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REPORT TO
GOVERNOR NELSON A. ROCKEFELLER

by the

CITIZENS' COMMITTEE

ON

REAPPORTIONMENT

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WILLIAM HUGHES MULLIGAN
Chairman

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CONTENTS

PART ONE

| | PAGE |
|---|------|
| INTRODUCTION | 1 |
| SUMMARY OF RECOMMENDATIONS | 5 |
| | |
| I. QUESTIONS 1 AND 2. | 7 |
| "WHETHER A NEW APPORTIONMENT PLAN SHOULD BE EMBODIED IN A CONSTITUTIONAL AMENDMENT OR IN A STATUTE." "WHETHER A CONSTITUTIONAL CONVENTION SHOULD BE CONVENED TO CONSIDER A NEW APPORTIONMENT PLAN." A. The Stop-gap Plan | 7 |
| B. The Permanent Plan | 8 |
| 1. The Methods of Amendment | 8 |
| 2. The Timing of the Amendment | 10 |
| | |
| II. QUESTIONS 3 AND 9. | 11 |
| "HOW 'POPULATION' SHOULD BE MEASURED AND WHETHER A NEW CENSUS SHOULD BE TAKEN TO REFLECT THE LATEST FIGURES." "WHETHER REAPPORTIONMENTS SHOULD BE REQUIRED MORE OR LESS FREQUENTLY THAN ONCE EVERY TEN YEARS." A. Citizens | 12 |
| B. Voters | 14 |
| C. Registered Voters | 16 |
| D. Periodicity and the Need for a Special Census | 16 |
| | |
| III. QUESTIONS 4 AND 5. | 18 |
| "WHETHER THE TERMS OF LEGISLATORS SHOULD CONTINUE TO BE TWO YEARS, OR WHETHER LONGER TERMS ARE NOW DESIRABLE." "WHETHER THE NUMBER OF MEMBERS OF EITHER OR BOTH HOUSES OF THE LEGISLATURE SHOULD NOW BE CHANGED OR WHETHER ANY OTHER CHANGE IN THE STRUCTURE OF THE LEGISLATURE SHOULD BE MADE." A. Terms | 18 |
| B. Bicameralism | 20 |
| C. Size | 21 |

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SUMMARY OF RECOMMENDATIONS

In response to the Governor's ten questions, the Committee makes the following conclusions and recommendations:

1. The mandate of the District Court directs the enactment of a plan of apportionment no later than April 1, 1965. Accordingly, the only method of compliance with the Court's order is by statutory enactment.

Under the State Constitution, no constitutional amendment containing a new apportionment plan can be adopted before January 1, 1967, at the earliest. Although the Committee holds to the view that an apportionment plan should be eventually embodied in the State Constitution, it recommends that no constitutional amendment be proposed until such time as the Supreme Court of the United States has further delineated the full scope of the "one-man one-vote" rule.

2. When the scope of the "one-man one-vote" rule has been delineated, a constitutional amendment setting forth a permanent apportionment plan should be accomplished by legislative initiative rather than by a constitutional convention.

3. As the measure of population for apportionment, the use of residents, or citizens, or voters would appear to be valid under the Federal Constitution. The Committee makes no recommendation, however, as among these alternative measures of population. The report sets forth the policy and legal advantages and disadvantages involved in the possible alternative measurements of population. It is clear, however, that it is not possible to take a new census in time to comply with the District Court's directive to adopt an apportionment plan no later than April 1, 1965.

4. The District Court's order fixes the one-year terms for legislators until December 31, 1966. The Committee recommends that the term of the Senate members should be four years, and the term of the Assembly members should be two years.

5. A bicameral legislature is required by the State Constitution and no change can be effected by legislative enactment. The Committee concludes that bicameralism should be continued in any permanent plan to be incorporated in the State Constitution.

The number of legislators presently fixed in the State Constitution is no longer binding upon the Legislature, in view of the decision of the United States Supreme Court striking down the apportionment plan contained in the State Constitution. The Committee recommends that the number of members in both houses of the Legislature should be increased. The maximum number in the Senate should not exceed 65 and the maximum number in the Assembly should not exceed 195.

6. Senate and Assembly district lines should be drawn by the Legislature in the stop-gap plan required by the mandate of the District Court. The time limit fixed by the Court—April 1, 1965—does not permit a divided responsibility for the preparation of a completed plan.

7. In New York State, it is the county that has been, both traditionally and constitutionally, the political subdivision which is significant in legislative apportionment. The Committee recommends that county lines continue to be respected in any apportionment plan except where necessary to comply with the Supreme Court's requirement of substantial population equality among the legislative districts.

