

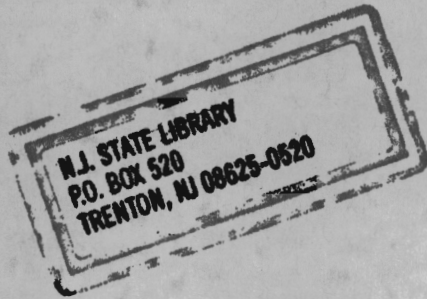
PUBLIC HEARING

BEFORE

SENATE JUDICIARY COMMITTEE

on

SENATE CONCURRENT RESOLUTIONS NOS. 22 AND 23
(PROPOSING TO AMEND ARTICLE IV, SECTION III, PARAGRAPH
1 OF THE CONSTITUTION OF THE STATE OF NEW JERSEY)
RE APPORTIONMENT OF MEMBERS OF THE GENERAL ASSEMBLY



Held:
Assembly Chamber
State House
Trenton, New Jersey
May 22, 1957


MEMBERS OF COMMITTEE PRESENT:

Senator Richard W. Stout (Chairman)

Senator W. Steelman Mathis

Also

Senator Robert C. Crane
Sponsor of SCR No. 22 and SCR No. 23



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SENATOR RICHARD R. STOUT (THE CHAIRMAN): This is a hearing called by the Judiciary Committee of the Senate to consider Senate Concurrent Resolutions Nos. 22 and 23, both of which were introduced in this session by Senator Crane of Union County. We have a list of those wishing to speak on these resolutions and I am going to call them in order. I will call first the proponents of the resolutions.

I am going to ask them to sit in this chair and to give their names and the organizations which they represent.

This hearing is held in accordance with the constitutional provision that before a constitutional amendment can be submitted to the people, there must be a public hearing.

The other member of the Committee here with me this morning is Senator W. Steelman Mathis of Ocean County. Will you take a bow, Senator?

I am going to ask Senator Robert C. Crane of Union County, the sponsor of the resolutions, to speak on behalf of the resolutions.

SENATOR ROBERT C. CRANE: Thank you, Senator Stout, for the introduction. For the record, I am Senator Robert C. Crane of Union County and my purpose in being here is to help forward the fight for the obtaining of a deserved fifth seat for Union County. We are discussing this morning Senate Concurrent Resolutions Nos. 22 and 23 and both recommend constitutional amendments effecting specific means and methods of reapportionment. Just generally, before I start, I will say

that Senate Concurrent Resolution No. 22, while it appears quite lengthy in its provisions, does just this: It provides for the appointment and selection of a Reapportionment Commission to serve after a period of time has been granted the Legislature to solve the issue of reapportionment. If they do not, then this Reapportionment Commission shall be appointed and attempt to do the same. If they do not, within a certain prescribed time limit, accomplish reapportionment, it then devolves back upon the Legislature. I shall substantiate the argument for this resolution in this type thinking a little bit later in my thesis. Generally, however, I want to say that this resolution is offered for those who feel that the Legislature must retain its prerogatives.

The other resolution, Senate Concurrent Resolution No. 23, does away with the present provisions except for due regard to historic precedent, of course, but it does make the process automatic, provides for a ministerial agency, prescribes a certain method known as "equal proportions," and sets forth the limit of the membership and also the date on which the reapportionment shall be effected. Basically, that is the description of the two we are talking about this morning.

I might cite, Senator Stout, that we have had an agreement that while we are discussing these two concurrent resolutions for the purpose of meeting the requirements for constitutional amendment, I feel that it would be very salutary to the State if there are those present who wish to discuss other types and methods of reapportionment, they would be allowed to do so, because I, myself, have sponsored other resolutions in this session. You will note in the latest Legislative Index there

are many apportionment suggestions and they are outlined in the first eight lines under the index title "Legislature".

My interest in re-apportionment is quite genuine. To all indications Union County is entitled to a fifth seat in the General Assembly.

Now, No. 1: Of the nine methods proposed by the New Jersey Legislature, subsequent to the promulgation of the 1950 Federal decennial census, eight of those nine methods would give an additional seat to Union County.

No. 2: Of three other methods proposed and used elsewhere and at other times, two would give an additional seat to Union County.

And, by the way, I have reports here which substantiate those facts, proving that those methods do give Union County that recognition.

No. 3: According to a chart prepared by the Law and Legislative Reference Bureau of the Division of the State Library on March 29, 1954, Union County, with 398,138 residents in 1950, represented 8.23 per cent of the State's total population and, based on ownership of a portion of the Assembly delegation by virtue of this percentage of population, they deserve 4.94 seats in the General Assembly. Now, it's like the weather - everybody talks about it but nobody does anything. For seven years we have been unable to find a magic solution that would concede the fractional warrant to six one-hundredths of a seat. It leaves us, like Ivory Soap with its reputation for 99.44/100 per cent purity, almost but not quite whole or perfect. Now, my concern is genuine.

Our county is growing, according to an article from

my own newspaper, if you will, but this does not represent conflict of interest, I hope.

SENATOR STOUT: Would you name that Journal, please?

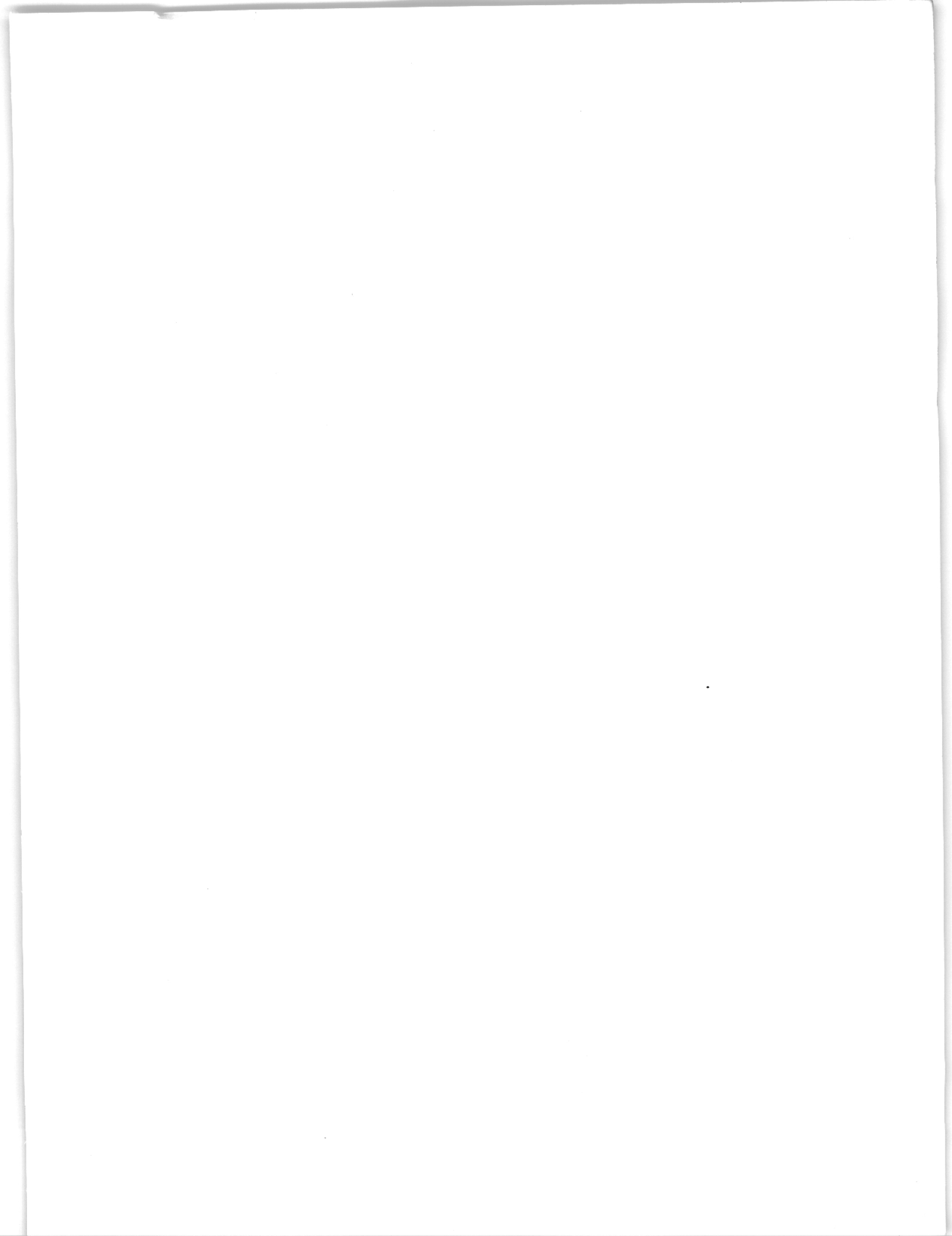
SENATOR CRANE: The Elizabeth Daily Journal, sir.

The issue of May 21, 1957 has an article in it dealing with the statistics given out by the Regional Plan Association. With respect to Union County it says: "The forecast based on an estimated 1955 population of 450,000 came from the Regional Plan Association after an eighteen month survey of trends in twenty-two metropolitan areas in New Jersey, New York and Connecticut." And further on in the article it clearly outlines the counties that were considered in this report and states that in New Jersey they took into consideration the counties of Hudson, Bergen, Passaic, Essex, Union, Middlesex, Somerset, Morris and Monmouth. Now, as I say, our county has been growing; in 1950 the result of the last census established our population at 398,000; in 1955 it is said that we had 450,000. This Regional Plan Association has forecast a 42% rise in the next twenty years, to 640,000 by 1975. Now, others are growing at the same time.

