HJR

45

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 29, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 2-28-92

The JUDICIARY Committee considered: HJR 45

HOUSE JOINT RESOLUTION NO. 45 REAPPORTIONMENT BOARD & REAPPORTIONMENT

Proposing amendments to the Constitution of the State of Alaska relating to reapportionment of the legislature.

RECOMMENDATIONS: [✓] the same title
be replaced with CS HJR 45 (JUD) [ ] a new title

[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal note(s) GOV. - Div'n of Elections

[ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Dave Donley	/				
[illegible]	/				
[illegible]	/	Mark Stanley		X	
[illegible] Ellis	X	Terry Martin		X	
		[illegible] Miller		/	

Dave Donley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HJR 45

Revision Date:
Title: Amendment to the Constitution-Reapportionment of the legislature.
Sponsor: House Judiciary Committee
Requestor: House State Affairs

Department Affected: Office of the Governor-Elections
BRU: Division of Elections
Component: 11 - Primary and General Elections

COMPONENT SERIAL NO. 0022

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	2.2*	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.) * This figure covers cost of inclusion of information about this issue in the Official Election Pamphlet as required by AS 15.58, and programming for Datavote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing of an additional ballot card, the fiscal impact would be: 53.4.

Prepared by: Elizabeth Ziegler, Deputy Director
Division: Elections
Phone: 465-4611
Date: 01/10/92

Approved by Commissioner: Carlotta C. Thickstun
Agency: Office of the Governor
Date: 01/10/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
HJR45.FN

Fiscal Note - Division of Elections

Alaska State Legislature

House of Representatives

House Judiciary Committee

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State Capitol
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SPONSOR STATEMENT

HJR 45 proposes a ballot proposition which amends the Alaska Constitution to reduce the influence of partisan politics on the redistricting process, and to eliminate provisions of the Alaska constitution that have been held to be unconstitutional under federal law.

Alaska is one of two states in the country in which the Governor has sole responsibility for redistricting (Maryland is the other state). Although the framers of the Alaska Constitution adopted this unique approach to reapportionment in an attempt to remove partisan politics from the redistricting process (see attachment 1), to date every attempt at redistricting in Alaska has been contentious and partisan.

The constitutional amendment set out in HJR 45 would transfer responsibility for redistricting from the governor to an independent reapportionment board. The advantages of having redistricting done by an independent board are:

- the reapportionment plan would be drawn by a body that does not have a direct stake in the final outcome;

- existence of an independent board would help take the politics out of an extremely political and divisive issue, and the process would become more technical, thereby enabling a fair plan to be drawn;

- a board would be more willing to create a plan with balanced districts, thereby allowing for competitive elections;

- the specter of gerrymandering, and the sense of unfairness that many people believe taints the current process, will be eliminated by having an independent board conduct redistricting.

In addition to the recurring problems with partisan political considerations controlling the redistricting process, many of the provisions of the reapportionment article of the Alaska Constitution are unconstitutional under the federal constitution as a result of the "one person, one vote" decisions of the U.S. Supreme Court (see attachment 2). The amendments proposed in HJR 45 correct these constitutional problems.

Alaska State Legislature

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SUMMARY OF HJR 45

CONSTITUTIONAL AMENDMENT RELATING TO REAPPORTIONMENT

HJR 45 changes the reapportionment process from the current system where the Governor has sole control over redistricting, to a system where redistricting is done by an independent, non-partisan reapportionment board. An outline of the key provisions of HJR 45 follows.

I. **Duties of Board:** The reapportionment board has responsibility for developing and establishing a redistricting and reapportionment plan after each decennial census. In addition to most of the existing criteria for drawing boundaries, a new criterion of political fairness is added.

