

STATE OF NEW JERSEY
N.J. CONSTITUTIONAL CONVENTION OF 1966
Fourth Hearing

before

COMMITTEE ON APPORTIONMENT OF THE LEGISLATURE

[Proceedings]

Testimony of:

Howard H. Kestin

New Jersey State Library

held at

RUTGERS UNIVERSITY

The State University of New Jersey

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STATE OF NEW JERSEY
CONSTITUTIONAL CONVENTION OF 1966
COMMITTEE ON APPORTIONMENT OF THE LEGISLATURE
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CHAIRMAN JOSEPH M. KEEGAN: Ladies and gentlemen, if we can have your attention, this is the continuance of the public hearing by the Apportionment Committee of which you are all members. There may be non-members of the Apportionment Committee here. If there are, they are welcome, of course.

We have one witness today, gentlemen, Howard H. Kestin, who is the Assistant Director for the Institute of Continuing Legal Education here at Rutgers. Mr. Kestin is a former Deputy Attorney General of the State. His real distinction is that he is a resident of Passaic County and a constituent of Senator Joseph M. Keegan. Quite seriously, he has a statement to make. We have copies of the statement and we would ask that you pass them out.

The usual rules apply. Mr. Kestin will give his presentation and after his presentation he will be subject to question by members of the Committee on the presentation or allied matters.

HOWARD H. KESTIN: Ladies and gentlemen: I wish to thank you for honoring my request to appear before you. I come as a citizen of the State of New Jersey possessing some knowledge in the area of reapportionment to express vigorous support for Proposal #5, presently pending before this Constitutional Convention. I consider Proposal #5 to

be the most effective solution to all the major problems presented by the necessity to reapportion the New Jersey Legislature according to constitutional mandate.

Much has appeared in the public press of late with respect to the many different proposals and areas of concern which confront the Delegates to this Convention. Many might consider some of these problems to be outside the necessary scope of this Convention's mission. It is clear to me, however, that it is not only proper, but also absolutely necessary as a matter of good government, that this Convention measure and weigh every aspect of representative government in New Jersey which is relevant or material to the operation of the legislative article of the Constitution. Only after such scrutiny, will the amendments finally proposed to the people by this body bring New Jersey into compliance with the requirements of the Constitution of the United States as articulated by the Supreme Court in Reynolds v. Sims, and also serve this State well for many years to come. Thus, most properly, the delegates to this Convention have not been content to limit themselves to a highly-mechanical approach to their necessary task, but rather have conscientiously concerned themselves with every such aspect of representative government in New Jersey however peripheral each may seem at the moment. For this, they are to be commended; for the only way to write or amend a constitution is with great care, with meticulous attention to detail, and with a highly-circumspect eye toward every conceivable problem which may arise in the future.

It is apparent, therefore, that any proposal for amendment which emanates from this Convention will have met the test of a great host of varying criteria. It will not be sufficient that it merely comply with the "one man, one vote" principle, although it is absolutely necessary that it do so. It must also pass muster with respect to other areas of major concern of which much has been written of late. Of these other less formal criteria, serious attention must be given to political and practical as well as to basic theoretical concepts. Politics is here to stay. It will always be a necessary part of state government as it should be. But the shortcomings of politics must be as candidly evaluated as its many benefits in arriving at an ultimate solution to the problems considered, and provision must be made therefor.

I believe that Proposal #5 is the product of all such valid considerations. Its proponents have apparently weighed them, balanced them, and have constructed a most effective and eminently practical solution to the multifarious problems which confront this Convention in its revision of the legislative article and related provisions of the Constitution.

Briefly, Proposal #5 contemplates a bicameral legislature with a Senate consisting of a fixed number of twenty-nine members, who would be elected individually from districts created for that purpose by the Legislature every ten years following the Federal decennial census. The Assembly would consist of a variable membership, the total number of which would be calculated simply by dividing the population of the smallest county into the population of the state at large.

An equally simple formula would then be applied for the purpose of allocating seats in the Assembly among the several counties. The population of the smallest would be considered as the representative unit. This representative unit would be divided into the population of each county producing a whole number quotient and a remainder. Each county would be allocated Assembly seats equal to this quotient or, to put it another way, one seat for every whole number multiple of the representative unit which its population represents. The remainders of this process of division will then be listed in descending order. Since it is unlikely that the initial allocation of Assembly seats will exhaust the whole number of seats in the Assembly, the remaining unallocated seats will then be distributed, one by one, first to the county having the largest remainder, then to the county with the second largest remainder, and so on until exhausted. Thus, would the county delegations to the Assembly be determined. All the Assemblymen would be elected on an at-large basis within each county. The size of the Assembly would always be somewhat larger than is presently the case and would tend to fluctuate as population ratios change. Based on the 1960 census figures, the size of the first such Assembly would be 125 members apportioned as indicated by a table contained in my remarks.