An article from the Newark Sunday News of February 17, 1957, shows data ranking Middlesex in the State's big three by 1975. Now, that is fantastic growth of course. Middlesex is supposed to pass Union in its size and population between 1970 and 1975; both will pass Hudson, according to these statistics, and Hudson is supposed to decline. (That is merely a projection and not a statement).

These suspected trends, already so well established in the early 50's, will plague re-apportionment in the 60's and 70's

if something is not done now. A stalemate cannot be permitted to exist, for nothing is so unpopular or undemocratic as unrepresentative government or disproportionment representation. My approach is wholly realistic, and I want to quote from a new book which, by the way, will be available to the general public on June 1, although I notice that others here today also have the benefit of a copy. It is entitled, "The Government and Administration of New Jersey," by Professor Bennett M. Rich, Director of the Bureau of Government Research, Rutgers, The State University. And, by the way, I have invited Dr. Rich to be present here with others from Rutgers today. On page 56, in a discussion of Apportionment, there is a paragraph which starts with the words, "Failure to establish an equitable method of distribution results in apportionment legislation based to a considerable extent upon the political strength that each party can muster at the moment. On the national level the problem was solved in 1941. Congress provided for apportioning the House of Representatives according to the mathematical system of 'equal proportions.' This system reduces to a minimum the relative difference in the two basic criteria for an equitable apportionment, the population per representative and the individual's share in a representative. The New Jersey General Assembly differs from the national House of Representatives in size, but the principle of apportioning the membership is precisely the same. Legislation to effect the apportionment by the method of equal proportions was adopted in the Senate. However, the House did not approve this proposal, or any other. As a consequence, the apportionment made after the 1940 census remains in effect as of 1956."



Now, I stated that my approach is realistic. I have recognized that a political parallel to possession being nine-tenths of the law is actually in effect. The "have's" and the "have-nots" have different concepts of what is fair and equitable. This was quite evidently the case when the merits of Senate bills Nos. 31 and 32 were argued last January in the State Senate. I have copies of those two bills to refresh our memories. I was the sponsor of S-31 which provided for apportionment based on equal proportions within thirty days after the effective date of this act, based on the 1950 census. Senate No. 32, of which I was a co-sponsor, did exactly the same thing but delayed the matter until the 1960 census figures were available. The method of equal proportions, the same used to apportion the House of Representatives in our Government, was hailed by the "have-nots" of Union, Monmouth and Burlington as manifestly fair to all concerned, giving each of them and Camden an added seat in the Assembly. The "have's" of Essex and Hudson said it just wasn't fair to give up two apiece by any standard. I submit that this is rather politically academic. Needless to say, both bills passed with somewhat less than unanimous approval and now lie buried in the Assembly under an avalanche of twenty-one formidable votes. This will continue to happen as long as we confine ourselves to seeking a present solution based on the 1950 census. By direct application of the formula the extent of gain or loss becomes quite apparent.

S-5 introduced by Senator Kenneth C. Hand in 1956 as a direct amendment in law, title 19, chapter 52, of the Revised Statutes of New Jersey, is a case in point: After specifying

the method of equal proportions and spelling out its effect on each county - all this on the first page and a half of this bill, there follows a six page well-documented statement making out a case most undeserving of the hung jury it engendered. In looking over the statement, I would say that it was eloquent, dispassionate, sincere, honest, virtuous and worthy in every respect, but it missed the mark, and I have a copy of this bill in case anyone would care to see it. If, in seven years, we are no closer to the solution of this problem than the day we began, we might as well spend the next three more productively evaluating our mistakes. 1960 offers us a fresh start, for its population figures are still a matter of conjecture and thus everyone will be taking a somewhat equal chance. Feeling that we cannot bind the 1961 or 1962 Legislature by law as to a means or method, I have turned to the process of Constitutional Amendment, introducing two for the purpose of offering a choice. Those are the result of a study of a national-wide record of legislative failure and success in the field of apportionment, which is best illustrated by a document dated September 10, 1954, also put together by the New Jersey State Library, Bureau of Law and Legislative Reference. Now, I would like to quote from it for just a part. It's entitled further in a subtitle, "Suggested Remedies for the Failure of State Legislatures to reapportion after each Federal census":- "For more than one hundred years the New Jersey Constitution has called for a reapportionment of its General Assembly seats among the counties by the Legislature at the first session following the promulgation of each Federal decennial census. During those one hundred years the

Legislature has complied with this constitutional mandate except in two instances: (1) Following the 1920 census the Legislature was one year late in passing a Reapportionment Act; (2) No Reapportionment Act has been passed subsequent to the 1950 census. The act passed in 1941 is still the basis of county representation in the Assembly despite considerable and significant growth and shifts in population since 1940. Since the promulgation of the Federal census in 1950, fifteen reapportionment bills have been introduced in the Legislature." And I'll remind you again that this is a report compiled in September, 1954. "These bills proposed eight different reapportionments of the Assembly seats; seven of these bills were based on the mathematical formulas which are part of the nationally known methods of 'Equal Proportions', 'Major Fractions', 'Harmonic Mean', the 'Vinton Method', 'Variations of the Vinton Method', and a locally-contrived method labelled 'The Method of Arithmetical Elimination'; the other seven bills, if based on any method, did not so specify.

"The New Jersey Legislature is not alone in its failure to reapportion. Twenty states have not reapportioned one or both Houses within the past ten years. During the 1941-1951 period, twenty-eight states reapportioned one or both Houses; during the 1931-1941 decade, only twenty. As in New Jersey, the Legislatures of almost all other states are designated by the Constitution as the apportioning agencies and also, as in New Jersey, the Legislatures in most of these States hold this power exclusively. This common legislative failure to reapportion itself has led to the recommendation and use of several remedies. Among the most notable of these, are:

(1) Narrowing the range of

legislative discretion and making the process of reapportionment more nearly automatic; (2) - providing alternate procedure in the event the Legislature fails to act; and (3) - removing reapportionment from the Legislature and placing it in the hands of a separate agency. Some have also recommended that to each of these three remedies be added a constitutional provision for judicial review of the reapportionment process. Each of these remedies has been adopted by at least one State."

Now, with respect to No.1 -"Narrowing the range of legislative discretion and making the process of reapportionment more nearly automatic". I am talking to Senate Concurrent Resolution No.23. And I have a letter again from the Division of the State Library, dated March 15, and it states that:"Senate Concurrent Resolution No. 23 provides that the Secretary of State shall apportion the members according to the method of calculation described therein," which is the method commonly referred to as the method of"equal proportions".I say that in case you cannot recognize the description in English of a mathematical formula. "It does not state in the bill that it is equal proportions. You will note that this draft specifically sets the size of the Assembly at 60. The present constitutional provision requires only that the size of the Assembly shall never exceed 60," and that's the quotation. It is my understanding it was not proposed to invest any discretion in the Secretary of State in this apportionment matter, but his responsibility would be a ministerial one, requiring a mathematical calculation according to a specified method susceptible to one, and only one, solution. To leave the present clause "shall never exceed 60" unchanged,

would permit the Secretary of State to certify an apportionment of any number of members between 21 and 60. Now, you will recall that every county is entitled to at least one representative. The size of the Assembly since the adoption of this clause in 1844 has always been 60.

Now, for those who cannot stomach the abandonment of our Legislative prerogatives, Senate Concurrent Resolution No.22 represents the present system, plus; the plus feature is the alternate procedure involved. Now, I might say that States which have attached alternate procedures - there are five that I have specific examples of, California, Michigan, Oregon, South Dakota and Texas, have all re-apportioned. Now, in addition to these five above-named States, there are two others, Colorado and Illinois. Now, the method that I have proposed in Senate Concurrent Resolution No. 22 as an alternate procedure, conforms more nearly to the feature in the Illinois suggestion. In fact, it establishes, of course, a non-legislative agency. I might also say that with respect to non-legislative agencies, of which there are several examples, one in Arkansas and Missouri, this proposal very nearly equals the one used in Missouri. Now, there is precedent for this jockeying back and forth, if I may use the term, between a Legislature and a non-legislative agency, one succeeding the other in case of failure, and then returning to the original agency, and I would cite for you the decision on Botti vs. McGovern, a decision rendered in law in New Jersey. In a direct quote from it by the court: "In our opinion the right of the inhabitants of the several counties in the State

be accorded the representation in the lower house provided by the Constitution cannot be defeated by such non-action of the Legislature. It is true that the clause requiring the Legislature sitting next after the promulgation of the federal census to make the apportionment is mandatory, but disobedience of that mandate cannot produce the result claimed by the relator. The failure to perform the duty cannot cancel the legislative obligation, that is to say, if the apportionment is not made in the first session after the return of the enumeration, the duty to make it devolves upon the Legislature then next sitting, and upon each following Legislature until that duty is performed."