II. **Makeup of Board:** The reapportionment board has nine members:

A. Appointed by:

1. Governor - one member

2. House caucus of party with largest number of representatives - two members

3. House caucus of party with second largest number of representatives - two members

4. Senate caucus of party with largest number of senators - two members

5. Senate caucus of party with second largest number of senators - two members

B. Qualifications/disqualifications of members:

1. Can't be public official or public employee.

2. Can't run for legislative office in the next two elections after term of office on board expires.

SUMMARY

3. No more than five members of board can be members of the same political party.

4. No more than five members of board can be from the same judicial district and there must be at least one member from each judicial district.

C. Selection of Chair:

1. Elected by the board from the members.

2. If there is an impasse and a chair is not elected within 14 days of appointment, the majority of the Supreme Court must choose a chair from the membership within seven days of the end of the 14 day impasse.

III. **DEVELOPMENT OF REAPPORTIONMENT PLAN**

A. Public hearings must be held in each judicial district after issuance of draft plan and before issuance of final plan.

B. Draft plan must be completed 18 months before the date of the first general election following the official reporting of each decennial census.

C. Final plan must be completed 14 months before the general election.

IV. **ELIGIBILITY OF CANDIDATES AFTER REAPPORTIONMENT**

In the election held after a reapportionment plan is adopted, a person can run for the legislature in the district in which that person's residence is located or in a new district that contains part of the former district in which the person resides, even if the person's residence is not located in the boundaries of the new district. If a person is elected in a district in which the person does not reside, the person has one year from the election date to physically relocate to the new district.

Alaska State Legislature

House of Representatives

House Judiciary Committee

Chairman Dave Donley

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DESCRIPTION OF CSHJR 45 (JUD)
REAPPORTIONMENT

I. It provides for a reapportionment board to develop and establish a redistricting and reapportionment plan after each decennial census. In addition to most of the existing criteria for drawing boundaries, a new criterion of political fairness is added.

II. Makeup of board (nine members).

A. Appointed by:

1. governor - one member;
2. majority caucus in house - two members;
3. minority caucus in house (second largest number of representatives) - two members;
4. majority caucus in senate - two members;
5. minority caucus in senate (second largest number of senators) - two members.

B. Qualifications and disqualifications.

1. Can't be public official or public employee.
2. Can't run for legislative office in the next two elections after term of office on board expires.
3. No more than five members can be members of the same political party.*
4. No more than five can be from the same judicial district and there must be at least one member from each judicial district.

C. Chairperson - elected by the board from the members.

III. Reapportionment plan.

A. Public hearings must be held in each judicial district after issuance of draft plan and before issuance of

B. Draft plan must be completed 18 months before the date of the first general election following the official reporting of each decennial census.

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* Currently, there is no absolute restriction on party membership.
final plan.

C. Final plan must be completed 14 months before the general election.**

D. Adoption of final plan takes votes of 6 of the 9 members. If any one plan is unable to get 6 votes:

1. the Supreme Court shall appoint a three judge panel;

2. within 45 days, the three judge panel shall select one proposal from the three proposals receiving the most number of votes by the board; and

3. the proposal selected may not be changed and becomes the final plan.

IV. Provides for expedited hearings and appeals if the final plan is challenged in the state courts.

V. Eligibility of candidates after reapportionment. In the election held after a reapportionment plan is adopted, a person can run for the legislature in the district is which that person's residence is located or in a new district that contains part of the former district in which the person resides, even if the person's residence is not located in the boundaries of the new district. If a person is elected in a district in which the person does not reside, the person has one year from the election date to physically relocate to the new district.

VI. Repeals existing sections of the constitution which have been found unconstitutional by Alaska and federal courts.

** This shortens the current time provisions to provide the greatest possible public notice of changes. This is possible largely because of computerization of the reapportionment process.

Alaska State Legislature

House of Representatives
House Judiciary Committee
Chairman Dave Donley

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M E M O R A N D U M

TO: Members of the House Judiciary Committee

FROM: Chairman Dave Donley

RE: CSHJR 45 (State Affairs), Proposing amendments to the Constitution of the State of Alaska relating to reapportionment of the legislature.