[The Table included in Mr. Kestin's written statement, but not read, can be found on the next page.]

TABLE I
ASSEMBLYMEN PER COUNTY UNDER PROPOSAL #5

<u>County</u>	<u>Assemblymen</u>	<u>Relative Deviation from Representative Unit</u>
Atlantic	3	+ 10.5 %
Bergen	16	+ .5 %
Burlington	5	- 7.5 %
Camden	8	+ 1.0 %
Cape May	1	-----
Cumberland	2	+ 10.1 %
Essex	19	+ .2 %
Gloucester	3	- 7.4%
Hudson	13	- 3.2 %
Hunterdon	1	+ 11.5 %
Mercer	6	- 8.5 %
Middlesex	9	- .7 %
Monmouth	7	- 1.6 %
Morris	6	- 10.2 %
Ocean	2	+ 11.5 %
Passaic	8	+ 4.7 %
Salem	1	+ 21.0 %
Somerset	3	- 1.2 %
Sussex	1	+ 1.5 %
Union	10	+ 3.9 %
Warren	1	+ 30.3 %

I will elaborate upon these figures, particularly those relating to relative deviations from the representative unit, that is, the degree of malapportionment, if you will, in short order.

One of the basic points of debate presently confronting this Convention is whether New Jersey should retain a bicameral legislature or whether a unicameral legislature will suffice. Basically, the proponents of unicameralism argue that since apportionment of each house of the State Legislature must be strictly based on population, it is not possible to achieve representation of differing interests in two houses and, therefore, many considerations including economy and simplicity of procedures militate in favor of creating a legislature consisting of only one house. The arguments in favor of bicameralism are well known. It is said that a two-house legislature assures a certain measure of checks and balances within the legislative branch of government itself. It is also said that when two houses must separately approve legislation, the chances that ill-conceived measures will be enacted are lessened, because a bicameral legislature composed of one large house and one smaller house embodies different kinds of consideration, the smaller house considering any proposed legislation in a more deliberative fashion than the larger house.

The arguments in favor of each of these positions are persuasive, but I respectfully submit that the weight is most heavily in favor of bicameralism. The basic assumption of the unicameralists is not entirely correct. While proper,

good faith application of the "one man, one vote" principle does not permit as great a diversity of interests to be represented as would be the case where only one house is needed to be organized on the basis of population and the other could be constituted on some other basis, such as geography, it is nevertheless clear that some not insubstantial provision can be made for the representation of different interests even under strict population apportionment.

Proposal #5 accomplishes this. Under it, every member of the Assembly would represent the people of an entire county, and each member of the Senate would represent a distinctly different group of citizens with differing interests. In some cases, the interests will be broader in scope, in a sense regional, such as where several lightly populated counties or portions thereof are combined to form a single senate district. Other interests will be narrower in scope such as where population densities require that a senate district be created from a single municipality or a part thereof, as in the case of the City of Newark. For example, a senate district comprising the counties of Sussex, Warren, Hunterdon, and portions of Somerset or Morris would frequently have interests differing from those of the counties individually. Clearly also, a senate district comprising a portion of the City of Newark would often have interests different from those of Essex County at large.

The achievement of differing interests in two houses of a State legislature, both of which reflect bona fide apportionment on a population basis when coupled with all the

other benefits of bicameralism render the case for retention of two houses much stronger, particularly when considered in view of the tradition and heritage to which United States Senator Clifford Case addressed himself in his persuasive testimony before this Committee last week.

Also embodied in Proposal #5 is a necessary compromise of two other divergent views clearly represented at the Convention, that is, single-member districts versus multi-member districts. Apparently, such a compromise is made necessary, in part, by the attempt to achieve representation of differing interests in the two houses in order to satisfy the issue of bicameralism versus unicameralism. The 29-member Senate consisting of representatives from 29 separate districts achieves that type of representation contended for by proponents of the single-member district concept. The Assembly plan, however, is essentially an embodiment of the multi-member district concept. This proposal has the additional advantage of further preserving tradition and heritage by maintaining the county as the basic unit of representation, while, at least in part, at the same time, complying with the requirements of the "one man, one vote" principle. It is this combination of considerations, which the Reapportionment Commission of 1964-65 thought so important, this combination of retaining county lines as a basis of representation and also, of course, honoring the "one man, one vote" principle, and also it is this dual consideration which causes the Assembly to double in size.

Several additional points must be made with respect to

the Assembly Plan contained in Proposal #5. First, as it stands, and because it embodies a simple and automatically applied formula, it totally obviates the possibility of tampering or gerrymandering as might occur if the counties were to be broken down into sub-districts, one for each Assemblyman. Purely aside from the interesting question of who would be vested with the responsibility of creating such sub-districts, the ease of application of the plan as proposed, its entirely automatic simplicity, and the ease with which it is reduced to a comprehensible formula, all speak well for this plan. Many responsible citizens of the State of New Jersey have expressed a desire for such a simple formula as a method of assuring that the future will be free from tampering, gerrymandering, or the like in the creation of legislative districts. Such a formula must almost of necessity make use of county lines in its formulation since the counties are the only sufficiently large geographic units which can be readily and generally identified to serve as terms of reference.