In both instances, in SCR-22 and SCR-23, I was guided by the historic provisions of the Constitution and all prior thinking on constitution^{a1} revision. Now, I quoted to you some thinking related to fixing the membership of the General Assembly at 60. There have been some worthy pieces of legislation introduced by well-intended members of our Legislature proposing to accomplish re-apportionment by adding members, but if we would look to New Hampshire we'll see a glaring example of the failure of that type system. They have a very large unwieldy Legislature created by adding seats when necessary, and I do believe that were we to exceed our historic limit of 60 we would tend in that direction and become less effective. Now, as to a selection of a method, I was guided by a nation-wide trend and by the fact that Congress re-apportioned according to a certain method known as "equal proportions" in the latest instance. If I might, I would like to cite a few examples of what I said was historic precedent. The Constitution of 1844

provided practically the same provision for reapportionment that is contained in our present Constitution, and established the limit of 60 by saying the whole number of members shall never exceed 60. The Constitutional Convention of 1947 was prohibited from making any substantive change in the 1844 constitutional provisions for legislative representation. Chapter 8, of the Laws of 1947, which authorized the Constitutional Convention, reads: "The constitutional convention shall prepare and agree upon a new State Constitution, revising, altering or reforming the present Constitution in such part or parts and in such manner as the convention shall deem in the public interest; provided, however, that the convention shall in no event agree upon, propose or submit to the vote of the people, either separately or included among other provisions, any provision for change in the present territorial limits of the respective counties, or any provision for legislative representation other than provision for a Senate composed of one senator from each county and a General Assembly composed of not more than sixty members apportioned among the counties according to population so that each county shall at all times be entitled to at least one member, chosen for, and elected by the legal voters of, the respective counties."

Now, during the late Constitutional Convention, a proposal was formally introduced to include in the draft of the new Constitution a provision for the election of Assemblymen by Assembly Districts. The question as to whether or not this was a proper subject for consideration by the Convention under the above enabling act was raised and the Convention requested

The Attorney General for an opinion. Walter D. Van Riper, the Attorney General at the time, in a formal opinion, instructed the convention that it could not consider this proposal. This opinion is to be found on pages 641 to 644 of Vol. 3 of the proceedings of that convention in 1947. Now, mind you, this was not a reflection upon the merit of that proposal and you will note that in the various acts that have been proposed this year, there is one for Assembly districts. It was discussed, by the way, on our legislative television program during February by Senator James F. Murray, the Democrat from Hudson, and Assemblyman Beadleston from your home county. Senator Murray took the positive viewpoint that these Assembly districts would be the best method in order to beat political bosses and Beadleston, of course, favored the equal proportions method advocated in Senate Bills 31 and 32. Even the Legislature when it acted as a constitutional convention, you will remember early in the 40's, was prohibited to act upon any changes or to make any recommendations to change the number of the Assembly. I came to the conclusion that all past is rather prologue and the need for new provisions since the use of these fixed ratios of the Vinton and the Variations of the Vinton Method have been proved mathematically unsound. It is true that we have reapportioned in the past using these methods but it was pointed out that in Alabama at one time, it was possible for one county, though it had grown more rapidly than any other, to actually lose a seat. Now, I do have a document here that details that graphically for anyone who wishes to see that, but it is possible under the Vinton or Variations of the Vinton Method to wind up

with that result, and I think that it is worthy that we have departed from the practice of using those methods. I will admit that there are other methods and that there are sincere proponents of those methods. This is merely my best effort and I would like to thank all those who have worked with me on it. The Division of the State Library, Mr. Alito, has been of invaluable aid to me, and also Rutgers University, through Dr. Rich, has done quite a bit of research to which I referred, and also their Department of Mathematics gave us this formula which was stated to be the equal proportions method, and Dr. C. Russell Phelps, the Associate Professor of Mathematics at Rutgers, is here today, should you care to ask him any questions.

We, in Union County, are bringing up this subject constantly. I know that many people feel that we do so ad infinitum and that it is just an old battle cry. To us it has great significance. We feel that if the Legislature can fail in this decade to reapportion, it can fail in 1960 and in 1970. I believe that I have brought to you facts which prove that we must make decisions. I personally favor the automatic method contained in SCR-23 because I believe that it will take this question out of politics. It will take it out of the struggle between the "haves" and the "have-nots". I think it will be fairer to all concerned and by doing so now we can do it while it is a matter of conjecture as to the population in each county and therefore no one can say with certainty that under this provision we shall lose or we shall gain. I hope that in the end analysis this constitutional amendment will be adopted and I have relegated this question to 1960

in the belief that it is the best for everyone and that Union County having established its case will then gain recognition. Thank you very much.

SENATOR STOUT: Senator, you favor SCR 23 as opposed to SCR 22, but if SCR 23 were not able to pass you would push SCR 22 just as hard?

SENATOR CRANE: Yes, I wanted to bring to the Legislature two recommendations so that there could be a choice. I actually favor the passage of both by the Senate so that the Assembly has that choice and will be presented with two, because I note that there are many who feel very strongly that we must not abandon our legislative prerogatives.

SENATOR STOUT: You have already named the counties which would gain under the 1950 Federal census, if the equal proportions method were adopted?

SENATOR CRANE: That's right - Burlington, Union, Monmouth and Camden.

SENATOR STOUT: It sounds like a good bill.

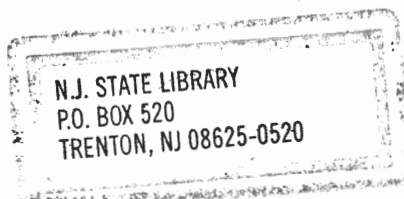
SENATOR CRANE: Under that formula it would take two from Hudson and two from Essex.

SENATOR STOUT: Thank you, Senator Crane. Would you like to join the committee on the rostrum here?

SENATOR CRANE: I would like to, yes.

SENATOR STOUT: It would lend some added weight to it.

SENATOR CRANE: I might say before I leave that I will furnish the committee for its report copies of these documents which I have cited so that it will not be necessary, perhaps, to reproduce them in their entirety.



SENATOR STOUT: Thank you, sir. I will now call Dr. Bennett M. Rich, of the Bureau of Government Research, at Rutgers University.

D R. B E N N E T T M. R I C H: Senator Stout, Senator Mathis and Senator Crane; My name is Rich. I am with the Department of Political Science, in the Bureau of Government Research, at Rutgers, the State University.

I should like to present to the committee my colleagues, Ernest C. Reock, Dr. Stanley H. Friedelbaum, of the Bureau of Government Research, and also Dr. C. Russell Phelps, Associate Professor of the Department of Mathematics. They are here with me and, Mr. Chairman, if it is all right after a short statement, if there are any questions I should hope that we can handle them as a group, with them coming in as seems appropriate.

We are very much pleased to accept Senator Crane's invitation to speak on the subject of apportionment inasmuch as this subject is dear to the heart of any political scientist, for it involves a basic issue in democracy; namely, the whole representative system. We have a statement which we should like to ask to be entered into the record, and I should like to speak for just a few minutes summarizing the points that are made in that statement.

SENATOR STOUT: Doctor, that's a statement entitled "Statement on Senate Concurrent Resolutions 22 and 23, dated today's date?"

DR. RICH: That is correct, sir.

SENATOR STOUT: We will include that in the record at this time.

DR. RICH: Thank you. We are speaking principally to

Senate Concurrent Resolution No. 23. This is the one that provides the automatic system. We feel that there is much to be said for this because we have the record of seven years' efforts by both Houses to effect reapportionment with over 50 different measures being introduced and no one of them having succeeded. There has been a lot of time taken, much argument, recrimination, back-biting, and we feel this could be solved easily by the acceptance of an automatic system.

Secondly, we like the idea contained in the resolution of the date of 1960, since this is far enough ahead, a system is set up, and in our report we have an observation that I think would hold here that such a procedure will mean an acceptance of the rules of the game before it is possible to see which way the ball will bounce.

Third is to the method. We think this plan, which is the method of equal proportions, is the most equitable one that has thus far been devised.

I might add that our principal reason for bringing Dr. Phelps along with us is because we, as political scientists, are in no sense familiar with the theory of mathematics and we thought there might be some members of the Committee or some in the audience who would like to ask questions with reference to the theory. So we asked Professor Phelps to come along. He was a student of Dr. Huntington, the Harvard University Professor who was one of the principal proponents of the equal proportions plan when it was introduced into Congress.

Fourth, we think the apportionment can be handled either by constitutional amendment or by legislation. Each system has its advantages.

Our principal point would be that the proposed amendment does meet the objective of providing what is, up to this point, the most equitable plan available. We would have one suggestion: We think perhaps it would be possible to spell out the enforcement a bit in the proposed amendment. You will note our statement at the top of page 13: "Presumably, the secretary of state could be compelled to act in accordance with the terms of the amendment by a judicial proceeding in lieu of a prerogative writ. However, provisos may well be included to make the amendment self-executing and to authorize expressly legal proceedings requiring action by the secretary of state." We think, also, that it might be advisable to use the expression "equal proportions" some place in the amendment.

Mr. Chairman, that concludes my statement. I would be very happy to have questions asked.

SENATOR STOUT: Are there any questions? Senator Mathis? Senator Crane?

SENATOR CRANE: I have one. It was more or less a forced method. We know that many States have provided for judicial review and, in some instances, judicial review has also given effective reapportionment. In other words, there is one provision, and I would have to go through these documents to establish it, but there is one State where the judiciary has the right, in the event of legislative failure, to review their act and to comment on it. If the Legislature does not actually make the reapportionment, then the judiciary can come come back and make the apportionment, Was it your idea in spelling out

enforcement on the matter of this ministerial agency to provide for some judicial review structure like that?

DR. RICH: That is correct, sir. In other words, that the Secretary of State could be compelled by some proceeding in lieu of a prerogative writ to carry out the direction of the Constitution.

SENATOR CRANE: That is all I have to say.

SENATOR STOUT: What is the usual length of time it takes to promulgate the federal census, or "certify" it, I guess is the word. The last time, I believe it took a year and a half.