8. Total weighted voting is questionable as a matter of policy and law in either a stop-gap or permanent plan of apportionment and is therefore not recommended. Instead, the Committee recommends consideration of a system of fractional voting for members of the Assembly within the limitations contained in the report, for the stop-gap plan.

9. Under the Supreme Court decision, reapportionment is not required more frequently than every ten years. More frequent reapportionments can be accomplished only if voters are used as the measure of population or if the State is willing to incur the multi-million dollar expense for a special census.

10. Changes in the Election Law and the State's election machinery are necessary and desirable in connection with a new apportionment plan.

II.

QUESTIONS 3 AND 9.

"How 'population' should be measured and whether a new census should be taken to reflect the latest figures."

"Whether reapportionments should be required more or less frequently than once every ten years."²⁵

As noted earlier, *Reynolds* and its companion cases require that seats in both houses of a bicameral state legislature be apportioned on a "substantially equal population" basis. This raises the root issue as to what population means and how it can be permissibly measured.²⁶ This issue is a vexing one and has been the subject of a particularly prolonged discussion in the Committee.

There are at least three recognized measures of population:

- (1) Residents (*i.e.*, total inhabitants including aliens),
- (2) Citizens (*i.e.*, total inhabitants excluding aliens), and
- (3) Voters (*i.e.*, either qualified voters or persons who went to the polls at a given election).

The *Reynolds* case involved an apportionment plan based upon resident population, while *WMCA* involved citizen population. Tennessee's qualified voter base was a consideration in *Baker v. Carr*,²⁷ however, the Court never reached the merits and simply decided that a justiciable issue had been presented. In none of these cases did the Supreme Court question the propriety of any of these measures of population. Indeed, in the *Reynolds* case, the Court specifically referred to the arrangement of legislative districts based upon "residents, or citizens, or voters".²⁸

Accordingly, the Committee concludes that the use of either residents, or citizens, or voters as the measure of population would appear to be valid under the Federal Constitution. In so concluding, however, we recognize the difficulty of determining with any degree of confidence the position which the Supreme Court would take if it were directly confronted with the question as to the proper measure of population in any given case.

This difficulty is demonstrated by the language in the *Reynolds* case itself. Chief Justice Warren in *Reynolds* speaks at various times of "citizens", "voters", "residents" and "persons". The terms are used almost interchangeably throughout

²⁵ Questions 3 and 9 are considered together since periodicity is intimately entwined with the selection of an appropriate population base.

²⁶ The most complete discussion of the problem is by Dr. Ruth C. Silva: *The Population Base for Apportionment of the New York Legislature*, 32 *Fordham L. Rev.* 1 (1963). (This discussion ante-dated the Supreme Court decisions in the *Reynolds* and *WMCA* cases.)

²⁷ 369 U. S. 186 (1962). For a discussion of each of these cases, see Appendix 1, *infra*, p. 45.

²⁸ 377 U. S. at 577.

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the opinion, although each clearly has a different meaning. For example, the Chief Justice speaks of the fundamental principle of representative government in this country as "one of representation for equal numbers of people without regard to race, sex, economic status or place of residence within a State", but in the next sentence speaks of "the basic standard of equality among voters in the apportionment of seats in state legislatures."²⁹ "Votes of citizens" is referred to in several passages on pages 562 and 563 of the opinion, and on page 565 he states that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." On page 567 we find "population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." On page 568 the Chief Justice states "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

Apart from constitutional questions, questions of policy remain in the selection of the preferable measure of population. We make no recommendation as among the alternative measurements; we believe it to be in the public interest and in keeping with the task assigned to the Committee to set forth the arguments for and against the alternative measurements.

A. Citizens.

Sections 4 and 5 of Article III of the New York State Constitution provide for the apportionment of seats in the Legislature on the basis of citizen population.³⁰ The Supreme Court, in *WMCA*, noted the State Constitution's exclusion of aliens from the population base, but did not make any adverse comment on this point. It would appear, therefore, that the continuance of the alien exclusion would raise no questions under the State and Federal Constitutions.

In favor of the use of citizens as the measure of population, it can be argued that it is traditional, raises few legal problems, and for the stop-gap reapportionment would employ information presently available. Specifically, these arguments are:

- (1) It is consistent with the measure of population that traditionally has been used for legislative apportionment in this State.
- (2) It would raise few, if any, legal problems under either the Federal or the State Constitutions.
- (3) A special citizen census was taken in connection with the Federal decennial census of 1960, and the results are now available.
- (4) It would substantially equalize the number of residents for whom each member of a house of the legislature would speak and to whom he would be responsible.

²⁹ *Reynolds v. Sims*, 377 U. S. at 560-61.

³⁰ It is pertinent to note that the test for Congressional districting is the number of inhabitants excluding Indians not taxed. See Congressional Formula, Appendix 9, *infra*, p. 98.