DATE: January 27, 1992

Why amend the state constitution regarding reapportionment?

First

Much of the Alaska Constitution's language on reapportionment is in violation of the federal or state constitutions or is obsolete. Because of this, it is impossible by reading our state constitution to obtain an accurate explanation of the reapportionment process in Alaska. The following sections or portions of sections of Article VI of the Alaska Constitution are either unconstitutional or are obsolete:

Section 2, Senate Districts, is not constitutional as written. In Wade v. Nolan, 414 P.2d 689 (Alaska 1966), the Alaska Supreme Court concluded that the state's senate districts did not comport with the U.S. Constitution.

Section 3, Reapportionment of House, is outmoded in part and unconstitutional in part. The constitution gives reapportionment authority to the governor and the board only as to the house. However, since Nolan, this authority has been interpreted to allow reapportionment of the senate as well as the house. The second sentence, requiring reapportionment to be based solely on civilian population,

was declared unconstitutional in Egan v. Hammond, 502 P.2d 856 (Alaska 1972), because it disenfranchises the military.

Sections 4 and 5, Method of Reapportionment and Districts, are inconsistent with U.S. Supreme Court decisions and are no longer considered by the reapportionment boards or cited by the courts in their reapportionment decisions.

Section 6, Redistricting, insofar as it refers to the retaining or combining of election districts provided for in Sections 4 and 5 and refers to civilian population, is unconstitutional. Otherwise Section 6 is still viable.

Section 7, Modification of Senate Districts, is clearly unconstitutional and dead. Its intent was to preserve senate districts based on geographic area and not population.

Sections 8 - 11 retain their viablility.

Second

Alaska is the only state which places exclusive power of reapportionment with the governor. The reason for this unique system no longer exists and Alaska should adopt a fairer system in conformity with other states.

The framers of the Alaska Constitution decided to provide for reapportionment of the legislature through a reapportionment board in the executive branch rather than allowing the legislature to reapportion itself, as is the case in a vast majority of the states.

The Alaska Supreme Court addressed this question in Wade v. Nolan, 414 P.2d 689, 694-695, which concerned reapportionment of the Alaska Senate after the U.S. Supreme Court's "one person, one vote" decisions: "... the Alaska Constitutional Convention purposely avoided placing any authority or responsibility for reapportionment in the legislature. The Convention was aware of the notorious and frequent failure or downright refusal of state legislatures to comply with their constitutional or statutory duty to reapportion."

At the time of the drafting of Alaska's Constitution, the U.S. Supreme Court had consistently held that suits

challenging malapportionment of state legislatures were nonjusticiable. However, in 1962, in Baker v. Carr, 369 U.S. 186, the U.S. Supreme Court reversed several decades of precedent to the contrary and held that federal courts could indeed hear such suits on equal protection grounds. Then, in 1964 the court upheld the authority of a federal district court to impose its own interim reapportionment plan on a state legislature that had been unable to reapportion itself constitutionally. Reynolds v. Sims, 377 U.S. 533. Thus, if the legislature had the responsibility of reapportioning itself and it failed to do the job adequately, either federal or state courts could step in, as was definitely not the case when our constitution was written.

Changing circumstances have basically done away with the reasons for reapportionment being a function of the executive branch in Alaska. These circumstances, when combined with the fact that not a single gubernatorial reapportionment since Statehood has ever failed to be followed by a judicial challenge, should say to us that we need to get politics out of this process to as great an extent as we can and look for a new way of accomplishing redistricting and reapportionment.

That is why I have chosen an independent board under the legislative branch for this task. Eighteen states use independent boards or commissions in some manner and half of these give the boards the absolute responsibility for developing those states' plans. I have combined what seemed like the best of those plans, with particular emphasis on Hawaii's framework, to come up with HJR 45.

What does this amendment do?

I. It provides for a reapportionment board to develop and establish a redistricting and reapportionment plan after each decennial census. In addition to most of the existing criteria for drawing boundaries, a new criterion of political fairness is added.