DR. RICH: That's right. It is our understanding that that is a little more than the normal amount of time but it would probably take somewhere in the neighborhood of a year.

SENATOR STOUT: It is conceivable that if this plan were adopted, or the resolution for the constitutional amendment were adopted, the reapportionment wouldn't take effect until perhaps 1963?

DR. RICH: That is correct.

SENATOR STOUT: Now, you have said there were two methods and both had their advantages: one was the constitutional amendment and the other was by legislation. I take it you mean that we could do it now by legislation but we just are unable to pass the bill in the Assembly.

DR. RICH: Well, our thought was that there are some people who contend that the Legislature alone should have control of the apportionment system, that this is strictly a political question and that the Legislature should not give up its control over the system, and, of course, when

a constitutional amendment is adopted, this, in effect, relieves the Legislature completely of its responsibility. Now, if an act were passed it might be possible to establish an automatic apportionment system and still leave the ultimate control in the power of the Legislature. In other words, the "equal proportions" act passed by Congress says that Congress still retains the authority, but if Congress doesn't act then the automatic system goes into effect.

SENATOR STOUT: In Senate Concurrent Resolution 23, I take it, from paragraph (b), which refers to geometric mean, that that is the "equal proportions" method. Is that correct?

DR. RICH: That is correct.

SENATOR STOUT: And you would recommend that somewhere in there we also include the words "this being an equal proportions formula" or some identification of it as that method?

DR. RICH: This is very much an arguable point. We feel, after all, that the first question people will ask will be, "What procedure is this?" and that there would be some advantage to having it stated in the amendment, particularly for future use.

SENATOR STOUT: I think that was Senator Crane's big difficulty in the beginning. He wasn't quite sure which formula this was.

SENATOR CRANE: Oh, no, I knew which formula it was, but in arguing it, I felt that if you stated it was "equal proportions" in the beginning, even though it was related to 1960, you would still have the opponents who thought only in terms of its present application.

SENATOR STOUT: Now, there is another question that I want to clear in my own mind. In the past five years, to my knowledge, I have always heard of a plan referred to as the "Rutgers Plan," is that the same as this one?

DR. RICH: Well, sir, in 1952 the Bureau of Government Research prepared a study relating to the apportionment problem in New Jersey in which we presented three mathematical plans, - major fractions, harmonic mean and equal proportions. We pointed out in there that the "equal proportions" plan was the one adopted by the Congress, and this plan was taken by some members of the Legislature and bills were introduced and those bills were often referred to as the "Rutgers Plan", yes sir.

SENATOR STOUT: Then the "Rutgers Plan" as of 1952 and "equal proportions" are the same?

DR. RICH: That is correct.

SENATOR STOUT: And there was another plan commonly referred to as the "Cavicchia Plan", was that the same thing?

DR. RICH: No, sir. The "Cavicchia Plan" was, in substance, the so-called "Vinton Plan", which Senator Crane referred to earlier this morning and which was in use by Congress for some years but was abandoned by Congress about 1900 and 1910.

SENATOR STOUT: Now, one more question from me, Dr. Rich. Do you know how many States use the "equal proportions" method?

DR. RICH: To the best of my knowledge and I'll call for help here - there are no States using precisely this system. Now the answer to that is not difficult to understand. There

are so many State Constitutions that spell out in some detail the method of the distribution of the seats. Happily, New Jersey has a relatively simple constitutional provision; it doesn't say that Newark shall have (X) seats; in other words, the Constitution of Maryland, for example, sets forth that a certain portion of the total membership shall be given to Baltimore. In other words, you couldn't have "equal proportions" system under those circumstances, and a great many of the State Constitutions are constructed in such a fashion that the "equal proportions" system wouldn't work.

SENATOR CRANE: Can you tell us what changes were made?

DR. RICH: I cannot tell you what changes were made. Stan, can you come to the microphone. This is Dr. Friedelbaum. Could he speak on that point?

DR. STANLEY H. FRIEDELBAUM:
That apportionment apparently was done under the "Cavicchia Plan" in 1941; that is under the old "Vinton" method which was abandoned by Congress because of the mathematical paradox involved. I believe Mr. Alito has the list of changes.

SENATOR CRANE: It was a swap of one seat. Bergen gained one and Hudson lost one.

DR. FRIEDELBAUM: It was a relatively small change.

SENATOR STOUT: Any further questions?

SENATOR CRANE: I have just one. To bring the record up to date, I would like to say that my previous allusion to a State in which a judicial review had the effect of establishing

law, I refer to the State of Oregon, and there are provisions for judicial review in Oklahoma, New York and Texas.

But I have two questions, Dr. Rich: When you talk about establishing apportionment by law you are talking directly to amendments of Chapter 52 of Title 19? I mean that that chapter, of course, spells out that Union County shall have four seats, Burlington one, or whatever the present provision is, and that is actually effected by number?

DR. RICH: That is correct.

SENATOR CRANE: Well, now, in your opinion, sir, as a political scientist, can we bind future legislatures to effect this reapportionment by a certain method in that law? Can you state in there, as is provided here in Senate 32, that in 1960 after the publication of the decennial census the Legislature shall reapportion based on the "equal proportions" method? Doesn't that more or less usurp the constitutional prerogative?

DR. RICH: You are correct that the only way that you could really bind the Legislature would be to do it by amendment, that an act of the Legislature could easily be repealed by a succeeding legislative body. A lot, of course, would depend upon public opinion. If there was a feeling that a system had been adopted which was equitable and fool-proof, then you could raise the question of whether the Legislature would want to tamper with that.

SENATOR CRANE: Well, then, I would like to say, Mr. Chairman, that both Senate 31 and 32 were the products of

the effort of Senator Wesley Lance of Hunterdon, who proposed these changes in law. It was Senator Lance's thinking that it could then be challenged in court, and, if upheld, it would have the effect of law and thereby coincide with the one recommendation you made. That has also been introduced in this session and we have the ability to do that if it is desirable.

DR. RICH: That is correct. One of the principal arguments for the amending process would be that it would do away with any possible challenge as to the constitutionality.

SENATOR STOUT: Do any of your colleagues have anything to add? We would be very glad to hear from them if they do.

DR. FRIEDELBAUM: With respect to Senate Concurrent Resolution No. 22, there is just one added comment. We note in our statement that perhaps with the commission operating, then the Legislature, and then the commission again, the process may well be interminable. There is a provision in the Texas Constitution which possibly might be of some help in this respect. In Texas it is mandatory upon the Legislature to reapportion the State into senatorial and representative districts at the first regular session following each decennial census. Failure to do so results in the creation of a legislative re-districting board. However, the State Supreme Court has jurisdiction to compel the commission to perform its duty by an extraordinary writ of mandamus. My thinking was that possibly that could be used in connection with this commission, prescribed in present Senate Concurrent Resolution No. 22, as a means of putting a break upon this

interminable process. In other words, if the Legislature failed to act at its first regular session following the promulgation of the census, the commission would come into being immediately. Its work, if it did anything, would have the full force and effect of law. However, the commission, unlike the Legislature, could be compelled to act through a proceeding in lieu of a prerogative writ.

SENATOR CRANE: Doctor, would that preclude the responsibility devolving back upon the Legislature?

DR. FRIEDELBAUM: I think it would. I believe, under the Texas system, it would mean that if the Legislature at its first session did not act, and the commission were established according to the Constitution, it would be the responsibility of the commission to act and that a proceeding could be brought to force the commission to act. In other words, no proceeding could be brought to force the Legislature to act but conceivably this type of writ could lie against the commission.

SENATOR STOUT: Thank you, Dr. Rich, we appreciate your being here this morning with your colleagues from Rutgers.

We will now call on Mr. Joel R. Jacobson, representing the State C I O Council.

MR. JOEL R. JACOBSON: Senators Stout, Mathis and Crane, my name is Joel Jacobson. I am the Executive Vice-President of the New Jersey State C I O Council. I speak here today on behalf of our 253,000 CIO members in the State, and express my deep appreciation for the opportunity

to express our view.

SENATOR STOUT: Excuse me, is that loud enough?
Will you speak a little louder, please?

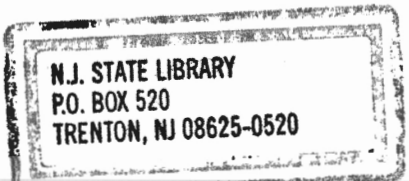
MR. JACOBSON: We aren't often accused of being soft spoken in the C. I. O.

At the risk of sounding naive, I want to say at the outset that the testimony that I am about to present to you has been drawn up with no regard for the political consideration of any party in the State of New Jersey. I know you might consider this an herculean task in the super-charged political atmosphere that exists in a gubernatorial year, but I do tell you that we have honestly tried to present a non-partisan testimony and have as our sole objective our contribution to fair and equal representation in this State.

First, I want to say that we, in New Jersey, are particularly fortunate in having Dr. Rich and his associates available for consultation. It is obvious that all who have testified here today referred to this excellent volume, and, of course, other studies made by the Bureau of Government Research. I want to state that I have taken any number of facts from the book and other studies by the Bureau, and that, while the facts stand as they have presented them, any interpretations or conclusions that I have drawn upon those facts, of course, are not to be attributable to Dr. Rich but to the C. I. O.