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Against the use of citizen population based on census data, it is argued that it is unwieldy, inaccurate, unfair, expensive and inconsistent with the spirit of "one-man one-vote." Specifically, these arguments are:

- (1) It is unwieldy since it limits State legislative apportionment to a Federal census which is taken only once in ten years.
- (2) Doubts have been cast as to its accuracy, because of errors and the loose methods of enumeration.⁸¹
- (3) It is unfair because census figures include blocs of people who have no real roots in the community in which they are enumerated—e.g., prisoners, inmates of hospitals and other institutions, out-of-State students residing at colleges and universities in New York, seamen aboard ships in the harbors of the State and other "unattached" groups.⁸²
- (4) It is expensive⁸³ since it requires a separate tabulation on a block by block basis, excluding aliens.
- (5) Citizen population does not accurately reflect current population movements in an increasingly mobile society. For example, it is estimated that since 1960, Suffolk and Rockland Counties have increased in population by 26% and 18%, respectively.⁸⁴ The Committee is informed that since the 1960 census, in Queens County more than 5,000 one-family homes, 7,000 two-family homes and 40,000 multiple apartment units have been built. Moreover, it has been estimated by the U. S. Census Bureau that the State population has increased by some 700,000 persons since 1960.⁸⁵
- (6) The use of citizen population as a base gives different weights to the votes of citizens, depending on where they reside. For example, if there were two legislative districts, each having a citizen population of 100,000, and if 60% of the citizens in the first district voted while only 30% voted in the second district, a vote cast in the second district would have twice the weight of a vote cast in the first district. This result would appear to violate the principle of "one-man one-vote."

In considering the adoption of a permanent plan of apportionment by means of a Constitutional Amendment, there should be a restudy of the question whether

⁸¹ *Silva op. cit.*, *supra* note 28 at 14-15.

⁸² For a Synopsis of Census Rules, see Appendix 10, *infra*, p. 101.

⁸³ Estimated at \$288,000 in 1950 and \$395,000 in 1960. See *Silva, op. cit. supra* note 26 at 13-14.

⁸⁴ These computations are based upon estimates as of July 1, 1964. N. Y. Dep't of Health *Vital Statistics Review* (Oct. 1964) p. 126.

⁸⁵ N. Y. Times, Sept. 1, 1964, p. 37, col. 1.

citizens should continue to be used as the measure of population. In 1894, when the Constitutional Convention devised the present test, there was a disproportionately large percentage of aliens in New York City as compared with other parts of the State. The population of the State has become increasingly "homogeneous" since that time so that there may well be ground for eliminating a separate citizens enumeration especially since this has little or no effect on the shifting of legislative representation.³⁶

B. Voters.

While the State Constitution refers to the use of citizens as the measure of population, it is not clear whether, in the light of the Supreme Court's decision striking down the State's legislative apportionment plan, this provision remains binding. There is no clear-cut method of determining which sentences or parts of sentences contained in sections 3, 4 and 5 of Article III of the State Constitution have withstood the decision of the Supreme Court in the *WMCA* case.³⁷ Moreover, as noted above, the use of citizen population in 1894, when there was a disproportion of aliens in New York City as compared with the rest of the State, is intertwined with the apportionment formula which, the Supreme Court found, gave disproportionately greater weight to rural areas than to urban areas.

In evaluating the policy question as to what constitutes the proper measure of population, those who favor the use of voters urge that the voter base is accurate, easy to compute and to keep up-to-date, inexpensive to compile and more consistent with the spirit of "one-man one-vote."³⁸ Specifically, the following are the arguments in favor of the use of voters:

- (1) The "one-man one-vote" concept implies that voter equality is the desideratum. It follows that constituencies should be so fashioned as to comprise a substantially equal number of voters. No voter should be given greater weight than another for apportionment purposes merely because a larger number of non-voters lives in his district.
- (2) Data respecting voters are more readily available than are population statistics. Figures are available promptly after each election. This means that more frequent reapportionments—for example, every 6 or 8 years—could be enacted without the delay of a special census.
- (3) Data respecting voters can be computed without the expense of a costly census.
- (4) A voter base may stimulate voter participation since the citizen would know that the degree of future representation of his district would depend upon his casting a ballot.³⁹

³⁶ *Silva, op. cit. supra* note 26, at 17.

³⁷ See discussion in Appendix 1, *infra*, pp. 59-61.

³⁸ A presentation supporting the use of the voter base was prepared by the Honorable Francis E. Rivers, a member of the Committee, and is presented herewith as Appendix 11, *infra*, p. 103.

³⁹ This argument appears to the Committee to be merely conjectural and has not been factually demonstrated.

