Ohio).

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THE AMERICAN POLITICAL SCIENCE ASSOCIATION
THE POLITICAL SCIENCE BUILDING
1726 MASSACHUSETTS AVENUE, N. W.
WASHINGTON, D. C. 20036

DUPONT 7-8585

August 5, 1964

Dear John:

I am enclosing a copy of an interesting poll done in Pinellas County, Florida. The Pinellas Poll is a thoroughly professional operation. Its results are quite valid and reliable.

Judging from the results, the Democratic situation looks quite encouraging.

Cordially,

Evron M. Kirkpatrick
Executive Director

Enclosure

Mr. John Stewart
Legislative Assistant to
Senator Hubert H. Humphrey
United States Senate
1311 New Senate Office Building
Washington, D. C.

dick funsch
(7/31/64)

The Pinellas Poll

If the election for president were being held today Pinellas County would go Democratic for the first time in 20 years.

This is the main conclusion of the Pinellas Poll's first pre-election "trial heat" between President Lyndon Johnson and his Republican opponent Arizona Senator Barry Goldwater.

The results of interviewing conducted on July 20 and 21 indicate that Johnson is the choice of 49 per cent of the county's voters while Goldwater is preferred by 21 per cent.

Three voters out of ten are still attempting to make up their minds. Indecision is twice as prevalent among Republican voters as it is among Democrats, the comparable "undecided" figures being 41 per cent for the former and 20 per cent for the latter.

The Pinellas Poll does not purport to "forecast" elections, but only to report voter sentiment at the time the survey was conducted. The poll cannot, and does not claim to assess shifts or developments subsequent to the date interviewing was completed.

With three months remaining before that fateful first Tuesday in November, much can and probably will happen to swing votes and help the undecideds decide. Pinellas County has voted Republican in the last 4 presidential elections and it would be presumptious to concede a Democratic victory at this early date.

At the present time, however, that is exactly what would happen. Countywide voter opinion devided as follows:

Johnson	49%
Goldwater	21
Undecided	30

Democrats went 70 per cent to 10 per cent for Johnson (20 per cent undecided) while county Republicans were somewhat less enthusiastic over their standard bearer, giving Goldwater a slim 31 per cent to 28 per cent margin (41 per cent undecided).

Many voters are undecided because they can't get very excited over either candidate. As a 58-year-old St. Petersburg woman said: "I don't know. I don't like either one but I guess I'll end up voting Republican".

Many Democrats also are having problems making up their minds. A 48-year-old Indian Rocks Beach man feels "It all depends on who Johnson picks as a running mate."

It looks like a long hot summer for more than a few Pinellas families. Typical of this group is the 41-year-old St. Petersburg woman who declared: "I'm for Johnson, but my husband likes Goldwater."

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WESTERN UNION TELEGRAM

W. P. MARSHALL, PRESIDENT

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HON HUBERT H HUMPHREY

ROOM 1313 SENATE OFFICE BLDG WASHDC

ADOPTION OF LEGISLATION AT THIS TIME RESTRICTING POWER OF FEDERAL COURTS TO ORDER STATE LEGISLATIVE REAPPORTIONMENT, EITHER BY SEPARATE BILL OR BY AMENDMENT TO PENDING LEGISLATION, WOULD BE TOTALLY ADVERSE TO THE BEST INTERESTS OF THE NATION. AN ISSUE OF THIS IMPORTANCE REQUIRES CAREFUL CONSIDERATION BY APPROPRIATE COMMITTEES, AND AMPLE OPPORTUNITY TO EXPRESS OPINIONS OUGHT TO BE GRANTED TO ALL INTERESTED CITIZENS. ON BEHALF OF THE INDUSTRIAL UNION DEPARTMENT OF THE AFL-CIO, I URGE YOU TO INSURE EQUALITY OF FRANCHISE BY VOTING AGAINST REAPPORTIONMENT LEGISLATION DURING THE REMAINDER OF THE 88TH CONGRESS

WALTER P REUTHER PRESIDENT INDUSTRIAL UNION DEPT AFL-CIO.

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SF-1201 (1-60)

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(NF) PD 4 EXTRA WASHINGTON DC 4 NFT
HONORABLE HUBERT H HUMPHREY 1313
UNITED STATES SENATE WASHDC
ANY ATTEMPT TO FORESTALL STATE LEGISLATIVE REAPPORTIONMENT IN ACCORD WITH FEDERAL COURT DECISIONS BY CONGRESSIONAL ACT DURING THIS SESSION OF CONGRESS WOULD BE UNCONSCIONABLE. AN ISSUE OF THIS IMPORTANCE SHOULD RECEIVE FULL CONSIDERATION BY APPROPRIATE COMMITTEES, WITH AMPLE OPPORTUNITY FOR ALL INTERESTED PERSONS TO BE HEARD.

AFL-CIO EXECUTIVE COUNCIL YESTERDAY UNANIMOUSLY STATED QUOTE WE CALL UPON THE CONGRESS, IN ITS WISE UNDERSTANDING OF THE AMERICAN GOVERNMENT, TO REJECT ALL EFFORTS TO DIMINISH OR DILUTE THE TRUE PROCESSES OF DEMOCRACY IN THIS COUNTRY, AND TO STAND FIRM FOR THE PRINCIPLE OF ONE MAN--ONE VOTE CLOSE QUOTE.

CLASS OF SERVICE
This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN UNION
TELEGRAM

W. P. MARSHALL, PRESIDENT

SF-1201 (4-60)

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1964 AUG 4 PM 6 35

AFL-CIO THEREFORE URGES YOU TO OPPOSE ANY ATTEMPT TO PASS REAPPORTIONMENT LEGISLATION DURING THE REMAINING WEEKS OF THIS SESSION OF CONGRESS

ANDREW J BIEMILLER DIRECTOR DEPT OF LEGISLATION AFL-CIO.

