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Calendar No. 3

71st Congress, 1st Session | SENATE | Report No. 2

CENSUS AND REAPPORTIONMENT

April 23, 1929.—Ordered to be printed

Mr. Jones and Mr. Vandenberg, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 312]

The Committee on Commerce, to whom was referred the bill (S. 312) to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress, having considered the same, report favorably thereon, and recommend that the bill do pass without amendment.

That part of the bill relating to the census is substantially the same as the bill which passed the House last session. The following changes have been made in the language of the bill as it passed the House:

Page 1, line 4, the word "unemployment" has been inserted. Senators Couzens and Wagner have taken a special interest in the matter of a census of unemployment in the country and the committee has been glad to provide for this.

Line 5, "1929" has been substituted for "1930".

Page 2, line 2, after the words "Canal Zone" there have been inserted a comma and the word "all".

Line 9, after the word "period", the following has been inserted:

Provided, That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within twelve months and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States.

Page 3, line 5, at the beginning of the line the words "annual or piece-price" included in the House bill, have been omitted.

Line 7, the following has been inserted:

Provided, That census employees who may be transferred to any such temporary positions shall not lose their permanent civil-service status by reason of such transfer.

Line 18, the word "temporary" has been inserted in lieu of the words "clerical, mechanical, and subclerical".

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Page 4, lines 8, 9, 10, 11, 12, 13, 14, 15, 16, to and including "6.)" in line 17, have been inserted in lieu of the House language, i. e., "Employees of the Post Office Department may, with the consent of the Postmaster General, in cases of necessity, and in far distant and outlying localities, be appointed and compensated for work performed under the provisions of this act."

Line 19, after the words "compensation at", there have been omitted the words "per diem or piece-price" as included in the House bill.

Page 5, line 13, the word "unemployment" has been inserted.

Page 6, line 20, "November" has been substituted for "May".

Page 12, lines 24 and 25 are new language.

Page 13, line 17, "1934" has been substituted for "1935".

Line 24, "November" has been substituted for "May".

Page 15, sections 19 and 20 are new language.

Page 16, line 11, the bill to provide for apportionment of Representatives in Congress has been added as a new section to the census bill, i. e., section 22.

Senator Vandenberg, a member of the committee has taken a great interest in the apportionment bill and, because the functions served by them interlock, the committee, at his suggestion, has joined the census bill and the apportionment bill. The following is submitted by Senator Vandenberg as a part of this report:

REAPPORTIONMENT

The committee has joined the census bill with the reapportionment bill because the functions served by them interlock. Indeed, there is but one basic constitutional function served by the census. It is to provide an enumeration of the people for the purpose of redistributing congressional representation proportioned thereto. The debates in the Constitutional Convention clearly prove that this necessity was the sole motive for requiring the decennial censuses at all. The faithful decennial habit of following the census with a responsive reapportionment was practiced from 1790 to 1910. The mandate of the Constitution, in other words, is accepted and validated by 120 years of congressional action. In putting the two functions into one law, therefore, the committee but emphasizes the order of the Constitution and the congressional practice of more than a century. It warrants a constitutional use of the census in the future.

The language of this recommended measure as it relates to apportionment closely follows the language of the so-called Fenn bill (H. R. 11725), which was passed by the House on January 11, 1929, and favorably reported to the Senate by this committee on January 14, 1929, but which failed of Senate consideration prior to adjournment. The basic purpose, namely, to validate Article I of the Constitution, and the basic phraseology remain the same. There is a change at two points in the body of the bill, principally to make it more flexible in its accommodation to the serial judgments of Congress in ministerial details. These will be analyzed subsequently.

NEED FOR THE BILL

The need for legislation of this type is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. The House has twice

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acted, but the Senate has twice declined to approve, although this is a problem primarily affecting the House itself. As a result, great American constituencies have been robbed of their rightful share of representation, not only in the Congress itself but also in the presidential Electoral College. On the prospective basis of the next census, more than 30,000,000 people are relatively disfranchised as a result of this lapse in a fundamental constitutional function. Already we have had two presidencies and four Congresses elected out of an anticonstitutional source. On the basis of census estimates, it is safe to say that reapportionment, with the present size of the House maintained, would affect 23 seats in the House of Representatives and 23 votes in the presidential Electoral College. So large a factor of misrepresentation is a travesty upon representative democracy, a flagrant mockery of constitutional equalities, an ugly hazard to domestic tranquility, and an insufferable affront to victimized States.