I first want to quote from the prepared testimony that Dr. Rich submitted to you on page 9, where he says, half way

down the page, "The ultimate goal of any apportionment is to make the number of persons represented by each assemblyman as nearly equal throughout the State as possible." It then goes on to state that this goal of perfection cannot be achieved for two reasons, the first being that the constitution requires that every county have at least one seat in the General Assembly. It is on the basis of this particular fact in our existing Constitution and the proposition proposed by SCR's 22 and 23 that we oppose both. It is our opinion that the retention of this method of apportionment of representation does not solve any problems but merely perpetuates the old problem that exists now of unequal representation. It will perpetuate in the Assembly the rather flagrant misrepresentative government that we do possess in the Senate at present. Just a brief statement: Under our representation method in the Senate today, we find that 17% of the State's population elect a majority of our State Senators; on the other hand, 75% of our State's population elect a minority of only 38% of our State Senators. And to be specific with regard to two counties, in Essex County, which possesses 20% of the State's population, they elect one Senator, or the percentage figure of 4.8%. If I may impose myself, I see Senator Crane at the head table today. As a resident of Union County and voting for my State Senator, I find that because Union County has about eight times the population that exists in Ocean County, for instance, my vote for Senator Crane has only one-eighth the power that a vote for Senator Mathis from one of his constituents has. But while representative govern-



ment in the Senate might very well be the subject of another hearing, I do want to say that this, in itself, emphasizes the need for fairer representation in the Assembly, and for that reason we do oppose SCR's 22 and 23.

The use of a county as the basic political unit, of course, is the root of this evil, and the county line, as we all know, is merely an arbitrary boundary which denotes generally nothing but a change in scenery and sometimes not even that. In the Housing project in which I live in Union, people who live across the hall from each other on the same floor live in different counties. It seems to be a rather arbitrary discretionary move to say that these people belong in different political units, and we make the point that it's the county line that retains the evil of unequal representation in the Assembly, as well as in the Senate. This is nothing new, according to Dr. Rich's facts. I find that as early as 1799, a gentleman who he says is an authority on land titles, one William Griffith, condemns this particular system as a gross violation of the first maxim of Republican representative government. Now, under the present system, and under the proposed system of the resolutions under consideration, each county receives at least one Assemblyman. For example, Sussex County has a population estimated now at 38,000. According to Senator Crane's figures, the estimated population in our county is about 450,000. The current apportionment gives Union County four seats and what you propose would give us five seats. According to our population, however, we are thirteen times in excess of the

population of Sussex County. I would think that we should have thirteen times as much representation in the Assembly, but what we have now is only four times as much and what you are recommending is only five times as much. I think we are not being as aggressive as we might in demanding our equal share of representation. To pursue this parallel further, Sussex County with its 38,000 population entitled to one Assemblyman, compares in this respect with the central ward of Newark, which has a population of 85,000 or almost double. If the system were to be fair we might assume that the central ward of Newark would be entitled to at least two Assemblymen; as it stands now they don't have any, and it's a question if they would under the proposed system. Throughout the State, of the twenty-one counties, eight counties have less population than the West Ward of Newark - one ward of Newark. These counties, of course, have eight Assemblymen, Newark does have one Assemblyman from the West Ward of Newark but this happens to be an accident more than any other design. So I think it shows that the system that is present and proposed under the two resolutions indicates plainly that representation is based on the system of real estate, or acres, rather than people, - certainly a violation of the facts that political science tells us, that it should be based on equal representation.

There is another reason we oppose the use of the county. That is primarily because we believe that negates the original philosophy behind the founding fathers' thinking on bicameral legislatures, and their thinking being that the

Upper Houses and Lower Houses of the Legislature should represent different constituencies. Of course, in New Jersey, it is just the opposite. The Assemblyman represents the very same identical constituency as the Senator. As a practical matter, we know that when Assemblymen and Senators run for election they run generally from the same party, overwhelmingly from the same party; they run on the same platform; they support the same program; they cast the same votes; and in far too many cases the Senator is generally the spokesman for the delegation of the entire county. We must ask the question then: Is this fair representation? Obviously, we draw the conclusion that it is not.

Now, the second evil that is retained in both of these amendments that we oppose is the provision for elections by county-at-large. We say this, too, perpetuates the unequal representation. And what we are proposing is that the Constitution be amended to provide for the establishment of Assembly districts, containing as near as possible, and certainly no more than 10% variation, equal population, with stringent safeguards written in to prevent gerrymandering according to the suggestions of the political scientists. Now, this too is nothing original because as the history books and as Dr. Rich's book tell us, as far back as 1852 Governor George Ford sent an annual message to the Legislature where he said that we should create single member districts, to "comport with the genius of our representative system and effect a more direct responsibility of the representative to his constituents."

In 1906, following a reversal of the system of assembly districts by the court, Governor Edward Stokes sent an annual message condemning at-large elections and asking for the establishment of assembly districts; Governor Fielder made a similar statement, and finally Governor Wilson, (we can look upon him as an outstanding educator rather than a politician from one particular party for the purpose of understanding this statement) called for an amendment to the Constitution requiring a return to the single member assembly district, and he declared that there was an obligation upon the State to, quote: "Make the representative body from which the legislation proceeds in fact representative, as nearly as possible a mirror of the character and opinion of the communities of which the State is composed."

Now, the original reason, we gather, for the establishment of a lower house was to make the assemblyman closer to his constituency, to make him more accessible, to make him more responsive; these would be the two year term. Just for example, in Essex County where you have twelve assemblymen elected at large, it is our opinion that the individual voter couldn't be more remote from his elected assemblymen. And I dare say that if we were to walk down to Broad and Market in Newark and ask any one hundred people at random to name one of their assemblymen from Essex County, no less what his views are, how he stands on issues of importance to them, I doubt if we could get anything resembling an answer indicating that they knew who their assemblymen were.

Secondly, to make an Assemblyman more responsive, I can

tell you as an unsuccessful lobbyist. that it is particularly difficult to pin-point the responsibility, and I don't say this with any feeling of rancor or anger, but we all know that it is very difficult in trying to determine from the legislators what their views are on legislation, and in many cases I feel like a ping-pong ball, and I attribute it primarily to this system.

Thirdly, to make the house more representative, it's silly to talk about it when they represent the same identical constituency as of the Senator, and we might ask, if the system that exists in the State Assembly today is fair, why do we not then elect our fourteen congressmen at large in the State of New Jersey? Certainly I think the question answers itself- that it is not fair, that assembly districts would make a more representative system. Now, with the election of twelve assemblymen, for instance, from Essex County, it uses what the political scientists call "the long ballot." The long ballot has long been in disrepute, it has been condemned by political scientists dedicated to good governmental procedures. They maintain and I agree it is a subversion of democracy, it permits concealment rather than to pin-point individual responsibility. It permits blind voting with twelve on a ticket. It's impossible to expect that the voters know everything they should know before they can cast intelligent votes. Secondly, the incentive when you go into a booth and are faced with twelve stellar names, is to vote the ticket and not the individual. This, of course, strengthens the hand of the political boss. It is virtually impossible for a maverick,-- most of whom are reformed mavericks, to oppose the machine. In

the primary, as Dr. Rich points out, they face hopeless odds.

Three, the system over-represents the majority party. Now, I agree that this is an argument of dubious value here, but I am discussing not politics but political science, and statistics show us that since 1900 in the New Jersey Senate, for instance, the ratio of the majority party to the minority party has been roughly three or four to one at all times, and in only two years, 1913 and 1914, has the Senate been Democratic. In the Assembly, since 1900, the ratio has been roughly two or three to one, majority party over the minority party, and the last Democratic Assembly was in 1937, twenty years ago. Under the existing system, in addition, the minority, however large, is deprived of any and all representation in the Assembly. For example, in 1953 the majority party in Essex received 125,000 votes, the minority party received 117,000 votes, and of course they didn't have one representative in the Assembly. But even where the majority party does prevail, the urban vote finds itself considerably diluted as compared to the rural vote. I make the point again of Sussex County, the smallest county in the State with 38,000 population, with one Assemblyman, and Essex County, with 900,000 population. Even though they do have twelve Assemblymen, the vote cast for an Assemblyman in Essex has just one-half the power of the vote cast for an Assemblyman in Sussex; and in Union, of course, it is four or five to one in your proposal, where it should be thirteen to one. If Assembly districts were to be created representing equal number of voters, it would be more realistic to assume that the voters could

determine the necessary information about their district's candidates! experience, voting record, and views on current issues which are necessary before any voter can cast an intelligent ballot. Not only would assembly districts permit more equal representation but it would permit the elected official to represent more faithfully the will of his constituents. With single member district elected officials, the representative would be closer to his constituents and more responsive to their needs and desires. While there is no question in our mind that a unicameral legislature, with elected officials representing as nearly as possible equal numbers of individuals, would provide a fair representation in New Jersey, we are well aware that this a political impossibility.

In conclusion, then, we would like to recommend the establishment of assembly districts of equal population as near as possible with no greater variation than ten per cent, with stringent safeguards against gerrymandering, and we believe that this would reverse the trend that currently exists in the Senate and would bring fair and equal representation to New Jersey. We urge consideration of this problem of apportionment in the light of these facts and these conclusions. Thank you very much.

SENATOR STOUT: Do any members of the committee have any questions? Senator Crane?

SENATOR CRANE: Well, I did have a few questions to ask Mr. Jacobson. It seems to me that if you would carry out your argument of the difference between Union and Sussex and the amount of representation that would appear to be our due if you went strictly by population, don't you believe that this would

tend to break the historic precedent with our traditional number of sixty in the House of Assembly?

MR. JACOBSON: Yes, it would, but I understand from the reading that I have done that the trend throughout the nation is in the other direction. I think the figure that I saw was that New Jersey has the fourth smallest Legislature of the entire States.