Second, the size of the Assembly will fluctuate with each decennial census depending upon the ratio of population growth in the smallest county to population growth in the State at large. By way of example, Cape May County, according to the 1960 census, is the smallest county in terms of population with some 48,555 people. The State of New Jersey has a total population of 6,066,782. The 125 member Assembly which would result from an application of this plan, using the 1960 census figures, is achieved by dividing 48,555 into

this figure in excess of 6,000,000. It is clear that the State of New Jersey is expected to experience a substantial growth during the rest of this century. It is equally clear that the places where this growth is most likely to occur are those areas which are least dense at this time. It seems to be sensible, therefore, to assume that the rate of population growth in less dense areas such as Cape May County will exceed the rate of growth of the State of New Jersey as a whole and that the size of the Assembly will be reduced as the years go by as the number which is to be divided into the total population of this State becomes larger in comparison with that total figure. It is most probable, however, that the reduction in the size of the Assembly will not be substantial. The most conservative figures respecting population growth in Cape May County, which are known to me, indicate that the rate of population growth in this area will not exceed that of the State at large, although it will almost match it. According to these figures prepared by the Research and Statistical Section of the New Jersey Department of Conservation and Economic Development on April 30, 1964, the Assembly between 1970 and the year 2000 would not exceed 129 members if the Assembly Plan in Proposal #5 were to be adopted. While not an expert on matters of population, I personally find it somewhat difficult to accept these figures that have been prepared by the Department of Conservation and Economic Development. It is my firm belief that developments in transportation and communication will cause the more remote and less populous

areas of the State, such as Cape May County, to increase their population at a rate greater than that anticipated in such reports, thereby causing the number of seats in the Assembly to decrease with each Federal decennial census.

The third point I wish to make with respect to the Assembly Plan is that a study of this Plan will reveal that the relative deviation from the representative unit, 48,555, with respect to two of the counties exceeds the much bandied figure of 15 per cent, which is spoken of as the maximum permissible deviation. It may be argued that the 21 per cent deviation for Salem County and the 30.3 per cent deviation for Warren County might serve to invalidate the entire plan contained in Proposal #5. This would only be true if the 15 per cent figure which is so frequently mentioned were truly meaningful. But, it is not. The United States Supreme Court in Reynolds v. Sims recognized that mechanical precision could not reasonably be expected in legislative apportionment, and it allowed for a "permissible deviation" in achieving compliance with the "one man, one vote" principle. Nowhere in that opinion or afterwards has the Court even indicated the extent of that "permissible deviation" or what it might be. Some authorities in the field have proposed the 15 per cent figure as a general rule of thumb. I suggest, however, that the Supreme Court knew what it was doing when it laid down a general principle such as "permissible deviation" rather than a more rigid percentage figure. It is clear that the Supreme Court, when it spoke of "permissible deviation," was saying that a plan must on

its face, in its application, and in its entirety represent a good faith compliance with the "one man, one vote" principle, and that where a proper plan for apportionment has been used, a not unreasonable deviation will be permitted where unavoidable. This is not to say that Proposal #5 or any other plan must not, at least potentially, meet the test of the most careful judicial scrutiny. But the obvious considerations which are embodied in the formulation of the Assembly Plan contained in Proposal #5 and its over-all fairness would be very strong points indeed in favor of sustaining it.

What I have already said with respect to the automatic operation of the Assembly Plan and the manner in which it obviates any possibility of future tampering, gerrymandering or the like does not apply to the Senate in Proposal #5, for this proposal would vest in the legislature the responsibility of aligning and realigning senate districts every ten years. While serious attention must be given the point of view that tampering, gerrymandering, and the like ought absolutely to be avoided, to agree wholly with such a position is to admit that the members of the Legislature cannot be expected to observe their oaths of office and uphold the Constitution of the United States. I am not of the view that discretion in the area of apportionment ought to be entirely removed from the Legislature. It is probably both reasonable and wise, for a variety of reasons, to assure that one house of the Legislature will be apportioned by a formula which is automatically applied. Yet it is equally reasonable and

equally wise to vest in the Legislature a degree of discretion in this area in order to provide the opportunity for an exercise of reasonable and legitimate practical considerations in reapportioning the legislature every ten years. An automatically applied formula does not admit of such reasonable and legitimate practical considerations. It should be noted in this connection that it has become a clearly defined function of the courts to review legislative action on apportionment in order to assure compliance with constitutional mandate. Furthermore, and in addition to the requirements of the Constitution of the United States in this regard, Proposal #5 would include in the New Jersey Constitution the requirement that "each [Senate] district . . . be contiguous, compact, as nearly as may be [possible] equal to each of the other districts in the number of its inhabitants, and shall whenever practicable be composed of whole counties and whole municipalities." Thus, tampering, gerrymandering, and the like would be prohibited as a matter of New Jersey State Constitutional law, and the courts would be given additional criteria by which to evaluate legislative action in this area, over and above the requirements of the Federal Constitution.