Despite the progressive development of this trespass during recent years, Congress has failed to correct the situation. The Senate has refused either to accept reapportionment initiated by the House or to originate such legislation itself. There is no convicing reason to anticipate that the same influences and considerations which have prevented constitutional apportionment in the past will not prolong these defaults indefinitely. As entrenched inequities increase, their voluntary correction proportionately becomes less easy and less likely. Thus it becomes evident that the protection of the roots of our representative Government requires an enabling act paralleling and authenticating Article I of the Constitution. Otherwise, the article is impotent. Therefore, the committee recommends this legislation. If it proves to be unnecessary—as will be the case if each decennial Congress hereafter does its independent duty to reapportion the Congress—no harm is done. If it proves to be necessary—as will be the case if congressional default persists—then its invocation will preserve the constitutional character of our representative institutions.

The Federalist Papers, oracle of the Constitution, said: "A power equal to every possible contingency must exist somewhere in the Government." Without this proposed legislation, where is the "power" to compel effective attention to the serious "contingency" created by the failure of Congress to apportion Representatives as the Constitution requires? Where is the "power" which shall protect the paramount theory of representative equality in our system of constitutional government? The "power" is lacking until this law is passed.

WHAT IS PROPOSED?

The theory of this legislation, as originated by the House in the last session, is that in every decennium the Congress shall have a free opportunity—as is its right and responsibility—to translate the current census into a new apportionment on whatever basis it pleases. There is no disposition or effect in this law which delimits freedom of action by Congress in this respect. This law does not operate unless Congress fails to act. In other words, it takes from Congress nothing except the right of inertia—the privilege of capitalizing inaction into a constitutional affront. Even then it accepts whatever decisions Congress itself may have last made as to the size of the

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House or the mathematical method of apportionment, and fits these indices to the new census enumeration. It preserves the status quo in every respect except as the new census requires, under the Constitution, a new application of these fixed indices to the new enumeration.

This proposal is not intended for 1930 alone. It is written in broad terms so that it will fit any subsequent decennial emergency which may arise. This is its great virtue. It is a permanent contribution to our representative institutions. It does not concern itself merely with the redistribution of a few seats which are contemporarily misplaced, serious as this immediate contemplation is, when one congressional district with one Congressman to-day has as great a population, in two typical instances, as have whole States with as many as eight Congressmen. The primary purpose of this proposal is to cure a basic statutory flaw and cure it with a formula which will be just as applicable in 1940 or 1950 or 1960 as in 1930. But perhaps it can best be visualized in its operations by indicating the schedule it would produce in connection with the next census and the next apportionment.

The census would be taken in November, 1929. One year later, with these figures in hand, the President would report the census figures, together with a table showing how, under these figures, the House would be apportioned with "the existing number of representatives" (which at this moment would be 435) "by the method used in the last preceding apportionment" (which was the method of "major fractions" as used in 1911). This report would be made in December, 1930, at the first day of the second regular session of the Seventy-first Congress. That entire session would be free to pass its own reapportionment on any basis it might see fit, fixing any size House it might desire and following any method it might care to embrace. But if it failed to act, then the Clerk of the House would notify the States in March, 1931, that the apportionment tables reported to Congress by the President, pursuant to a purely ministerial and mathematical formula, would be forthwith effective. Then the States would have the balance of 1931 and the first half of 1932 in which to redistrict themselves as they may choose. The new apportionment would govern the election of representatives to the Seventy-third Congress and presidential electors in November, 1932. Precisely the same process would protect reapportionment in each subsequent decennium.

OBJECTIONS

The committee believes that there are no sound objections to any phase of this proposal, particularly in view of the manner in which the phraseology of this new act meets certain previous objections to prior attempts at too much and needless detail.

The objection that this is an improper "delegation of power" to the Department of Commerce (which takes the census) and to the President (who reports the arithmetic) is answered by an examination of the facts. No power whatever is delegated. The Department of Commerce counts the people (as it always has done) and the President reports upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress

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itself, and to which there can be but one mathematical answer. Congress always has and always will depend upon outside experts to do this mathematical problem. The usual situation in this respect is not changed.

This objection, and the kindred objection that this is "anticipatory legislation," would defeat practically every enabling act ever written. But they are not infirmities. The Supreme Court repeatedly has passed upon this issue. It is settled. "Let the end be legitimate, let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, and consist with the letter and spirit of the Constitution, are constitutional." (McCullock *v.* Maryland, 4 Wheat. 316.) It equally is settled that the delegation of a purely ministerial function by Congress, in pursuit of these ends, is beyond constitutional question. "It is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact of the state of things upon which the enforcement of its enactment depends would be to stop the wheels of government and to bring about confusion, if not paralysis, in the conduct of the public business." (Union Bridge Co. *v.* U. S., 204 U. S. 364.)