II. Makeup of board (nine members).
  A. Appointed by:
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1. board shall transmit all proposals to the Supreme Court;

2. the court shall appoint a three judge panel and transmit the three proposals that received the greatest number of votes by the board; and

3. within 45 days the panel shall select one of the proposals without change as the final plan.

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** This shortens the current time provisions to provide the greatest possible public notice of changes. This is possible largely because of computerization of the reapportionment process.

NATIONAL CONFERENCE OF STATE LEGISLATURES

1560 BROADWAY SUITE 700 DENVER, COLORADO 80202
303-830-2200 FAX: 303-863-8003

MEMORANDUM

To: Hayden Kaden
From: Tim Storey
Date: February 4, 1992
Re: Proposed House Joint Resolution No. 45

As you requested, I have reviewed the proposed amendments to the Alaska Constitution regarding the establishment of a reapportionment commission. Currently, nine states have some type of commission with original authority for producing a state legislative redistricting map. The enclosed parts, which I think you may already have, describe the commissions in those states.

I strongly encourage you to contact some legislative staff colleagues in a sample of the states that presently utilize commissions. They will be able to give you insight into the advantages and disadvantages of a commission system as compared with redistricting within the traditional legislative process. I have attached a list of contacts to assist you.

I realize that Alaska is unique in this area since the governor actually has the authority to issue the final plan. In no other state does the governor have such powers in relation to redistricting. Of course in most states, the governor has veto power over any plan enacted by the legislature. In Maryland, the governor drafts the initial legislative maps, but they must then be approved by the legislature. Arkansas's governor also has considerable influence by virtue of his seat on their redistricting commission with only the attorney general and the secretary of state as the other members.

Having read through your proposal, I note that it incorporates aspects of various commissions in other states. For example, three states preclude commissioners from running for the legislature under the lines that they draw. Your proposal also is commendable for establishing specific deadlines for action. And, your attention to public input is important to the process. A notable change in the 1990's round of redistricting has been the emphasis placed on the issue of public access, so it is good that your proposal addresses this issue. You may even want to consider public hearings after the proposed plan has been issued by the commission. It is also noteworthy that you have provided a mechanism in the event that the commission is unable to come up with a plan. In many states there is no formal backup, so it requires parties to file suit in either state or federal court.

Please feel free to contact me if you have further questions. I am eager to assist in any way I possibly can.

Contacts from other states with redistricting commissions:

Colorado:

Becky Lennahan
Deputy Director
Office of Legislative Legal Services
(303) 866-2045
*** Becky is the lead staff person for the Colorado commission.

Hawaii:

Anne Lee
League of Women Voters
(808) 395-0115
*** She is very knowledgible on the Hawaii system and was an active participant in their process.

New Jersey

Donald Stokes
Dean of the Woodrow Wilson School
Princeton University
(609) 258-4800
*** Stokes was the "public member" of New Jersey's commission in both 1980 and 1990. He believes strongly that the commission model is the best way to go.

Ohio

Jim Tilling
Chief of Staff
Ohio Senate President's Office
(614) 466-2510
*** Jim was the key staff person to Ohio's commission from the Ohio Senate and is a long time observor of redistricting. He is currently the Vice-Chair of NCSL's Reapportionment Task Force.

Pennsylvania:

Barbara Brown
(215) 875-7038
*** She was the independent counsel to Pennsylvania's commission.

Mark McKillop
(717) 783-5193
*** Mark works for the Pennsylvania House Democrats and has some strong opinions about the role of politics in redistricting whether by commission or not.

Washington:

Jennifer Helget
(206) 786-7935
*** Jennifer staffs Washignton's rather unique public redistricting commission.

Iowa:

Gary Kaufman
Legal Counsel
Legislative Service Bureau
(515) 281-3994
*** Although Iowa does not have a commission system per se, their method is very unique and elliminates much of the political discord that often accompanies redistricting.