It might also be noted at this juncture that reduction of Senate membership or apportionment to an automatically applied formula would require the use of easily identified geographical areas such as the counties and would probably result, therefore, in the creation of a Senate which would be a miniature Assembly. Thus, the need for a bicameral

legislature would be truly obviated. So, in order to achieve a difference of representative interests in the two houses of the Legislature, it is necessary to arrive at different plans for apportioning each house, one which is reducible to a formula and one which is not. Mention should also be made with respect to the provision in Proposal #5 that members of the Assembly would serve two-year terms and members of the Senate would serve five-year terms. It is self-evident that total compliance with the "one man, one vote" principle requires speedy reapportionment of both houses of the Legislature after each Federal decennial census. In order that such speedy action would be assured in perpetuity, the term of each legislator must be for a number of years which can be evenly divided into ten so that in each tenth year, the terms of all legislators will end, permitting total reapportionment without cutting terms short and avoiding the possibility of constitutional challenge based upon holdovers in membership, not to mention a host of practical difficulties. By electing the members of one house for two years and the members of the other for five, legislative continuity would always exist except for every tenth year, when constitutional mandate would require total reapportionment.

Finally, a word must be said concerning those aspects of Proposal #5 which vest original jurisdiction in the Supreme Court of New Jersey with respect to apportionment matters and establish a 120-day time limit for re-districting the Senate on the part of the Legislature. It is essential in order to assure absolute and strict compliance with the

"one man, one vote" principle that a time limit be written into the Constitution wherein the Legislature would be required to apportion senate districts, so that a situation such as that which arose in Baker v. Carr, the first of the modern reapportionment cases which arose from the failure of the Tennessee Legislature to reapportion for a considerable length of time, would be avoided. It is also necessary that a challenge to any action taken with respect to reapportionment be adjudicated as quickly as possible. Because it is essential that such matters be expedited to final adjudication and because factual controversy is unlikely to be present to any substantial degree in such disputes, the Supreme Court should have both the first and last word in such matters. Where factual disputes do arise, the Supreme Court may appoint a special master to receive evidence in order that it might have sufficient basis for making factual findings.

On the whole, therefore, I believe Proposal #5 to embody the best, most realistic, and most permanently meaningful solution to all the major problems which confront this Convention in its primary task. In certain parts it represents a compromise of opposing positions, but always for good reason. It is exactly this attribute, compromise, which distinguishes the Federal Constitution and almost every piece of legislation which goes through any state legislature. Reasonable and well-considered compromise is the essence of good government in a representative democracy and there is no reason why it cannot generate the best product in the area of apportionment as it does in so many other aspects of

government. Thank you very much.

[Applause]

CHAIRMAN KEEGAN: Thank you very much, Mr. Kestin. It was quite a learned paper that you have submitted to the Committee and we are grateful to you for the preparation and the thought that went into it.

MR. KESTIN: Thank you for the opportunity.

CHAIRMAN KEEGAN: As you know, the members of the Apportionment Committee may, after consideration, propose questions to Mr. Kestin. If there are questions, we will entertain them. Would you identify yourself for the record.

MR. JAMES M. CAWLEY: I am James Cawley, Union County. Mr. Kestin, we in Union County have gone over this particular plan and we are quite impressed with it on both sides of the aisle. We have one or two points, and possibly you could help us with these particular points, so this particular plan could be sold to all parties.

Number one, what would your justification be for having the Senate from single-member districts and the Assembly from multi-member districts in relation to reversing this particular thing?

The second thing is: What would the justification be for the Legislature having the right to apportion the particular plans due to the fact that they have failed for 16 years possibly in some cases to do it up to date?

MR. KESTIN: Well, let me answer the second one first. It is easier. The Legislature of New Jersey only once to my knowledge has been under pressure to reapportion.

It has always done it voluntarily and in 1961 the Supreme Court put some apparent pressure on the Legislature, but the Legislature did it itself without a court order. I think the Legislature of New Jersey has acted pretty well in the area up to now, particularly in comparison with some other legislatures, such as Tennessee, and I think they can be trusted to reapportion. Whether they reapportion properly or not is something that is subject to judicial scrutiny.

With respect to your first question, I am not sure that the idea underlying Proposal #5 is so rigid and inflexible as not to permit a reversal of the single and multi-member district approach. I would say, however, that Proposal #5 fascinates me because it combines in one house the idea - one-half of this - plus at least one representative, one assemblyman, from each county which you could not get in a smaller body in the Senate. An assembly has got to be about this size, 125 members, in order for Cape May County to have one assemblyman. And I just think it works out better on paper the way it sits.