The Role of the Federal Courts in the Reapportionment of State Legislatures

This is the winning essay in the 1964 Ross Prize Essay Competition, conducted annually by the American Bar Association pursuant to the bequest of the late Judge Erskine M. Ross. The contest was open to all members of the Association (except officers and employees), and it closed prior to the Supreme Court's decisions in the reapportionment cases. The judges were Sylvester C. Smith, Jr., of West Orange, New Jersey; Judge Richard H. Chambers of the United States Court of Appeals for the Ninth Circuit; and Dean F. D. G. Ribble of the University of Virginia School of Law.

by R. W. Nahstoll • ***of the Oregon Bar (Portland)***

DURING THE LATTER part of the eighteenth century, men of good will concerned themselves with the theory and structure of government. It is immaterial that the period cannot be precisely defined, but surely from 1776 to the adoption of the Bill of Rights in 1791 these were matters of coffee-house concern. Public attention to the "state of the Union" was sometimes skeptical, sometimes defiant, sometimes incredulous, but rarely apathetic. If general public interest did not ultimately supply the delicate phraseology which is the statement of the Constitution, nor yet the basic principles, it nevertheless furnished a crucible in which the ideas of the political sophisticates were refined for articulate explanation through *The Federalist* and similar communications.

Probably the interest in apportionment problems, Congressional and legislative, has provoked currently more widely spread reflection on political theory than at any time since the founding of this country.

During the Reconstruction Period, to be sure, there was high popular interest in these affairs. But, the attendant climate of postwar hostility, despair and fatigue, aggravated by calculated vindictiveness of some elements of Congressional leadership, tended to abort, at that time, development of any valid political theory.

From time to time, issues arousing intense public responses have arisen in relatively restricted issues, *e.g.*, President F. D. Roosevelt's New Deal, the extension of Executive power, and his "Court-packing" effort of 1937. However, despite the heat generated by these issues, they provoked no significant general reanalysis of the theory of government.

And then came 1962—and *Baker* v. *Carr*.[1]

This offering proposes no effort to review the niceties of *Baker* v. *Carr*, vis-à-vis its predecessors, nor to examine the positions assumed by the several members of the Court. To anyone aware of the copious compendium already published to those ends, no conceivable purpose could justify another effort. Also, the nature of *Baker* v. *Carr* and its spawn commends the suggestion of Mr. Justice Holmes, who, in a different context, observed that "at this time we need education in the obvious more than investigation of the obscure".[2] As a milestone on the tortuous path of constitutional policy, the significance of the case is nowhere to be denied. It marks a turn that will have it live in the company of *McCulloch* v. *Maryland*[3] and *Marbury* v. *Madison*[4] which is assurance, indeed, that it likely will not be disregarded. But the disturbing effect of the *Baker* case results from the narrowness of the path from this turn as restricted by the labored effort of the majority to justify federal judicial intervention in this problem on the basis of the equal protection clause of the Fourteenth Amendment and to reject the basis of the guaranty clause of Article IV. I submit that the result of that election of the Court interjects the Federal Government beyond appropriate limits into internal affairs of the

1. 369 U.S. 186.
2. COLLECTED LEGAL PAPERS 292-293 (1920).
3. 4 Wheat. (17 U.S.) 316.
4. 1 Cranch (5 U.S.) 137.

states by according to the Federal Government an unjustifiable power to require uniformity in the structure of state governments. The result includes potential harm by reducing or destroying the viability and genius of the "republican" form of government which is constitutionally presumed for each state.

One hundred sixty-two pages of the U. S. Reports are devoted to the collective opinions in *Baker* v. *Carr*, but the reader may indulge a private suspicion that, after the dust had settled from the Court's *in camera* skirmish, it might have served the purpose to rule briefly the essence of the case: To claim for the Federal Government, acting through its courts, the power and duty to intervene, on the petition of individual voters,[5] in a matter of legislative apportionment. In short, unless he is to be understood as joining his brethren of the majority in limiting jurisdiction to the Fourteenth Amendment, Justice Stewart's opinion might well have sufficed.

Little Resistance to Baker Principle

There has been little resistance expressed by writers to the *Baker* principle that legislative apportionment is an appropriate area for federal judicial concern and action; nor is it suggested here.[6] Indeed, one's predisposition to acknowledge the necessity of federal jurisdiction over matters of legislative apportionment is so strong that it is astonishing to what difficulty Justice Brennan believed himself committed in order to persuade his reader to not change his mind. Few could have anticipated that the Court, when at last it faced the problem, should, or might have, ruled otherwise. The realities of our times render vain the continuing protestation of some that, "Come weal or come woe, our status is quo!" Whatever may be one's attitude toward the prospect of more of the same, it is unrealistic to believe that the future holds any significant retreat from past changes tending toward centralization of authority in the Federal Government.[7] Many of the affairs of men once thought to be of only local or intrastate concern have become of concern to those in other states, adjoining and remote, and must be now resolved in the context of the several states. These interstate interests are founded, in part, on the moral responsibility of caring about the welfare of fellow countrymen. They are founded also on the realities of interstate business and the fluidity of our people. It *does* make a difference to a Californian that a child in Mississippi is educated today, for tomorrow they may be neighbors. It *does* make a difference to a New Yorker that industry is not attracted elsewhere by submarginal wages. It *does* make a difference to an Oregon lumberman whether West Virginia's economy sustains a market for lumber products. Moreover, federal attention to such matters may be regarded as necessary if one accepts the cynical assumption that states consciously control the rate at which they "solve" their social problems to retard interstate flow of residents. Does any state consciously deter its solution to problems of its needy, its aged or its minorities, lest solution of the problems invite the welfare and employment burdens of other states? The practical recall that the public image of prosperous California enticed droves of dust-bowl needy who became a welfare and employment burden. But precisely because such matters have come within the federal concern there is need to respect as a hazard a possible "tyranny of the majority".[8]

Court Refuses To Evade Responsibility

Properly, it seems, the Court refused to evade responsibility for decisive action by taking refuge behind the "political question" doctrine of *Colegrove* v. *Green*.[9] If federal protection is due the individual, where but the courts can he look for that protection? It is not satisfactory to leave the solution, as would Justice Frankfurter, ultimately to the "conscience of the people's representatives".[10] If a voter is deprived today, it is no answer to tell him that at some indefinite future time things may worsen sufficiently to evoke curative action.[11] To refuse to be limited by the "political question" theory does not require that the courts remove from the judicial arsenal the doctrine of equitable restraint to act in those cases where satisfactory state action is manifestly under way. Retained for appropriate use, it can serve an obvious function to withhold judicial action pending the state's opportunity in lieu of dismissal of the litigation.