SENATOR CRANE: Have you ever heard praise of a State because it had a small Legislature?

MR. JACOBSON: I haven't heard it but I assume it might have been given on that basis. It seems to me that the actual number of the legislators is not quite so important as it is to see that each voter has an equal voice in his elected representatives.

SENATOR CRANE: Well, then, another point that I wanted to bring out: You referred to the fact that your apartment is divided by a county line. Isn't it a fact that your apartment was built after the county line was established?

MR. JACOBSON: That is true.

SENATOR CRANE: You are divided by a municipal line, too, between Union Township and Irvington; isn't that right?

MR. JACOBSON: Yes, that is right. The point that I do make, Senator, is that in the urbanized population, such as we have in North Jersey, a boundary line is nothing more than an arbitrary line through the sky; it doesn't mean anything.

SENATOR CRANE: Well, it's a boundary of government, of jurisdiction, of course. Now, would you, in this proposal

to make assembly districts, also break through municipal boundaries? I mean, would you draw a line, say, down through the middle of Union Township at one point, or through Irvington, or through Newark? Are you going to break up municipal boundaries, too?

MR. JACOBSON: The Legislature has had no compunction in doing this in the districting of congressional seats, and I don't see any reason why it can't be done in the Assembly. I would like to make the point, though, that if the---

SENATOR CRANE: To transcend all barriers.

MR. JACOBSON: That is right. If we are to maintain a ratio of sixty Assemblymen, which we have no objection to, then, according to the statistics I've seen, each assembly district should represent roughly 80,000 voters with attempts to prevent gerrymandering. It appears to us that this would be the fair method of representation.

SENATOR CRANE: To accomplish this though, it has been historic in all our constitutions that each county has been entitled to one vote. You cited that as an evil.

MR. JACOBSON: Does this break with tradition?

SENATOR CRANE: Yes, it breaks with tradition and it is a further departure from tradition than is Senate Concurrent Resolution No. 23.

MR. JACOBSON: Well, what may be one man's kettle of hallowed tradition is another man's pot of ill-conformity and it's all how you look at it I suppose.

SENATOR CRANE: Well, while you're there because this is a point which remains in discussion, I want to ask Dr. Rich:

Is it true or not, sir, that the method of equal proportions comes more nearly to the norm - that after granting one representative to each county, thereafter the representatives are divided as nearly equal to a norm of population?

DR. RICH: -- one to each county. Having granted those 21 seats, then how do you equitably divide the remaining 39? The equal proportions system would do that.

SENATOR CRANE: Well, that answers my question, sir. Then to come back to this, Mr. Jacobson. You offered what I felt was rather a novel proposal, that your Senators represented different constituents from those represented by Assemblymen?

MR. JACOBSON: I said, "the same."

SENATOR CRANE: You mean, by larger territories, that they would not overlap, or what?

MR. JACOBSON: What I said was that under the existing and proposed recommendations, the Senator does represent the same constituency at present and, according to the understanding I have and what I have read of our history, the reason for a bicameral Legislature of any nature was that each House would represent a different constituency.

SENATOR CRANE: In other words, I would represent different people entirely - no overlap with my Assemblymen?

MR. JACOBSON: I think there would be a considerable amount of overlap.

SENATOR CRANE: Well, would you have Senate districts, then, and Assembly districts?

MR. JACOBSON: Well, implicit in our statement, it would probably be the abolition of the Senate. We would like to

see a unicameral Legislature, but this is so politically impossible that we don't even say it seriously, but if we are talking serious political science, we would say that.

SENATOR STOUT: Would you want the same thing about the Federal government, a unicameral government?

MR. JACOBSON: Surely. I can't see any reason, for instance, why two Senators should represent some barren area out in the West with fewer population than they have in the central ward of Newark. This doesn't seem to be fair.

SENATOR STOUT: Well, Mr. Jacobson, the founding fathers felt differently.

MR. JACOBSON: I wasn't there at the time the debate was on.

SENATOR CRANE: I want to ask you this question: Would the adoption of this Assembly district proposal of yours mean that you intended to, in fact, rid the State of the Senate?

MR. JACOBSON: No, we are realistic enough to understand that this couldn't possibly be done. What we are saying is that the unequal representation that exists in the Senate should not be perpetuated into the Assembly, and the proposal we make would prevent that.

SENATOR CRANE: Well then, in other words, in effect this is purely for the Assembly and without respect to the Senate?

MR. JACOBSON: That is right.

SENATOR CRANE: I believe that this proposal is presently before the Legislature in one of the acts. ACR-32 has

to do with apportionment of districts. I am not familiar with it, but are you familiar with it?

MR. JACOBSON: No, I am not, - I didn't know there was one in existence.

SENATOR CRANE: But there is one presently before the Legislature and it is an Assembly Concurrent Resolution. Therefore I feel that it must be a recommendation to amend the Constitution. You feel that you are just taking a single step toward the reformation of the Assembly?

MR. JACOBSON: Yes, that is right. I don't know if this is cricket or not, but in response to the question of Dr. Rich I did want to say that in his chapter entitled "A Look Ahead" he makes this statement: "Under the existing system, the minority, however large, is deprived of all representation in the General Assembly. A return to the system of district elections under judicial or other safeguards would seem to assure a more representative Lower House." And I think this is theory echoed by many political scientists on this particular issue.

SENATOR CRANE: That would be a good note to close on for your argument.

MR. JACOBSON: That's why I said it.

SENATOR CRANE: That is all.

MR. JACOBSON: Thank you very much.

SENATOR MATHIS. I think we have another one.

Will you come forward, please, and state your name and the organization that you represent?

M R. J A M E S E. B R Y A N: The name is James E. Bryan, from Elizabeth, Union County, and I am representing the Property Owners' Association.

Senators, we are very much interested in this legislation. We don't feel competent to advise our Senator as to the details of procuring equal representation for Union County. We are in accord with his ethics and we think he is making a very good effort and we can wish for success. Union County has only four Assemblymen and we have been entitled to a fifth for seven years and we are very much concerned about whether we are ever going to get that representation. I don't have anything to add to what the Senator has said. I think he is doing a wonderful job in representing us, and anything we can do to help him get that representation for us, we will be only too glad to do if he will point the way.

I would like to state that we would be very much opposed to the proposition that was just presented of cutting the county or the State up into districts. I believe that system is very much in disrepute wherever it has been tried in our local governments. The City of Newark, which was mentioned, has long since abandoned it and their councilmen form of government, and many of us in my municipality are very much disgusted with the workings of that process at the present time, and there are many who would like to see it abandoned and go into some other form of government. Certainly if it won't work in a small municipality like the City of Elizabeth, it won't work on a statewide base.

There are a couple of questions that we have in mind.

We considered this proposition from the taxpayers' standpoint for sometime and if it would be possible to get any information on it, I would be glad to have it. I would like to address a question to Dr. Rich, if I might, on the subject. Would that be permissible? I would like to ask, in all his research and study on this question, if he has ever found where the validity of an act of the legislators, who are not organized according to the Constitution, has been challenged? Now, to enlarge on that just a little, it would appear that our Constitution is very clear, it requires certain representation. Certainly we don't get it in Union County. The question in mind would be whether it would be possible as a taxpayers' suit to have the validity of any action taken by a Legislature, where it is not organized according to the Constitution, challenged in the court?

SENATOR STOUT: Do you understand the question, Doctor?

DR. RICH: I think I will have to call for help here. Stanley, can you answer that question?

DR. FRIEDELBAUM: In so far as the state cases are concerned, I believe there has never been a taxpayer's suit in which the courts have declared an act of the legislative body illegal, simply because an apportionment has not been made. The closest to that would be in New Jersey in the case of Botti vs. McGovern, which has already been quoted, in 1922. The sole question before the court related to the power of the Legislature to reapportion in a session subsequent to that prescribed in the Constitution. In that case, the State Supreme Court declared that the responsibility of reapportionment is a continuous one, and, well, to quote from it: "It is cast, in turn, upon each

Legislature succeeding that which has defaulted in the performance of the obligation until the obligation is fulfilled."

Now, there are States in which apportionment has been subjected to judicial review; however, I know of no case in which a taxpayer's suit has been entertained against legislation, otherwise valid, merely because the Legislature has failed to carry out its constitutional mandate to reapportion.

SENATOR STOUT: Does that answer your question, Mr. Bryan?

MR. BRYAN: That answers the question; we were wondering if it had ever been challenged. One other question, it is very short. We would like to know if there has ever been an instance where the legislators have failed to proportion, it would be necessary for the counties that had more representation than they should have, to make their candidates appear on the ballots of other counties? In other words, if Essex County and Hudson County are going to have more than their fair share of representation over a period of years, shouldn't those candidates have to appear on the ballot of Union County so that we would have an opportunity of helping to select that representation, and if no other method can be found of getting proportionment could that be brought about? In other words, any county that is short of representation would have a right to participate in the electing of those senators from the counties who have more than their fair share, that we might be able to break up this log-jam of this twenty-one blocking votes?

SENATOR CRANE: There is only one precedent for that, Mr. Bryan. One State allows for fractional representation in time only. In other words, to get this equity of representation, they allow that. I am not sure whether it is Michigan or where it is, but basically it is this: During the decade just past, if in the apportioning of seats a county is entitled to a fraction more, let's say one-tenth of a legislator or one-twelfth of a legislator - it is more easily depicted by using one-tenth of a legislator - that one year before that reapportionment ends, effectively they will be granted an additional legislator for that period. It does not provide for taking away another one of these systems of adding to the Legislature. I am sorry I don't know the actual State. It is cited in these provisions. Mr. Alito might remember which State that was.