MR. CAWLEY: Thank you.

CHAIRMAN KEEGAN: Professor Lockard of Mercer County.

MR. WALTER DUANE LOCKARD: I am Duane Lockard from Mercer County. Mr. Kestin, I suppose you would agree with me that methods where reasonably possible should be applied in order to ease the task of the voter in rendering a rational act in the polling place. This ought to be made possible where we can.

MR. KESTIN: Yes, sir.

MR. LOCKARD: Do you think that it is possible for the average voter rationally to choose 19 people in an at-large situation as you are suggesting that they should do in Essex County?

MR. KESTIN: In Essex County?

MR. LOCKARD: Yes.

MR. KESTIN: I do. As a matter of fact, I think that an Assembly of 125 members and Essex County having the opportunity to chose 19 would lend itself to a more rational choice. The voters might not be so inclined to vote straight party lines when they have so many votes to cast.

MR. LOCKARD: Are you aware of the research that has been put into this question, for example, by people in Michigan University?

MR. KESTIN: Yes, I am.

MR. LOCKARD: [Continuing] -- which showed among other things that the voter apparently cast his ballot for people first in line and that substantial law suits among individuals running for office have been brought on the question of their not having their name adequately rotated in the ballot because the evidence is perfectly clear that the voter does not rationally chose among people, but plunks for the first name on the list?

MR. KESTIN: I cannot disagree with the study. But I don't think this applies to every voter or even most voters. I must agree that some voters do this. Some voters don't even vote, which is probably the more intelligent approach if they are just going to vote for the first 19

people on the list. Perhaps some political education of the voters will be a necessary concomitant of any reapportionment.

MR. LOCKARD: Would you concede then that the education of the voter is not made simpler when he has 38 names to work with?

MR. KESTIN: The education of the voter is not made simpler, no, but it can be made more effective.

MR. LOCKARD: Thank you.

CHAIRMAN KEEGAN: Mayor Inglima.

MR. ROBERT J. INGLIMA: Mr. Kestin, I am Robert Inglima, Delegate from Bergen County. I have a question directed to your reference to the form or the structure of the Legislature itself. Before I state the question, I think in fairness to you, as the Delegate from Union County, I might say that I am opposed to the essential views you have set forth. But it seems to me that one of the basic reasons you have set forth in favor of the bicameral form is the fact that under your suggested bicameral form, you permit in the one branch of the Legislature legislators who represent larger districts or larger groups of people and consequently as you state different points of view than you do in the other branch of the Legislature.

MR. KESTIN: Either larger or smaller, but in most cases, different.

MR. INGLIMA: Different, yes. Now wouldn't it be also feasible and possible, and possibly more beneficial, if this same concept were permitted to exist in a unicameral

form with part of the representatives from the given political subdivision, the county, being elected at large and part of the representative delegation being elected from specific districts? In other words, wouldn't this satisfy that benefit which you have stated is one of the reasons for going for a bicameral form?

MR. KESTIN: Theoretically it would, and this is one area in which I am very concerned with education of the voter. I have thought about this and I am convinced that it would be a highly difficult task to explain this proposal to the voters so that they could cast an intelligent vote on whatever proposal is made to them by this Convention. A formula is easy. If you can't explain it in words, at least you can put it on paper. It is demonstrable. The single-member district concept for the Senate is easy to understand. But if you are going to start breaking down districts and making some people represent larger areas and others represent smaller areas, all for the same house, I am not sure the voters will understand a proposal like that as easily. I agree with the underlying thesis of your question. But it can be done, yes.

MR. INGLIMA: Part of the question and in support of the stand in favor of doing this within the one house - wouldn't you have in this particular representation, in other words, representation of differing viewpoints or differing constituencies within the one house? Wouldn't this also permit of a greater dialogue within the house and a greater exposition of the ideas from one grouping to another in order

to get the best possible legislation?

MR. KESTIN: It would. But I think you are ignoring the other benefits of bicameralism, the dual consideration of any legislation, the more deliberative consideration where one house is small and one house is very large. An example of this arose in the State of New Jersey not too long ago when our Senate approved a resolution which would have placed it in support of those proposals which would have created a super court, remember that, over the Supreme Court in matters of apportionment and other matter concerning states' rights. Our Senate actually passed that resolution and then after it had discovered what it had done, rescinded that action. Now had that resolution been legislation, it would have had to pass two houses and in the interim the public outcry might have arisen and it would have failed in the other house.

MR. INGLIMA: Well, sir, you are obviously now talking about a check and a balance as between the two branches of the legislature.

MR. KESTIN: That is one of the advantages of bicameralism.