But the unfortunate results of *Baker* flow from the incongruity of its unpersuasive proclamation that: (a) Under the guaranty clause of Article IV, legislative apportionment as an element of the republican form of government is a nonjusticiable "political question"; and (b) Under the Fourteenth Amendment, legislative apportionment as an element of equal protection is not a "political question", and is justiciable. This distinction is based upon the Court's adoption of reasoning which began with *Luther* v. *Borden*,[12] and has now come full circle. Chief Justice Taney wrote for the Court in *Luther* that Congress,

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5. The standing of "any person whose right to vote is impaired" appears properly resolved, against the contention that such a claimant is without standing because his right is not peculiar to him, but is shared in common with all others. *Baker* v. *Carr*, 369 U.S. 186, 204-208; *Gray* v. *Sanders*, 372 U.S. 368, 375.

6. A valuable contribution to the literature on this subject is Professor Alfred de Grazia's book, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (1962). The author says:

> The least disputable general determination of the Supreme Court in *Baker* v. *Carr* appears to have been that state apportionment systems, whether contained in the State Constitution or in legislation, could be admitted to examination in a case before a Federal Court to determine whether they violate the equal-protection provision of the 14th Amendment of the Federal Constitution [page 154].

Professor de Grazia does not, in his book, consider Article IV, and in his apparent acquiescence in the Court's position excluding the guaranty clause, he is not joined by this writer.

7. See JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955), especially chapter III:

> It is the maintenance of the constitutional equilibrium between the states and the Federal Government that has brought the most vexatious questions to the Supreme Court. That it was the duty of the Court, within its own constitutional functions, to preserve this balance has been asserted by the Court many times; that the Constitution is vague and ambiguous on this subject is shown by the history preceding our Civil War. It is undeniable that ever since that war ended we have been in a cycle of rapid centralization, and court opinions have sanctioned a considerable concentration of power in the Federal Government with a corresponding diminution in the authority and prestige of state governments [pages 65-66].

8. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, c. XVI (for a similar warning, see THE FEDERALIST, No. 51).

9. 328 U.S. 548.

10. 368 U.S. 270.

11. As Justice Goldberg observed in *Watson* v. *Memphis*, 373 U.S. 526, 533:

> The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

12. 7 How. (48 U.S.) 1.

rather than the courts, had exclusive right to decide which of two disputing state governments was the established one. The Court assumed, without explanation, that Congress was charged under Article IV "to decide what government is the established one in a state . . . before it can determine whether it is republican or not".[13] The Court disregarded the distinction between (a) the choice of recognizing as the established government one of two claimants and (b) the issue of deciding as to only a single government whether it was "republican" in form, and suggested, in what was dictum with reference to the second issue, that the problem was a "political question . . . to be settled by the political power" and accordingly was committed to Congress.[14] From this origin, ensuing cases perpetuated and expanded the notion until any issue raised under the guaranty clause was judicially spurned as a "political question".[15] Now we are told by Justice Brennan that issues arising under the guaranty clause are committed to a co-ordinate branch of the Federal Government and respect for the separation of powers requires courts to regard such as nonjusticiable "political questions". But this "bootstrap" reasoning which began with Chief Justice Taney's dictum in *Luther* is something short of Justice Brennan's standard that a "political question" involves a "textually demonstrable constitutional commitment of the issue to a co-ordinate political department".[16] *Luther* says the questions are nonjusticiable because they are "political questions" and, as such, committed to Congress. *Baker* says the questions are committed to Congress and, as such, are "political questions". Then, with implicit recognition that the guaranty clause was not satisfactorily explained away, Justice Brennan undertook to nail down its coffin lid with a bewilderingly small tack:

> This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile.[17]

It seems equally clear that, as a guaranty clause issue, legislative apportionment is not *a fortiori* rendered nonjusticiable by Justice Brennan's alternative standard that a "political question" exists where there is "a lack of judicially discoverable and manageable standards for resolving" the issue.[18] If standards of legislative apportionment are judicially discoverable for equal protection purposes, are they less so for purposes of Article IV? And, if there were serious doubt regarding the judicial capacity "to decide the limits of the meaning of 'republican form' ", as Justice Brennan suggests in a footnote, where is greater capacity to be found?[19]

Is it a significant difference that the courts treat legislative apportionment as a factor of equal protection rather than as a factor of the guaranty clause? This involves consideration of the source and nature of the right which the federal courts have undertaken to enforce. It is necessary to respect the distinction between Congressional apportionment and legislative apportionment. The former is clearly a federal matter, contemplating definition by federal statute. If Congressional apportionment is improperly defined by Congress or insufficiently implemented by adequate state action, and falls short of satisfying Constitutional standards, it is clearly a matter for federal remedy. Whether that remedy should come from courts or await Congressional action is an issue on which there is strong difference of judgment, but none disputes that a federal right is in issue.

The Problem of Legislative Apportionment

The Court's position respecting the source of the required standard for legislative apportionment is more bothersome. On its facts, *Baker* might have been limited to protection by federal concern of a right vested in the individual voters by a constitutional dictate of the state. This restraint would have left for future consideration the status of a claim of right to voter-parity in the absence of state provision, either constitutional or statutory, or against the claim that the state provision does not satisfy acceptable standards of voter-parity. Also, further consideration could have been accorded the question whether the recognized right is a federally protected right to be secure in such rights as the state has undertaken to define as the due of all its voters, or a federally protected right to federally defined voter-parity. Similarly, *Baker* might have been confined to situations where, as in Tennessee, there exists no provision for popular initiative.