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- (5) A voter base for both houses of the Legislature was recommended by the 1938 Constitutional Convention.⁴⁰
- (6) A voter base is not unique. Qualified voters or some variant thereof is used as a base in one or both houses in Arizona, Massachusetts, Rhode Island, Texas and Tennessee.⁴¹
- (7) A voter base acts as a brake on the power of political bosses in low-voting districts. The use of citizen or resident population as a base gives disproportionate power to party leaders who can deliver to the polls a relatively small number of party faithful, who thereby control the choice of the legislator—the American equivalent of the English “rotten-borough” system.

Against the use of voters as the population base, it may be argued that equality of representation for all citizens is desirable, and this should not depend upon the incidence of voting. It also departs from the traditional New York citizen-population base. Specifically, these arguments are:

- (1) The apportionment base should not be restricted to that relatively small number of persons within a given area who are not only literate, over 21, residents of the State for at least one year (or for at least 90 days to be eligible to vote for president and vice-president) but who have registered and do, in fact, vote at the particular election to be used for purposes of apportionment.⁴² The result of using a voter base could well be that a person living in a populous area with a small proportion of regular voters would enjoy only half the representation of a person living in an area 50% less populated but having the same number of voters.
- (2) Voting patterns are not consistent throughout the State.⁴³ Areas with a high percentage of illiterate or otherwise culturally disadvantaged persons usually have a low percentage of voters, even though their need for adequate representation may be more demanding. Furthermore, voting patterns may be significantly affected by such natural phenomena as hurricanes or snow storms⁴⁴ or by unusual interest in a particular local issue.

⁴⁰ New York Constitutional Convention of 1938, Doc. No. 16, p. 49 (1938). The entire apportionment proposal of which the voter base was one part, was defeated by the electorate.

⁴¹ See Appendix 7, *infra*, p. 85.

⁴² At the general election in 1962, in only 5 of the 62 counties of the State did the percentage of population casting a ballot for governor equal or exceed 50%. See Appendix 12, *infra*, p. 106.

⁴³ *Ibid.*

⁴⁴ Since no such phenomena occurred in recent years, this argument has no validity insofar as the stop-gap plan of apportionment for immediate purposes is concerned. See Silva, *op. cit. supra* note 26, at 43-45. For the permanent plan of apportionment, it should be possible specifically to provide a special procedure to be followed in such cases.

- (3) Shifts in resident population are, within limitations, predictable, but there is virtually no way of anticipating the behavioral patterns of the electorate. Differences in voting patterns can occur, but these differences might have nothing to do with the swings in resident population. For this reason, an apportionment utilizing a voter base might not accurately reflect such swings.
- (4) A population base is employed in the vast majority of states today and a citizen-population base has been the traditional standard in New York; to adopt now a plan grounded upon past voting records might be deemed arbitrary.

To some extent, the disadvantages of using a voter base for apportionment purposes would be reduced in importance if the average number of votes cast in *two* elections were used rather than the vote cast in just *one* election.

These are some of the major policy considerations which the Legislature of the State of New York should weigh carefully before deciding on a course of action.

C. Registered Voters.

In discussing the voter base we have not distinguished between registered voters and persons who went to the polls at any given election. If registered voters is to be the test, such arbitrary factors as natural catastrophes would be eliminated. If registered voters are to be utilized as a base, the Committee is concerned by the lack of a uniform registration system in the State.⁴⁵ At the present time in this State we find three types of registration: annual personal, permanent personal and permanent nonpersonal.⁴⁶ The Committee urges that the Legislature study the question of a mandatory system of uniform registration.⁴⁷

D. Periodicity and the Need for a Special Census.

As to the frequency of the apportioning process (periodicity), Chief Justice Warren has this to say in the *Reynolds* case:

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every ten years coincides with the prescribed practice in 41 of the States. . . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than

⁴⁵ See *Silva, op. cit., supra* note 26 at 20.

⁴⁶ See Appendices 12 and 13, *infra*, pp. 106-109.

⁴⁷ See Appendix 13, *infra*, p. 108.

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every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.⁴⁸

The Committee believes that if the citizen population base is retained, 1960 census figures may be appropriately utilized in any stop-gap plan of apportionment. In the permanent plan the decennial census would also appear to be constitutional and apportionment at ten year intervals permissible. In a voter base plan six or eight year frequency is possible and desirable. The permanent plan in any event should fix the period of reapportionment.

If the present citizen-population base is to be retained for purposes of the next apportionment, the question is posed whether a special interim census should be taken. Time does not permit the completion of a special census for use in a statute to be enacted before April 1, 1965, the deadline imposed by the District Court. For future planning purposes it should be noted that a special census is estimated to cost \$4.5 million.⁴⁹

⁴⁸ 377 U. S. at 583-84.

⁴⁹ The Committee has been so advised by the U. S. Bureau of the Census which also indicated one year would be required for completion.