It is rather a novel suggestion and it does have precedent somewhere, but it hasn't been considered here.

MR. BRYAN: Perhaps, Senator, if these resolutions cannot be passed, you could give further consideration to that and see if it might possibly be brought about.

SENATOR CRANE: All right.

MR. BRYAN: Thank you.

SENATOR STOUT: Thank you, Mr. Bryan. Is there anybody further who wishes to be heard?

SENATOR CRANE: Could I just leave one thing into the record. I don't want to unduly prolong this but I just want to have this one point made and then ask if these recommendations will take care of the provisions.

In reviewing the matter of reapportionment, we find a New Jersey Court decision and it was written for Attorney General Parsons by Dominick Cavicchia, whom we have cited previously. In this 1951 decision, it was pointed out that "An apportionment of the members of the General Assembly shall be made by the Legislature at its first session after the next and every subsequent census." And concluded: "If the final county population figures were not formally issued by the Federal Government until 1951, the 1951 Legislature could not pass a Reapportionment Act," that such an Act must wait until the next year. If this interpretation were to hold after the 1960 census, and the 1960 population figures were not officially promulgated until the following year, and there is little likelihood that they would be formally promulgated earlier, a reapportionment act could not be enacted until 1962, since the Assemblymen sitting in the 1962 Legislature will be in the first year of their two-year term. This will mean, if they have a right to full two-year terms, once elected, the new reapportionment will not be effective until the 1963 election for Assemblymen to be seated in the 1964 session.

Now, here is something that points to the fact that although we have new census figures, it wouldn't affect the Legislature until 1964. Would these new Concurrent Resolutions in their provisions as amendments to the Constitution take care of that point? I'll ask Dr. Rich. If he cares to refer it to anyone else, it is all right.

DR. RICH: Senator Crane, I don't think that I can answer the question. We talked this over among ourselves about

the time element and frankly we weren't quite sure what the time element would be. Stanley, do you have a comment you want to make?

DR. FRIEDELBAUM: The opinion to which you refer is simply an opinion of the Attorney General, it has no real status in law, it isn't a decision of any court of this State. I would assume that Senate Concurrent Resolution No. 23 would take care of any difficulty which would arise, since you say: "Within 30 days of publication by the United States Government of the certified totals of the number of inhabitants of each county according to the next and each subsequent decennial census, the Secretary of State shall calculate according to the method described hereafter the number of members to which each county shall be entitled and forthwith certify the same to the several county clerks." I think the constitutional problem as we presently have it, arises from the fact that an apportionment is required to be made by the Legislature at the first session following each decennial census. In other words, if the figures are certified during a legislative session, presumably it would have to go over until the next one, although I don't think even that is settled. My own personal opinion is that that would not necessarily have to be the case if this were done by statute rather than by constitutional amendment.

SENATOR CRANE: This does tend to reduce that time element, though?

DR. FRIEDELBAUM: Yes, very definitely so.

SENATOR CRANE: You are quite correct, I've made a

mistake in reading my notes here. I referred first to Botti vs. McGovern and then confused it with Cavicchia's statement.

I would like to close then on a note that I have ignored one group of people that I would like to cite for their help in this, and that is our own Law Revision and Legislative Services. I would like to point out that Messrs. Ockford, Arthur Smith, and William Lanning of the Bill Drafting Department have been invaluable in their aid.

SENATOR STOUT: Thank you, Senator.

If there are no further appearances, the public hearing is adjourned.

(Statement prepared by the
Bureau of Government Research, Rutgers, The
State University, follows.)

HEARING CONCLUDED.

STATEMENT

on

SENATE CONCURRENT RESOLUTIONS

22 and 23

Before the

COMMITTEE ON JUDICIARY

NEW JERSEY SENATE

Prepared by

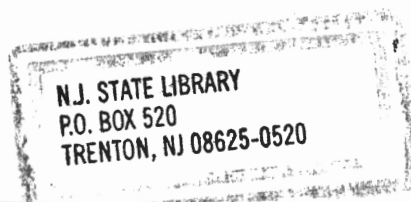
BUREAU OF GOVERNMENT RESEARCH

RUTGERS, THE STATE UNIVERSITY

May 22, 1957

Inaction of the New Jersey Legislature has not been based upon opposition to reapportionment itself, for few persons hold that no change is necessary. Rather, the major obstacle appears to be opposition to the results obtained by any specific method of apportionment when the gains and losses are known and are evaluated from a political and regional viewpoint. In this atmosphere, an objective discussion of the merits of any particular plan becomes difficult.

The 1950 census figures are now more than seven years old. Any apportionment based upon them necessarily will be out-of-date. Passage of such an apportionment act would conceivably produce some measure of temporary, approximate equality in representation, and destroy the desire for a permanent, automatic, and equitable apportionment system. The better course is to authorize a detailed automatic process now, with the first application deferred until after the 1960 census. In effect, such a procedure will mean an acceptance of the "rules of the game" before it is possible to see "which way the ball will bounce". The experience of the past seven years has shown that it is idle to expect an objective analysis of the merits of competing apportionment plans when specific gains and losses in representation are attached to each. It seems far better to agree upon the best system now, applying the procedures to the official population statistics when they become available in 1961.



The experience of the past seven legislatures in attempting to reach agreement upon an apportionment plan for the General Assembly emphasizes the futility of this procedure. Since 1951, a total of 54 apportionment proposals have been considered without success. Included are 39 proposed statutory apportionments and 15 proposed constitutional amendments. Even if it is assumed that the legislature may eventually agree upon an apportionment plan, further potential obstacles to final enactment are raised by the necessity for approval by the governor in the case of a statute or by the voters through a public referendum in the case of an amendment to the constitution.

Numerous other states have encountered similar difficulties in achieving apportionment of one or both houses of the legislature. In several cases some type of automatic apportionment procedure has been devised to meet this situation.¹ Adoption of an automatic procedure in New Jersey will assist in keeping representation in the General Assembly in close alignment with the population of the state as required by the constitution. Delays caused by inability of the legislature to agree upon a specific apportionment method will be eliminated.

¹ Lashley G. Harvey, "Reapportionments of State Legislatures--Legal Requirements," 17 Law and Contemporary Problems 374-5 (1952)

II

Practice among the American states reveals two basic and variant approaches to the resolution of the apportionment problem. These may be designated conveniently as the discretionary and ministerial power theories. The first is predicated upon the assumption that discretionary power must be maintained in the legislative body. Essentially, the apportioning process is treated as a political function which may not and should not be divorced from the legislature itself. Apportionment is considered of such importance to the survival of democratic institutions that only the direct representatives of the people may be trusted to perform the operation. Under the doctrine of the separation of powers, moreover, the periodic rearrangement of seats is looked upon as a responsibility which may not be delegated either to the executive or judicial branches of the government.

A ministerial approach to the apportionment problem represents an effort to accomplish a redistribution either by the creation of a legislative agency for this express purpose or by the assignment of responsibility to an official or officials outside the legislative branch. Policy determination remains within the purview of the legislature, at least in the first instance. Once a fixed rule has been adopted, however, the execution of the rule devolves upon a designated officer or officers whose function is wholly ministerial in character. Discretion is eliminated completely or reduced to a minimum. The process often becomes automatic involving, in most cases, routine calculations based upon a pre-established formula.

What has stimulated recent interest in the ministerial power theory despite the long tradition of legislative discretion which has prevailed among the American states? In large measure, resort to ministerial action has been indicative of an increasing wave of dissatisfaction with legislative inaction in carrying out the apportionment function according to constitutional mandate. The courts, both national and state, have offered little relief in compelling legislative bodies to act. Generally, throughout the United States, the extraordinary writ of mandamus has been held not to lie to require a performance of legislative duties. Constitutions often have defined legislative responsibilities, but sanctions are lacking.

The United States Supreme Court, in the case of Colegrove v. Green, held that the Constitution "...has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action... The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."² This view has been adhered to uniformly throughout the nation. For example, in Fergus v. Marks, the Supreme Court of Illinois ruled that, despite the constitutional mandate to apportion, the judiciary could not exercise control over or compel action by a coordinate

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328 U.S.549, 90 L.Ed.1432 (1946).

branch of the government.³ Additional examples may be multiplied by reference to judicial proceedings in other states.⁴

Despite the traditional aloofness of the courts, judicial remedies have been successfully invoked in proceedings to compel a ministerial officer or officers to act. The doctrine of the separation of powers no longer is directly applicable. Nor is there a question of possible coercion exercised upon a coordinate branch of the government. Instead, a writ of mandamus lies simply against a subordinate officer whose responsibilities are defined either by constitutional mandate or by statutory prescription. Where a constitutional void formerly existed, a legal sanction has been supplied.

III

Article IV, Section III of the Constitution of New Jersey provides that members of the General Assembly "...shall be apportioned among the several counties as nearly as may be according to the number of their inhabitants, but each county shall at all times be entitled to one member and the whole number of members shall never exceed sixty." An apportionment is required to be made by the legislature at the first session following each decennial census and the apportionment "...when made shall remain unaltered until the following census shall have been

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321 Ill.510, 152 N.E.557 (1926).