The lower court found the Tennessee apportionment statute repugnant to the state constitution and violative of something ambiguously described as "the rights of the plaintiffs".[20] The majority of the Supreme Court expressly disregarded "rights guaranteed or putatively guaranteed by the Tennessee Constitution" and, in a footnote which belied

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13. 7 How. (48 U.S.) 42.
14. 7 How. (48 U.S.) 46. Justice Brennan approaches acknowledgment that this part of *Luther* is dictum, in stating:
> But the only significance that Luther could have for our immediate purposes is in holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government [369 U.S. 223].

15. *E.g., Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612, holding that even if a state statute were a denial of a republican form of government as guaranteed by Article IV, "the enforcement of that guaranty, according to the settled doctrine, is for Congress, not the courts", citing *Pacific States Telephone & Telegraph Co.*, 223 U.S. 118; *Ohio* ex rel. *Davis* v. *Hildebrant*, 241 U.S. 565; and *Ohio* ex rel. *Bryant* v. *Akron Metropolitan Park Dist.*, 281 U.S. 74.
16. 369 U.S. 217.
17. 369 U.S. 226, 227.
18. 369 U.S. 217.
19. See note 48, 369 U.S. 222.
20. 179 F. Supp. 828.

the significance of the point, boldly classified the enforceable right as one derived exclusively from the equal protection clause.[21] And there's the rub!

We must acknowledge that rights of an individual to participate in his state government on acceptable voter-parity (bearing in mind the need for definition of that term) is by its source a federal right. But to acknowledge federal interest in and power to enforce the individual's relation to his state government is not to define it. Nor does it supply the definition to bespangle the concept with labels which are attractive, inviting, euphemistic and familiar—and meaningless. Once the right is classified as a part of the equal protection principle, epithetical jurisprudence supplies labels sufficient to confuse the problem and the solution: "equal apportionment", "fair representation",[22] "equal representation", "equality among voters",[23] "one person, one vote".[24] Through label-fixing, the problem is oversimplified and appears plausibly satisfied by judicial insistence upon a system of geographical subdivisions of practically equal population.

This solution has the appeal of relative certainty and precision. What, after all, is more certain than geography and arithmetic? But, it is also unimaginative, doctrinaire and stifling of the representation it purports to protect.[25] Thus, one sympathizes with the frustration implicit in Justice Stewart's remark to counsel during argument of *WMCA* v. *Simon:*

> I'm only suggesting that the problems in these cases are somewhat more complicated and subtle than the briefs suggest, and cannot be solved by eighth grade arithmetic.[26]

The Court has abandoned its actual duty to protect an equal right to share participation in a republican form of state government.[27] It undertakes, instead, to establish a federal standard of participation in state government without allusion to whether something less, or different, would qualify as a republican form of government. Indeed, the Court consciously avoided reference to the republican structure as the measure of acceptability and gratuitously adopted the substitute test of voter equality, brooking no "invidious discrimination". It might have been possible, in the absence of further expression, to speculate that the states continued free and viable to invoke different or modified techniques of realizing representational government. But, this freedom is manifestly in jeopardy, and with its restriction the genius of republican government is seriously prejudiced, inasmuch as the essence of the individual's relation to his state is no longer voter-representation. It is now voter-power to influence legislative action.

The Supreme Court appears persuaded that exigencies of present society require that a theory of relatively uniform representation be adopted, found or fabricated. It has refused to recognize that the applicable standard should test whether a challenged state system is republican in form.

In its inception, the guaranty clause contemplated that the several states are interested in the republican character of their governments and those of their sister states, and the Federal Government was acknowledged as the repository of power to enforce that interest.[28] Though the guaranty clause in form is a statement of assurance to the several states, it is not confined to a federal promise to hold the states free of anti-republican encroachment by the central government or extraneous forces. As expressed by Madison, the assurance contemplates that the states "may choose to substitute other republican forms" with the indulgence and protection of the Federal Government. Concurrently, the states are restricted by the obligation that their respective governments shall be "republican" in character. The significance of this continuing requirement is as surely a matter of concern to and right of the individuals within a state, as to the totality of the state's citizenry.[29] Accordingly, the pre-Fourteenth Amendment Constitution should be recognized as a valid source of federal guarantee of the right of individuals to participate in, and live under, a "republican" state government. The Fourteenth Amendment reaffirmed that federal interest and duty. At least this has been clear since the overruling of the doctrine of the *Slaughter-House Cases*,[30] which held that applicability of the Fourteenth Amendment was limited exclusively to the rights and status of Negroes.

The central issue is whether the Fourteenth Amendment did more than assure to each citizen that, in common with others in his state, he shares a right of equal protection under a "republican" state government. Until *Baker*, there had been no indication that the Fourteenth Amendment had changed or broadened the guaranty clause right.[31] What is that right? That the individual is due a "republican form of government" answers nothing without definition of that term.

The Semantics of the Science of Government

We have been too long careless of the semantics of the science of government. Though the U.S. Constitution guarantees us a "republican" form of state government, of habit we have come to think of our government as "democratic". What "democracy" imports to us, respectively, probably is more closely correlated to subjective criteria of *freedom* of the citizens under the government than to any connotation respecting either the structure of that gov-

21. 369 U.S. 194.

22. See *Wesberry* v. *Sanders*, 376 U.S. 1.

23. Mr. Justice Goldberg during argument of *WMCA* v. *Simon*, 32 Law Week 3189.

24. See *Gray* v. *Sanders*, 372 U.S. 368, 381; *Wesberry* v. *Sanders*, 376 U.S. 1.

25. For a Congressional apportionment case referring to other factors justifying consideration, see *Lund* v. *Mathas*, 145 So. 2d 871 (Fla. 1962).

26. 32 Law Week 3189.

27. Justice Frankfurter, dissenting in *Baker* v. *Carr*, recognized the issue as a "Guarantee Clause claim masquerading under a different label." 369 U.S. 297.

28. MADISON, THE FEDERALIST, No. XLIII.

29. See *Hoxie School Dist. No. 46 of Laurence County, Arkansas* v. *Brewer*, 137 F. Supp. 364 (E. D. Ark. 1956).

30. 16 Wall. (83 U.S.) 36.