MR. INGLIMA: Well, isn't the ultimate check which was sought to be established by the bicameral form within the State Legislature, that is, similar to the Federal check, in other words, the check of a senatorial geographical subdivision over a subdivision which was strictly in accordance with population numbers?

MR. KESTIN: Originally that was so.

MR. INGLIMA: Now this would not be possible if both houses under your plan had to be chosen on population.

MR. KESTIN: You would not have a check from that viewpoint, but you would still have a check.

MR. INGLIMA: I don't want to pre-empt anyone else's time, but I just make the observation, sir, that the check could well be said the check as between the different branches of the government, the Executive, the Judicial and the Legislative, rather than a check as within the Legislative itself because this reasoning could also be said to require two governors instead of one because one might exercise the veto power precipitously.

CHAIRMAN KEEGAN: Mr. Cotton.

MR. HARRIS Y. COTTON: Sir, I am Harris Cotton from Gloucester County. In your presentation, which incidentally I would like to compliment you on - I thought it was very erudite --

MR. KESTIN: Thank you.

MR. COTTON: [Continuing] -- you point out many fine features of your assembly with its automatic reapportionment, with maintaining county lines, and so on, and you point out that there are weaknesses in the senate which might lend itself to gerrymandering perhaps, although you count on the oath of the senator to the legislature to prevent --

MR. KESTIN: And judicial scrutiny.

MR. COTTON: [Continuing] -- and judicial scrutiny, which I think you will agree is very, very limited. We have

developed over, I think, many years of constitutional law an attitude of the courts of great judicial restraint when it comes into delving into political areas. However, you feel that we must build in this shortcoming into our system because of the advantage of having two different interests. I mean, this is the main pitch apparently of your argument, that there are two different interests being represented. I would suggest this to you and ask you to give me your thought on it: Don't you really think that although there is a distinction between the two bodies, it may well be a distinction without a difference in that these districts that may be created - or let's examine the present ones, for instance, Gloucester, Atlantic and Cape May County - it may well be that there probably won't be a community of interest. I mean, there is absolutely no similarity in the interest of Gloucester County, which is partly rural and partly urban and industrial, and Atlantic and Cape May Counties which are a little bit rural and mostly vacation areas. Now what kind of an artificial area is this that has actually been created and what advantage will inure to the people just because you have created a difference? I think it has to be a rational difference before it will be meaningful and I am not convinced of that or at least you haven't shown it in your presentation.

MR. KESTIN: The difference in approach which a legislator who represents a regional district will take will of necessity be different as in the case of Gloucester,

Cape May and Atlantic. Where there is not a single common interest which can be identified for that region, then that legislator will be forced to act as a statesman in the best interests of the entire State and can justify his action in that way.

MR. COTTON: But, sir, isn't legislation that represents all of the people usually the product of compromise between one interest over another?

MR. KESTIN: No question about it.

MR. COTTON: Don't you really defeat this when you elect a man from two counties where the interests are completely, not necessarily opposite or divergent, but at least not in common? You place him in a position of dilemma and perhaps place the voter in the same position of dilemma. It may well be that a man running for office may have certain attributes which may lend themselves very well to Gloucester County, but many be very, very offensive to Atlantic County because of their particular attitudes. And I will give you a specific example, not of one that is in existence, but one that could. Atlantic County obviously has a great interest in entertainment, social activities, alcoholic beverages, night clubs and so on. This is of necessity in a recreational area. Gloucester County may well be a highly religious, conservative, a rural community. Isn't it placing an almost impossible task upon your political parties to have to select a candidate that will be suitable to both counties, and if they do find somebody that is some type of a compromise, put him in a terrible position

where he has to bend and not use independent thought for the people that he actually should be representing, unless you feel that there is no distinction or no reason for county lines?

MR. KESTIN: Oh, no, I am very much committed personally to the preservation of county lines to the greatest extent possible.

You have asked a two-part question. The first part with respect to the difficulties a political party might encounter in nominating individuals which might be acceptable to all areas, it makes things more difficult admittedly, but I don't think it makes it impossible. Political parties have a great history of being able to select candidates which apply to a broad spectrum of voters with many and varying interests.

With respect to the legislators, themselves, yes, a legislator who represented Gloucester, which for the moment we will assume is a highly-religious, Bible-belt type of place, and who also represented Atlantic which is interested in alcohol and entertainment --

MR. COTTON: Incidentally, that was just a hypothetical situation.

MR. KESTIN: I appreciate that. [Continuing] -- and also represented Atlantic which is interested in alcohol and entertainment and the like, yes, he would be in a dilemma. And because he would have to justify his actions to all his constituents, I think he would be forced to ask himself, "What's in the best interest of the State of New Jersey," and

justify his actions to his constituents in that manner.

MR. COTTON: Or perhaps, sir, could I suggest to you, "Where are the most votes coming from and whom am I going to have to sell down the river and whom am I going to have to please?" This is a strong possibility.