⁴

Recent illustrative cases include Smith v. Holm, 220 Minn.486, 19 N.W.2d 914 (1945) and State ex rel. Martin v. Zimmerman, 249 Wis.101, 23 N.W.2d 610 (1946).

taken." Flexibility of choice in the adoption of a specific method or procedure necessarily flows from the constitutional language. Similar phraseology in other state constitutions has been interpreted to afford an area of discretion to the legislature.⁵

The case law of New Jersey offers little guidance in defining the constitutional mandate to apportion. The leading case of State v. Wrightson, which reached the state Supreme Court in 1893, related primarily to the districting issue. The creation of districts was held to be an unconstitutional exercise of legislative power. Collaterally, the Court asserted its right to subject an apportionment statute to judicial review. Justice Depue, who delivered the opinion of the Court, maintained that an act "... in the performance of that function is the exercise of a legislative and not of a political power, and the constitutionality of the act by which that legislative power is exercised is a subject of judicial inquiry."⁶

In Botti v. McGovern, decided in 1922, the sole question before the Supreme Court related to the power of the legislature, sitting in a year succeeding the promulgation of a federal census, to defeat the constitutional scheme by refusing or neglecting to

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The Court of Appeals of Kentucky, in applying a similar clause, declared: "...Exactitude is not to be expected. Approximation is the rule erected by the Constitution, but the Legislature may not escape the duty of approximation imposed by the Constitution on the ground that mathematical precision is not attainable..." Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315 (1931). For more recent interpretations, see Attorney General v. Secretary of the Commonwealth, 306 Mass. 25, 27 N. E.2d 265 (1940) and State v. Zimmerman, 264 Wis.644, 60 N.W. 2d. 416 (1953).

make the apportionment required. Once again, the apportioning process itself was not directly germane to a ruling in the case. The Court found simply that the obligation to apportion is continuous and "...is cast in turn upon each legislature succeeding that which has defaulted in the performance of the obligation, until the obligation is fulfilled..."⁷

IV

Given the need for ministerial action, how may this objective be accomplished in New Jersey? Procedurally, either a constitutional amendment or a statute will serve to provide a system of automatic apportionment. The first incorporates a fixed rule within the framework of the constitution. It places a responsibility upon the secretary of state which may be enforced judicially. A constitutional amendment elevates a specific method of apportionment to a plane paramount to ordinary legislation. Any possibility of prolonged litigation to challenge the validity of the method adopted is precluded. Moreover, the apportionment issue is taken out of the political arena to the maximum degree possible.

An automatic apportionment statute, on the other hand, offers a greater degree of flexibility in approach than is possible under a constitutional amendment. Conceivably, a degree of legislative participation may be retained by means of a proviso that the automatic features of the plan would become effective

only if the legislature failed to take positive action within a specified time. A similar clause is embodied in the federal apportionment act.⁸ Congressional experience during the past several decades has revealed that the statutory approach does not result in abuses of legislative discretion.⁹

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On the first day, or within a week, of the first regular session of Congress following each decennial census, the President is required to submit to Congress a statement indicating the number of representatives to which each state is entitled on the basis of its latest population figures. The apportionment is made by the method of equal proportions. Unless Congress acts, the Clerk of the House, within fifteen days of receipt of the statement, must notify the governor of each state of the number of representatives assigned to the state. U.S.C.2-2a.

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A possible objection to the validity of an automatic apportionment statute may derive from the principle of the separation of powers embodied in Article III of the constitution and its allied maxim, Delegata potestas non potest delegari. This objection may be obviated if a precise method of apportionment is prescribed. The secretary of state need not be afforded any discretion in performing the mechanics of the apportionment. His role should be wholly ministerial in character. Given a fixed rule or standard, the actual calculation will admit of only one possible distribution of assembly seats. Failure to take any action at all may be remedied by a proceeding in lieu of a prerogative writ instituted against the secretary of state.

An automatic apportionment statute, therefore, may involve nothing more than an assignment of a mechanical function to an executive officer. There need be no delegation of legislative power, either stated or implied. The sole purpose of the assignment is a conferral of responsibility to insure that a suit may be instituted to compel compliance with the statutory requirements. Ultimately, the success or failure of any plan must depend upon legal sanctions capable of judicial enforcement. Without such sanctions, legislative inaction may thwart indefinitely the right of the people to equitable representation in the general assembly.

In any automatic plan for apportionment of the General Assembly, it is essential that the mathematical method to be used should be stated with exactness. Any precise, automatic method of apportionment reflecting the distribution of population within the state is preferable to the present indefiniteness which has resulted in no apportionment at all since 1941. Of the methods which have been proposed, the method of equal proportions appears best suited to the process of apportioning General Assembly seats among the counties of New Jersey.

The ultimate goal of any apportionment is to make the number of persons represented by each assemblyman as nearly equal throughout the state as possible. A perfect apportionment would be achieved if every assemblyman were to represent the same number of persons. In the case of the 1950 population of New Jersey, this number would be the population of the state, 4,835,329, divided by the number of assembly seats, 60, or 80,589 persons. This goal of perfection cannot be achieved for two reasons. First, the constitution requires that every county have at least one seat in the General Assembly, regardless of its population. Second, the population of a county seldom, if ever, is evenly divisible by 80,589. Since the apportionment must deal in whole seats, some assemblymen must represent a few more or a few less persons than the ideal number. Nevertheless, the inability to achieve perfection does not rule out the use of perfection as a standard against which any apportionment plan may be measured.

There are two approaches to a measurement of the degree to which any proposed apportionment approaches the perfect standard. These are: (1) by comparing the number of persons represented by each assemblyman; and (2) by comparing the share in an assembly seat which each individual inhabitant of the state has. Each of these two approaches may be expressed by two mathematical terms: (1) by absolute numbers; and (2) by relative numbers or percentages. Therefore, there are four tests which can be applied to any apportionment:

- (1) The absolute difference between any two counties in the population per assemblyman.
- (2) The absolute difference between any two counties in the individual share of an assembly seat.
- (3) The relative difference between any two counties in the population per assemblyman.
- (4) The relative difference between any two counties in the individual share of an assembly seat.

The smaller the absolute and relative differences, the better the apportionment. The method of equal proportions reduces to a minimum the relative difference in the population per assemblyman and also in the individual share of an assembly seat. Other mathematical methods are available which reduce to a minimum either the absolute difference in population per assemblyman or the absolute difference in the individual share of an assembly seat.

The relative difference between two numbers frequently is recognized as the best comparison of them. In 1941 the Congress of the United States, accepting this position, enacted an automatic apportionment statute using the method of equal proportions for all future apportionments of the House of Representatives.¹⁰

10

Any apportionment, regardless of the method used, may be tested by the following procedure:

- (1) Select the mathematical objective which is considered most desirable. For example, the minimum relative difference in the population per assemblyman may be used.
- (2) Compare any two counties and the number of seats assigned to them by any two apportionment plans.
- (3) Determine whether the objective selected can be better achieved by shifting a seat from one county to another.

EXAMPLE:

County	Population	Plan 1		Plan 2	
		Seats	Population Per Seat	Seats	Population Per Seat
Burlington	135,910	1	135,910	2	67,955
Essex	905,949	11	82,359	10	90,595
Absolute Difference.....		53,551..	 22,640	
Relative Difference..		$\frac{53,551}{82,359}$65%		$\frac{22,640}{67,955}$33%	

- (4) In the illustration above, the objective selected is the minimum relative difference in the population per assemblyman. This goal is achieved better by Plan 2 than by Plan 1.
- (5) The same procedure may be followed in comparing any two counties under any two apportionment plans.
- (6) The method of equal proportions results in keeping the relative differences at a minimum. Any change from this method will increase the relative differences in both the population per assemblyman and in the individual share of an assembly seat.

VI

What, then, is the best method of approaching a solution of the apportionment problem in New Jersey? Senate Concurrent Resolution 22 proposes a constitutional amendment requiring the legislature to apportion the General Assembly by July 1 following publication of the 1960 and subsequent censuses. If the legislature fails to act, a ten-member bipartisan commission is established. No mathematical method of apportionment is specified. If the commission fails to reach agreement by August 1, the apportionment problem reverts to the legislature where, if no further action is taken, it remains until July 1 of the following year when a new apportionment commission is constituted.

The plan set forth in Senate Concurrent Resolution 22 provides no conclusive method of automatic apportionment. It fails to specify any mathematical procedure. The result may well be a continuation of the current inability to agree upon a reapportionment of the assembly. Without an express sanction, the process proposed in Senate Concurrent Resolution 22 may be interminable.

Senate Concurrent Resolution 23 proposes a constitutional amendment requiring automatic apportionment of the General Assembly by the secretary of state following the 1960 and succeeding censuses. The procedure described expressly is the mathematical method of equal proportions. The resolution also provides

a conclusive automatic procedure. Presumably, the secretary of state could be compelled to act in accordance with the terms of the amendment by a judicial proceeding in lieu of a prerogative writ. However, provisos may well be included to make the amendment self-executing and to authorize expressly legal proceedings requiring action by the secretary of state.

Is a constitutional amendment necessary to accomplish the results contemplated in Senate Concurrent Resolution 23? There would appear to be no constitutional impediment to a statutory approach provided a fixed method is specified by the legislature in advance. If any doubt remains, legislative participation should militate in favor of the validity of a statute. An act could provide that the automatic features would not become effective if the legislature adopted an alternative plan of apportionment within a specified period of time.

While a constitutional amendment and statutory procedures represent diverging paths, both seek to achieve essentially similar results. The choice depends largely upon such factors as the degree of permanence desired, the question of legislative participation, and the political feasibility of adoption. In any event, the substantive features of Senate Concurrent Resolution 23 seem well designed to provide an equitable solution of the apportionment problem in New Jersey.