31. It is one of those interesting quirks of legal literature that *Luther* v. *Borden*, on which the majority in *Baker* v. *Carr* principally rely to hold the guaranty clause inapplicable contains language which recognizes the power of the states to remodel their governmental structures, subject only to the limitation of Congressional determination that it continues "republican" in form. Chief Justice Taney said:

> No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every state resides in the people of the state, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it [7 How. (48 U.S.) 46].

ernment or the precise implementation of voting influence. Considered apart from the concept of freedom, democratic government is variously understood. The term can, of course, refer to a direct democratic form, of the town meeting type, in which each citizen participates and votes his will.

Surely there are few, if any, serious advocates of this as a vehicle for present-day government. The term can also refer to a *representative* democratic form. Such is the republican government contemplated by the Constitution. Representative democracy involves the element of consent of the governed expressed in popular selection of those charged with administration of government, including assurance that the selection is subject to some acceptable mode of review by the governed. It contemplates that diverse interests and points of view will be communicated and considered in the implementation of government. It requires a balance of power for protection of those who, of the moment, constitute the minority. It connotes an orderly system of law to which the government, as well as the governed, is responsible and responsive.

Proper legislative apportionment of a representative democracy is necessarily related to the role or charge to which the elected official is committed as a "representative" of his constituency. As long as representative government has been considered, writers have espoused one or the other alternative of the familiar dichotomy. Is a representative chosen to determine the will of the majority of his constituency and to express that will through his vote? If this is the extent of his responsibility, it could be accomplished better these days by utilization of opinion sampling and computers. Certainly the representative is chosen for a higher and more exacting task. Despite the premise of democracy, "the people" cannot be enlightened on all intricacies of modern government, informed as to the details of governmental affairs or sophisticated to the handling of them. This is not to suggest that public inquiry and interest should be discouraged; nor is it to discount lay *expertise* respecting limited areas in the public concern. But, it is unrealistic to suppose that individual voters, much less an aggregate of those in a constituency, have an informed and formulated judgment to which their representatives are, or should be, bound. Accordingly, we must accept the alternative theory that the representative is charged to become informed and then to vote his informed judgment and conscience. His judgment is not informed by any inherent omniscience. It must become so through reflection on information and attitudes of others. To broaden the base of that reflection, the widest possible variety of responsible opinion should be available before decision. To effect this fundamental purpose of supplying that diversity of opinions is the end of representation.

Mindful of this simple principle, *Baker* and its successors measure distressingly wide of the mark. In extending itself beyond Justice Stewart's recognition that federal jurisdiction lies, and undertaking to establish an arithmetically and geographically oriented definition of acceptable standards of equal protection, these cases tend to adopt two invalid predicates: (a) a definition of constitutionally sufficient representation cast in terms of the power consequences indirectly effected by the voter through his representative; and (b) an assumption that geographical subdivisions are reliable, and perhaps exclusive, bases of the several interests properly in need of articulate representation.

These two predicates are commingled in the misleading principle adopted as the goal of reapportionment under the grossly oversimplified shibboleth, "one person, one vote", which dominates the Court's theme. So committed are we to respect for "equality" that we tend to prompt, unchallenging and reverent acceptance of any idea couched in terms suggesting absence of discrimination. It is not inappropriate to exact "equality" among the several voters within a defined constituency, so that the representative of that group may be selected by a majority. But, it is a quite different thing to require that the several constituencies shall be so defined that the arithmetical prospect of influencing ultimate legislation shall be equalized between a voter in Constituency "A" and a voter in Constituency "B".[32] If this were the true goal, a myriad other factors of great practical influence logically would require similar equalization. Should each expect that, in common with every other voter, he is entitled to have his representative function as chairman of the most powerful committee in the legislative body? Should a voter be constitutionally offended if the representative of another constituency is more politically sophisticated, articulate, competent or successful? Has he a constitutional right to expect that there shall be no disparate committee assignments? The equality of voter influence implicit in the "one person, one vote" concept is invalid when it is not limited to equality in the correlation between voters in a common constituency. The true issue involving a voter's due respecting his representation is primarily whether he has an equal voice in the choice of the representative of him and his fellow constituents; it is only secondarily involved with the relative influence of his representative in shaping legislation compared with the influence of other representatives.[33]

Without discounting the unfortunate emphasis assigned to the promise that each voter must have equal ultimate influence, an even more disturbing consequence of the cases is their apparent ultimatum that constituencies be geographical divisions of equal population. Of habit we have become accustomed to geographical districts. It is a familiar scheme and we have not troubled ourselves seriously to consider alternatives.[34] But, alternatives there are, and because of their relative validity as vehicles to implement representative government, we should be astonished, concerned, and perhaps outraged, that they seem to have been eliminated from

32. See concurring opinion of Justice Stewart in *Gray* v. *Sanders*, 372 U.S. 368, 381.

33. See, for conscious adoption of both goals, *Moss* v. *Burkhart*, 220 F. Supp. 149, 151 (W. Okla. 1963).

34. de Grazia, *op. cit. supra* note 6, at 153: Some State Courts have been charged with the review of apportioning procedures for years. Mr. Arthur L. Goldberg has cited 54 cases in which apportionments were invalidated, prior to *Baker* v. *Carr*. There is even a smattering of theory about representation and apportionment to be found in court decisions going back to earliest times. At the same time, almost all of these cases may be shown to be highly tentative and apologetic incursions into the province of the legislature.
Moreover, the great number of affected voters have remained, until *Baker* v. *Carr*, generally oblivious and unaroused.

adoption, or even consideration, as variations from the Court's preconceived commitments to representation by cohesive geographical districts. It is one thing for the Court to restrain the states from "invidious discrimination" against fair representation. It is quite another thing for the Court to indicate that *prima facie* avoidance of unacceptable discrimination must commence with constituencies defined as cohesive geographical districts practically equal in population.

In the first place, the obligation can require shifting of voters from a constituency with which they have been traditionally allied, and with which their felt interests are to some extent associated, to a different constituency with which there is relatively less community of interest for the rather artificial reason that the districts will then be equal in population. Within the purposes the Court professes to serve, the shifted group is disserved and its influence on ultimate legislative action in fact is diminished.