Another objection to the previous bill was that the Secretary of Commerce should not be intrusted with the final responsibility for making so important a report to Congress. The new and pending bill recognizes this objection to the extent that the President is substituted for the Secretary of Commerce so that this function may be served by a constitutional officer. This makes for greater permanence, which is one of the major virtues to be desired in such a statute.

Other objections heretofore have complained against the identification of any specific House membership or any specific method of apportionment in a measure of this character. These objections are met—and, in the judgment of the Committee, the bill is improved—by the new language which accommodates itself to the serial decisions of Congress in respect to these details. Constant power is left with Congress to control these details if it sees fit to act. Thus, for example, if the Congress passes a reapportionment act in 1930–31 and decides to embrace the method of "equal proportions," this law will recognize and embrace "equal proportions" in 1940–41 and thereafter until again changed by Congress itself.

To identify any one method in this permanent act, whether the method of major fractions or equal proportions, would be to assume that science itself has traversed the subject with finality. Science is thus not static. For example, there are at least three other methods discussed in the report of the National Academy of Sciences, which is careful to delimit its present findings to "the present state of knowledge." Again, there never yet has been a deliberate effort to fix the constitutional objective which the method of apportionment should answer. In other words, the subject is far from closed. The last word by no means has been spoken. Scientists themselves will be among the first to recognize this fact, and, like the National Academy, scrupulously confess themselves limited to the "present state of knowledge." A permanent ministerial apportionment act should be susceptible of accommodation to the progressive state of knowledge. Progressive latitude is impossible if any one method be frozen into this neutral law. This act expressly and purposely avoids all limitation, leaving to each decennial Congress the right of unpreju-

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diced selection. Such a purpose can be achieved by the language proposed.

It should be stated in this connection that the quarrel over "methods" heretofore has magnified this factor out of all proper perspective. As a matter of fact, the choice between the two principal rival methods would have affected but three seats out of 435 in 1920 and, on the basis of census estimates, would affect but one seat out of 435 in 1930. The basic problem involved in this contemplation is too great and too vital to be submerged in controversy over comparatively trivial detail. This new proposal lifts itself above such controversy by confining its specific corrections to the fundamental default in all apportionment.

RECOMMENDATION OF EXPERTS

Previous discussions of this problem have been clouded by an external disagreement among scientists as to the best method for arriving at a constitutional conclusion. Happily, this controversy does not attach to the phraseology recommended in this bill. All of the experts attached to the Government are unanimous in recommending the passage of this bill. These experts comprise the advisory committee of the census, consisting at the present time of Prof. Walter F. Willcox, of Cornell, chairman; Prof. George E. Barnett, of Johns Hopkins University; Prof. Robert E. Chaddock, of Columbia; Prof. W. I. King, of New York University; and Prof. George F. Warren, of Cornell. The full committee met in Washington on April 13, 1929, and unanimously recommended the phraseology of this enabling act for ministerial reapportionment. (Their complete report is found at p. 94 of the Congressional Record.) This recommendation is approved by Dr. William M. Steuart, Director of the Census, and by Dr. Joseph A. Hill, assistant director. There is further concurrence by Prof. Carroll W. Doten, of Massachusetts Technology; Prof. Edwin R. A. Seligman, of Columbia; and Prof. Wesley C. Mitchell, of Columbia, all of whom are surviving members of the advisory committee of 1921 which last officially passed upon this problem. Doten, Mitchell, and Willcox have been presidents of the American Statistical Association. Seligman, Chaddock, Willcox, and Mitchell have been presidents of the American Economic Association. These are the two associations from which the membership of the advisory committee is drawn. Thus, there is no disagreement regarding this proposed measure by the experts upon whom Congress leans for advice in relation to problems of this character. They preserve their right of independent judgment as to details, but they insist, with the committee, that the need for this enabling act is fundamental and that it best serves its highest purpose by leaving details for the serial decisions of Congress in connection with actual apportionments.

CONCLUSION

With these credentials and for the urgent reasons given, the committee recommends the provisions in this bill, which will provide for ministerial apportionment in the event that any further decennial Congress declines to validate its decennial census. This breach in our system of representative institutions must be closed, not only for the sake of equity and justice to the people of the United States but also for the sake of the perpetuity of our institutions.

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