MR. KESTIN: This is always a strong possibility.

MR. COTTON: So you will admit certainly for ease of government - and I use that to cover a broad spectrum of things - unicameralism, save this one point that you make, representing different interests, which may or may not have a reasonable relationship to the end that we are trying to achieve - this is the only reason or the only substantial reason. I mean, the checks and balances that you talk about, you certainly must agree with a little thinking, the type of thinking that went into Proposal #5, proper safeguards of passage of legislation could be built into a unicameral system.

MR. KESTIN: I have doubts. I have strong doubts about that. You will not have the double check on legislation - you just can't - in a unicameral house.

MR. COTTON: And you don't think with the flexibility and ingenuity of the people here that we could adopt some type of plan that might prevent hasty legislation.

MR. KESTIN: I think it would be extremely difficult if you are dealing with only one house. I truly do. I want to make this point. I tried to include it in my formal remarks and couldn't, but I knew I would have the opportunity to make it. I think that the example of Nebraska is singularly

inadequate for New Jersey.

MR. COTTON: I agree with that.

MR. KESTIN: Nebraska's legislature is totally and absolutely nonpartisan. I have been assured by residents of Nebraska that this is true. They are really nonpartisan. The people of New Jersey - at least the people who are in a position to exercise power - would never accept nonpartisan government. I don't think they should. But I think that it is clear that they never would. And while the Nebraska example may work well in Nebraska with nonpartisan politics, I doubt it would work well in New Jersey.

MR. COTTON: It would have to be tailored for New Jersey. I agree with you.

One last comment on Professor Lockard's comment, when you said you didn't feel that voting for 19 people might be confusing, I would just ask you this in regard to voter habits: In your practice as an attorney or perhaps a candidate, have you ever been involved in a vote recount and had the opportunity to look at some ballots?

MR. KESTIN: Yes, I have.

MR. COTTON: Then you know --

MR. KESTIN: There will always be confused voters.

MR. COTTON: Thank you.

CHAIRMAN KEEGAN: Gentlemen, we are running out of time. We will entertain two more questions. Senator Dumont.

MR. WAYNE DUMONT, JR.: You advocate here a legislature of 154 members.

MR. KESTIN: 125, Senator.

MR. DUMONT: 125 plus 29 in the Senate. Isn't that true?

MR. KESTIN: Oh, the entire legislature, yes, sir.

MR. DUMONT: -- as against or contrasted now with a legislature of 89 and prior to January 11, it was only 81. Now how do you justify that much of an increase in New Jersey when it is a well-known fact that increasing the quantity does not necessarily improve the quality of either legislators or legislation?

MR. KESTIN: I think there are numerous examples of legislatures throughout the country which are even larger than the one that Proposal #5 contemplates in states which are not as well able to support them as New Jersey. New Jersey's legislature is very small compared to many places generally.

MR. DUMONT: Is that bad?

MR. KESTIN: Not necessarily. But I don't think a large one is necessarily bad either if you can achieve representation on a county-by-county basis which has something in tradition and heritage to speak for it, Senator.

MR. DUMONT: Well, you also mentioned, I think, in reference to answering one of Delegate Cotton's questions that you would prefer to observe county lines. Yet as I read one of your senate districts in here - I don't have the plan in front of me - you would have Sussex, Warren and Hunterdon and a portion of Morris and Somerset perhaps, which certainly does not observe county lines.

MR. KESTIN: The Proposal requires that the redistricting

observe county and municipal lines wherever practicable. Where you are creating only 29 single-member districts, however, I think it is an impossible task to recognize them absolutely and completely. I think there will have to be some cutting across.

MR. DUMONT: Now finally, don't you think it violates the "one man, one vote" principle when each voter in Essex County is voting for 19 members of the General Assembly?

MR. KESTIN: No, sir, I don't. It certainly doesn't violate what the Supreme Court had in mind in Reynolds v. Sims. It is how each voter is represented in the State Legislature that the court was primarily concerned with and each person in the State of New Jersey will have an equal voice or equal representation in the State Legislature under this Assembly Plan.

MR. DUMONT: Thank you.

MR. WILLIAM L. ROACH, JR.: I am William Roach of Morris County. Mr. Kestin, I have a more technical question for you. The method of apportionment you propose for the Assembly is technically known, I believe, as the Vinton Method of Apportionment. Can I ask why you chose that method in preference to such popular competitors as the Method of Equal Proportions and the Method of Major Fractions, etc.?

MR. KESTIN: For several reasons. The first reason was that there was little, if any, difference in the results as between these methods. On occasion there was some small

difference. Most importantly, was that this approach is most easily reducible to formula, to a comprehensible scheme on paper and automatically applied. There is no room for discretion whatever in apportioning the Assembly under this Plan. Each of the other methods, while almost entirely automatic, do, as far as I am concerned, contain room for discretion here and there, not considerable, I will admit.