In the second place, there is not a rational justification for adopting a definition of constituencies which is committed to a geographical essence. It is conceivable that in some past day the interests of voters in public affairs were reasonably correlated to geographical residence, and segregation of interest groups by the vertical division of geography may have had acceptable validity. If it were so in the past, it is doubtful that this obtains today. The mere circumstance of a voter's place of residence may well be one of the least of the reasons which arouse his interest in the public concerns. Is it not conceivable, or even likely, that a Democratic mill-worker with no school-age children and a leaning toward public power, though he resides in geographical district "X", has more in common with a similarly oriented mill-worker residing in District "Y", than he has with his neighbor in District "X", a Republican utilities employee and the father of four public school students? Should the two mill-workers, by the chance of their remote residences, be denied opportunity to choose a common representative? Or, suppose that in districts "X" and "Y", respectively, there are 5,000 of our hypothetical mill-workers and 4,000 of our hypothetical utilities workers. If more numerous mill-workers elect the representative in each of the districts, 8,000 utilities employees would be without a legislative spokesman. The "tyranny of the majority" of which de Tocqueville warned, and against which the essence of republican government is directed, can then become a foreboding potentiality.

In the third place, an uncompromising requirement of geographical representation virtually precludes the possibility of providing within the legislative framework for selection of representatives from among available persons of competence, respected over the state, but not "politically known" in their districts of residence and unprepared to engage in the rigors of a campaign for localized support. It will be an expensive error for us to aggravate the tendency, upon which John Stuart Mill and others have commented, for representative government to attract to its assemblies persons who are less than the best qualified.[35]

Some of the alternatives to the geographical-arithmetic representation base have been rather specifically expounded or employed. Professor de Grazia has classified the systems by which constituencies are apportioned as involving one or more of the following criteria: "territorial surveys; governmental boundaries [cities, counties, town, etc.]; official bodies [*e.g.*, the electoral college, or election of a mayor by the popularly elected city council]; functional divisions of the population [*i.e.*, "non-territorial aggregates of persons who share social or economic interests", including tax-paying groups, nationality groups, university groups, professional groups, factory groups and general occupational groups]; and free population alignments."[36] The most comprehensive free population plan is that proposed by Thomas Hare in 1859,[37] and enthusiastically championed by John Stuart Mill as a system of "Personal Representation . . . among the very greatest improvements yet made in the theory and practice of government."[38]

It is not suggested here that all, or any one, of the schemes heretofore tried or espoused would be advisable for adoption by any of the United States. But, it is insisted that insofar as the federal courts, by implementation of *Baker* v. *Carr* or otherwise, impose upon the states an obligatory formula of geographically equal districting it will irretrievably dilute and weaken state government.

The hazard from diminution of state government is not primarily the risk of offense taken by the states on account of some vague "invasion of sovereignty". The hazard is that it will preclude or discourage pragmatic experimentation into political ways and means which characterizes a viable government. In an earlier day, the Court observed:

> The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.[39]

The significance of that experimentation was dramatically revealed by the talented British observer, James Bryce:

> It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State Constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself.[40]

Dicey once characterized the United States as "A nation concealed under the form of a federation."[41] *Baker* v. *Carr* moves inescapably to confirm that observation. It does more than move from the states to the Federal Government jurisdiction over problems now of national scope. It tends to undermine the health of state government, and its consequences should not be underrated.

35. J. S. Mill, On Representative Government, c. 7. See also, de Tocqueville, Democracy in America, c. XIII; Bryce, The American Commonwealth, c. XLV.

36. de Grazia, *op. cit. supra* note 6, c. 2, pages 20-26.

37. Hare, The Election of Representatives.

38. J. S. Mill: On Representative Government, c. 7. For current support to a comparable plan, see Professor Charles V. Laughlin's article, *Proportional Representation: It Can Cure Our Apportionment Ills*, 49 A.B.A.J. 1065 (1963).

39. *Anderson* v. *Dunn*, 6 Wheat. (19 U.S.) 204, 226.

40. 1 Bryce, American Commonwealth 35 (3d ed.).

41. Dicey, Introduction to the Law of the Constitution, (9th ed. 1939) App. 604.

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Senator Dirksen's End Run

The Supreme Court's historic decisions on State reapportionment have provided an effective means of righting a grievous wrong. To our thinking, they are the only effective means. Now, however, Senator Dirksen has moved to thwart this desirable reform by a hastily conceived legislative end-run which ought to be rejected out of hand by the Senate.

His bill is a model of brevity. Its effect, however, would be to invoke a total, iron-clad moratorium on the reapportionment decisions—for as long as two years in some States and four years in others. No hearings have been held on the grave consequences of this proposal. Indeed, only a handful of Senators and Representatives have expressed an opinion about it. At least two members of the Senate Judiciary Committee doubt its constitutionality. Yet Senator Dirksen, abetted by a majority of the Judiciary Committee, apparently intends to attach the measure as a rider to the Senate version of the foreign aid bill, which is certain to pass within the next several days. Traveling in this company, the rider would be virtually immune to the threat of a veto.

Senator Dirksen says his motive is not to kill reapportionment, but merely to gain time for Congress t a constitutional amendment people of each State the ri termine by referendum wh houses of their State assemb be constituted primarily on of population.

The Supreme Court r that State senates must be or a population basis is, to be s guable issue. And of course i appropriate for Congress t such an amendment—provic muster the necessary two-t in both houses. But the rig gress to move in that dire subsequent session, if it cho way justifies the action pro by the Senator from Illino the rush?'

The obvious fact is th cant progress is being made ber of States toward equit representation at the pre through normal democratic Maryland is one example. T bill would halt that useful its tracks and prolong, poss indefinite period, the abuses from rural domination of tures and other inequitable tation practices.

Aug. 5, 1964 Washington Post

Panic in the Senate?

A group of Senators yesterday launched a reckless action designed not only to upset a decision of the Supreme Court but also to jeopardize the democratization of the state legislatures. The movement began with Senator Dirksen, but it quickly enlisted the support of the Senate Judiciary Committee. Together they are threatening to stampede the Congress into a hasty action that would have damaging repercussions throughout the country.