I might add that the deviations which this plan produces, while in some instances there are some greater deviations, in others, there are some smaller; by and large across the board I think the deviations more closely approach the norm in this method.

MR. ROACH: Are you aware of the fact that the Vinton Method is subject to the Alabama paradox?

MR. KESTIN: I am. I have heard a lot about the Alabama paradox. I have read a lot about the Alabama paradox, whatever there is to read about it. I don't think that this Convention or the Legislature or any body which is dealing with what is essentially legislation can provide for everything that might go wrong. That is what the courts are there for too. The Alabama paradox is something that is so unlikely to arise that I personally feel the Convention oughtn't to trouble itself with it.

MR. ROACH: Is it not true that when the Congress of the United States was apportioned by the Vinton Method between 1850 and 1900 that the Alabama paradox arose several times?

MR. KESTIN: That may be true. I don't know.

That may be true. I have heard it said that that happened, yes.

MR. ROACH: Thank you, Mr. Kestin.

CHAIRMAN KEEGAN: One further question.

MR. NORMAN H. ROTH: Mr. Kestin, I am Norman Roth of Hudson County. With the thought in mind that the "one man, one vote" rule was to bring the responsibility of the elected official to the people, would it not work out fairer in your mind if from multi-representative districts, you had each man representing the equivalent number of people so that one big city in one big county could not control the entire delegation?

MR. KESTIN: You are talking of subdistricting within counties.

MR. ROTH: That's right.

MR. KESTIN: Yes, this has something to be said for it. I cannot deny that. My fascination with Proposal #5 is that it achieves this compromise between multi-member and single-member districts which would not be achieved if you had single-member districts for the Senate and then subdistricts within the counties for the Assembly where the Assemblymen would be representing essentially single-member districts also.

MR. ROTH: Taking you one step further with that, if you would grant that you would have a better type of representation as such, if this Convention came down to a deadlock on a point of one house being at large, that would be your senate, and the assembly being individual districts,

would you not say that if a compromise were to be effected, it should be in the bigger house so that you could have each man representing the equivalent district of what you are talking about as the ideal?

MR. KESTIN: -- a fewer number of voters.

MR. ROTH: -- a fewer number of voters.

MR. KESTIN: No, I frankly don't think it matters.

MR. ROTH: But you think we ought to deadlock altogether and waste our time and effort here?

MR. KESTIN: no, no.

MR. ROTH: I was just asking.

MR. KESTIN: Well, I don't think theoretically and practically to my mind, it matters from the point of view of the type of representation each voter would get, whether he has an assemblyman who represents him in a very small unit or whether he has nine assemblymen representing him from a much larger unit.

MR. ROTH: That wasn't my question, sir. My question was: If we deadlocked on the issue of whether we were to have one house at large and one house on districts, do you think that the distinction is fine enough to break up the time of all the men that have attended and the ladies that have attended this Convention, to just have it come back with nothing, or do you think it would more effective if the Senators were elected at large from bigger districts and the Assembly represented smaller districts?

MR. KESTIN: I see the question. I would say that it is much more preferable for this Convention to come out

with something than with nothing.

CHAIRMAN KEEGAN: We have one more question.

MR. ARTHUR J. SULLIVAN, JR.: I am Arthur Sullivan, Delegate from Passaic County. Wouldn't it necessarily make for less voter confusion if you confined your at large voting to the smaller house and had your single districts in the larger house? Then under such an arrangement you necessarily eliminate any case where one voter has to worry about nineteen representatives.

MR. KESTIN: Yes, there would be less confusion.

Every one of these questions that I have answered yes to in an apparent contradiction of my basic position, the contradiction is only apparent because my support for Proposal #5, my fascination with it, is as a whole. Each of these questions has torn apart a portion of it and I can answer yes or no to a question and appear to contradict myself. But I am speaking to a plan as a whole for the entire legislature and as a whole I think Proposal #5 is better than any plan which has been submitted to date and the best that I can imagine anyway.

Thank you very much for having me today.

[Applause]

CHAIRMAN KEEGAN: Gentlemen, there are a few announcements if we can make them. I am informed that there is a meeting of the Republican Delegates in the room immediately next to us. I guess it is Room D. And the presence of you gentlemen is required.

I can point out to the members of this Committee

that their attendance at any of these conference meetings or whatever you call them, may go over four o'clock. This Committee is scheduled - both sections of the Apportionment Committee are scheduled to meet here at four o'clock in this Room. The Chair earnestly requests that consistent with your obligations to other meetings, you keep in mind that we will be meeting in a joint meeting here at four o'clock.

May I also make the announcement that today's hearing will be the end of public hearings for this Committee. I will your attention to the fact that all proposals must be submitted by next week's Convention date.

The Democratic members of the Apportionment Committee will meet here right now.

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