What Mr. Dirksen is really aiming at is a constitutional amendment that would reverse the Supreme Court's ruling to the effect that both houses of the state legislatures must be apportioned on the basis of population. But there is no time to put a constitutional change through the present session of Congress. So he induced the Senate Judiciary Committee hastily to approve a bill forbidding the courts to give effect to the Supreme Court ruling until two more regular sessions of the legislatures have been held. The Senator has also indicated that he will try to attach his judicial mandate as a rider on the Senate foreign-aid bill now before the Senate.

There is no emergency to justify any such drastic action. If Congress ultimately wishes to propose a constitutional amendment allowing the states to relate representation in one house to geography rather than population, it will be free to do so next year. But it should not presume the acceptance of such an amendment by two-thirds of both houses of Congress and three-fourths of the states by delaying the operation of the Constitution as it now stands. If difficulties or hardships arise in any of the states in regard to reapportionments, they can be readily adjusted by judicial action. A blanket delay in all efforts to bring the state legislatures into compliance with the law would be inexcusable.

Some states are admittedly undergoing sharp transitions in the distribution of legislative seats. For this, however, the whole country ought to rejoice. For decades most of the state legislatures have been scandalously malapportioned. Their neglect has resulted in a crass denial of representative government to the vast majorities now living in urban areas. Correction of this evil ought to be regarded as an urgent undertaking for every state in which it exists. Congress cannot delay the process without throwing its weight on the side of favoritism, discrimination and a denial of equal standing among citizens of this free land.

It is true that some members of Congress sincerely believe that the Supreme Court has made an unfortunate ruling. That, however, is beside the point now at issue. The question is whether Congress will be stampeded into an irrational assault on that ruling without time to debate and deliberate upon the momentous consequences.

We cannot believe that such a rash attempt to interrupt the normal processes of government will succeed. Indications are that the House would not tolerate such a potentially disastrous rider to remain attached to the foreign-aid bill. Yet a serious risk remains, and the Senate will have to decide whether its reputation would survive

Congress vs. the Courts

Whatever may be said in favor of Senator Dirksen's move for a Congressional mandate delaying application of the Supreme Court order to reapportion state legislative districts on a "one man, one vote" basis, there can be no question that he is wrong in seeking to stampede it through Congress without full consideration of its damaging potentialities.

Time for national contemplation of the sweeping implications of the Court's decision, which is the Dirksen bill's immediate aim, has much to commend it. But haste on Capitol Hill is a perilous corrective for the perils the Court's critics see in too hasty effectuation of its reapportionment ruling. Certainly a bill raising such grave questions of the division of authority between the legislative and judicial branches ought not be railroaded through as an irrelevant rider to foreign aid appropriations. This is legislative blackmail, not deliberation.

The Court's view that both houses, not just one, of a bicameral state legislature must be based on population does fly in the face of the pattern governing the Federal legislature. It rules out a host of considerations involving geography, history and economic or political groupings that have played a part in the evolution of the American democratic system. Against this is the depressing record of refusal of rural-dominated and other unrepresentative legislatures to take any voluntary action to insure equity for all citizens in line with the constitutional principles relied on by the Supreme Court.

The Dirksen bill, frankly intended as forerunner for an attempt to overrule the Court by amending the Constitution, would excuse any state from reapportioning for two years and, in the case of states with biennial legislative sessions, for four years. The proposal has been approved, without hearings, by the Senate Judiciary Committee by a 10-2 vote. Chairman Celler of the House Judiciary Committee declares the bill unconstitutional and warns "it could wind up rendering the Court a nullity, destroying our republican form of government."

The malapportionment now characterizing many legislatures is so gross that a four-year ban on judicial remedies would mean a Congressional freeze on injustice that makes a mockery of democracy. If the apportionment standard set by the Court is too rigid, the answer is not to perpetuate conditions under which one vote in one section of a state has as much weight as a hundred in another.

N.Y. Times Aug. 6, 1964

Redistricting Delay Gains in the Senate

Aug. 5, 1964

By JOHN D. MORRIS

Special to The New York Times

WASHINGTON, Aug. 4 — The Senate Judiciary Committee laid the groundwork today for a possible clash between Congress and the Supreme Court over the apportionment of state legislatures.

By a 10-to-2 vote, the committee approved a bill to delay the reapportionment of legislatures in compliance with a June 15 ruling by the Supreme Court. The Court held that districts in both houses must be "substantially equal" in population.

The bill is designed to buy time for Congress and the states to approve a constitutional amendment limiting the effect of the June 15 ruling. The measure is sponsored by Everett McKinley Dirksen of Illinois, the Republican leader of the Senate.

Senator Dirksen said he would try to attach it to the annual foreign-aid authorization bill now awaiting Senate consideration.

This would assure Congressional action and guard against a possible veto by President Johnson.

Strengthens Hand

The Judiciary Committee's action promises to strengthen Mr. Dirksen's hand in the maneuver. His prospects of success may depend on whether President Johnson actively opposes him.

So far, the Administration h taken no public position on the Supreme Court decision or on proposals to delay its effect by legislation and then overturn it by a constitutional amendment.

If the Dirksen bill became law, it constitutionally doutless would be challenged and the question would ultimately reach the Supreme Court. This could lead to another politically volatile episode in the age-old power struggle between the Court and Congress.

Under the bill, no state would be required reapportion its legislature in compliance with the June 15 decision for at least two years.

The measure says that any court proceeding dealing with apportionment "shall be stayed until the end of the second regular session of the legislature of that state which begins after the date of enactment of this section."

Delay of Up to 4 Years

Legislatures that meet annually would thus have two years and those that meet every other year would have four years to comply.

Some legal experts maintain the bill violates the constitutional prerogatives of the courts under the doctrine of the separation of powers.

Senator Dirksen's legal advisers contends, however, that the bill merely deals with a procedural matter over which Congress has legal purview.

Regradless of how the Supreme Court mikht ultimately rule on that question, enactment of the bill would provide valuable time or consideration of a constitutional amendment while the courts were considering the bill's constitutionality.

Senator Dirksen is sponsoring a proposed amendment that says:

"Nothing in the Constitution of the United States shall prohibit a state, having a bicameral legislature, from apportioning the membership of one house of its legislature on factors other than population, if the citizens of the state shall have the opportunity to vote upon the apportionment."

In the House, Representative William M. McCulloch, Republican of Ohio, is sponsoring an identical amendment. He has a introduced a bill, identical with Senator Dirksen's, to delay the effect of the Supreme Court's apportionment ruling.

House Hearing Held

Hearings are under way in the House Judiciary Committee, but action this session is regarded as doubtful. The Senate committee acted on the Dirksen bill without hearings. A two-thirds vote in both houses is required to propose the amendment to the states.

With Congress now moving toward adjournment, there is little chance that it will act on the proposed amendment this year. It is recognition of that reality that Senator Dirksen is seeking the time-buying legislation.

In most states, the lower house of the legislature is roughly apportioned according to population, while representation in the other house is based on other factors, such as geographical area. The effect is to give rural interests greater voice in the upper house than urban and suburban interests.

The Dirksen - McCulloch amendment carries out a plank in the party's 1964 platform. It has considerable support, however, among Democrats as well as Republicans. The House Democratic leader, Representative Carl Albert of Oklahoma, is among those who favor it.

If Congress proposes the amendment, it must be ratified by three-fourths of the states to become effective.

In the Senate Judiciary Committee today, only Philip A. Hart of Michigan and Quentin N. Burdick of North Dakota, both Democrats, opposed the Dirksen bill.

Senator Kenneth B. Keating, Republican of New York, abstained. Seven Democrats and three Republicans voted for the measure. One Democrat and one Republican were absent.

Washington Post Aug 14, 1964

Shabby Compromise

Senate Majority Leader Mansfield and officials of the Department of Justice succeeded in softening the Dirksen bill a little, but it remains highly offensive in principle. Originally Senator Dirksen wanted to have Congress tell Federal judges that they must stay orders in state reapportionment cases for two to four years. The present compromise would put Congress in the position of telling the courts that they may not interfere with the election of unconstitutional legislatures before Jan. 1, 1966, and that they must allow states "a reasonable opportunity" to reapportion their legislative seats in regular legislative sessions, except in "highly unusual circumstances."

In other words, Congress would be saying that the constitutional right of the citizen to equal representation in the legislature cannot be enforced in the months ahead unless there is some kind of emergency or extraordinary justification. If Congress is going to intervene at all, we think the formula should be reversed. Court orders requiring fair distribution of legislative seats should go into effect promptly, "in the absence of highly unusual circumstances." We can see no excuse for making temporary denial of equal rights the norm and granting them the exception.

The compromise has one advantage. It provides that if a state fails to bring about a proper distribution of its legislative seats within the time allotted, the courts themselves shall effect a reapportionment in accord with constitutional requirements. In effect this seems to put Congress in the posture of sustaining the Supreme Court's "one person, one vote" formula and of recognizing the validity of judicial reapportionments if they become necessary. It is well to remember, however, that the basic purpose of the Dirksen bill is to allow Congress time to pass a constitutional amendment to reverse the Court's decision—an amendment that could be ratified by the grossly unrepresentative state legislatures.

One effect of the bill would be, for example, to reinstate the scandalously unrepresentative legislature of Alabama. The last reapportionment in that state was based on the census of 1900. The Supreme Court found that the representation of each resident of one small county in the Alabama House was 16 times that of the residents of Alabama's largest county. In the Alabama Senate the disparity was 41 to 1. Yet this mockery of representative government would be legitimatized for the purpose of passing on a constitutional amendment designed in part to perpetuate the abuses.

disruption of the election process ... result from requiring precipitate changes . . .

The mechanism for avoiding any crises or hardships resulting from the Court's ruling is already at hand. There is no necessity for Congress to add anything to it. Though less offensive than the original Dirksen bill, the Senate compromise is a most unfortunate device to perpetuate an indefensible situation in the state legislatures. And the Rules Committee bill is one of the worst assaults ever made upon the judicial system.

Congress and Apportionment

The crude haste with which enemies of the Supreme Court's redistricting decision are trying to upset or limit it in Congress was dramatized by yesterday's irresponsible action in the House Rules Committee. That body, so often the graveyard of legislation that had every right to go forward, voted 10 to 4 to take away from the Judiciary Committee and rush to the floor an apportionment bill by Representative Tuck of Virginia.

The Tuck bill is a devious and potentially deadly attack on the traditional right of Americans to enforce their constitutional rights in the courts. It would open the door for Congress, by simple statute, to cut off any area of constitutional protection from safeguard by the Federal judiciary.

Measured against this shocking attempt to erase any proper dividing line between legislative and judicial authority, the compromise proposal in the Senate for an enforced slowdown in the pace of court-ordered reapportionment has much to commend it. It still contains some troublesome features and it should certainly not be part of the foreign-aid bill, but it is less a frontal assault on judicial independence and the integrity of our process of constitutional litigation than the rider first presented by Senator Dirksen.

As now drafted, in consultation with Administration lawyers, the language directs the courts to stay any redistricting order so that legislative elections may be held normally this fall and next. Alternatively, stays are to be granted to give a state's Legislature or its "people by constitutional amendment" a reasonable chance to reapportion. Only in "highly unusual circumstances" could such stays be denied.

A delay until the end of 1965 to give state authorities an opportunity to make their legislative districts more equitable is certainly not unwarranted. The one possible loophole is in the proposed stays to allow correction by state constitutional amendment. In New York and some other states this could entail a delay of as much as four years. However, the Justice Department takes the view that the courts would have discretion under the compromise to permit a stay for *either* legislative or constitutional action and that they would not sanction a too lengthy process. This interpretation should be firmly pinned down to avoid later conflict.

The best part of the revised Senate plan is that it expressly recognizes the courts' power to reapportion if the states do not act within the stay period. The most effective antidote to the extension of court authority remains the fulfillment by legislative bodies of their obligation to do their rightful job.

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