DIVISION OF LEGAL SERVICES

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240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM February 6, 1992

SUBJECT: Legislative members' qualifications (CSHJR 45 (Jud))
(Work Order No. 7-LS1035\M)

TO: Representative Dave Donley

FROM: Jack Chenoweth
Legislative Counsel

With reference to my February 4 memo on this subject --

You, I am sure, know--I did not know until late yesterday--that Hawaii has established in its constitution a reapportionment commission that has the same composition and manner of appointment as the one you are considering in HJR 45. The state has also adopted in its constitution a bar against those persons serving on the commission from eligibility for election to the legislature for the two following general elections. We have the material from the 1978 Hawaii Constitutional Convention prepared, published, and distributed by the state at which this commission idea was presented, and nothing in that background material indicates that the convention was concerned about the possibility that the disqualification of these commission members from eligibility for election to the state legislature might raise an equal protection problem. The statute volume does not carry an indication of any litigation concerning this provision since in its insertion in the Hawaii constitution.

Montana's constitution also contains provision for reapportionment and redistricting by an appointed commission and a note in a recent article indicates that service on Montana's commission disqualifies the member from seeking elected office for two years. I reviewed the Montana constitution and was unable to find language explicitly barring commission members from seeking election for a two year period. Perhaps the disqualification is statutory.

JBC:pl
92-075.plm

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M E M O R A N D U M February 4, 1992

SUBJECT: Legislative members' qualifications (Work Order No. 7LS-1035M)

TO: Representative Dave Donley

FROM: Jack Chenoweth
Legislative Counsel

Article II, section 2 of the state constitution establishes the qualifications of legislative members. A proposed addition to article VI, sec. 8--set out in this version as subsection (e)--would add a further limitation of service by disqualifying from eligibility for legislative service the nine persons appointed to serve as members of the Reapportionment Board. The disqualification would last for the first two general elections (that is, for four years) after the members' completion of service on the board.

You have asked whether this further disqualification is constitutional under the federal constitution.

While I cannot be certain in my conclusion, my sense is that the disqualification would survive constitutional challenge.

The use of commissions to reapportion and redistrict legislatures is becoming more common. Examination of state constitutions disclosed that the proposed disqualification provision is similar to the use of a special commission to apportion and district the legislature of one other state, Missouri. The Missouri Constitution, art. III, sec. 2, provides for use of an apportionment commission to reapportion the state house of representatives, while a companion provision, art. III, sec. 7, directs the use of a commission to reapportion the state senate. Each section cited further provides that:

> Members of the commission shall be disqualified from holding office as members of the general assembly [i.e. of either house of the Missouri legislature] for four years following the date of the filing by the commission of its final statement of apportionment.

There is no record of reported litigation challenging these disqualification provisions.

The provision in question would place a disqualification against those who may desire to seek legislative office. As a general rule, a state enjoys broad authority to prescribe the qualifications of its public office holders. Sugarman v. Dowell, 413 U.S. 637, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973). Conversely, courts have found that individuals have a "federal constitutional right"--grounded in the equal protection provision of the Fourteenth Amendment--"to be considered for public service without the burden of invidiously discriminatory disqualification." Turner v. Fouche, 396 U.S. 346, 362, 90 S.Ct. 532, 541, 24 L.Ed.2d 567, at 580 (1970).

The cases suggest that a state's exercise of its powers in prescribing the qualifications of its officers may be subject to an examination under the equal protection clause. Generally, the principal factors to be taken into consideration in determining whether a provision violates the equal protection clause are "the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

Federal equal protection analysis, as you well know, involves one of two standards employed to gauge the constitutionality of the challenged state action. The first, more stringent, commonly used when certain fundamental rights are infringed, requires the state to support its action by showing that it furthers a compelling state interest. The second, more lenient, places the burden on the challenger to show that the challenged provision has no rational relationship to the achievement of a legitimate state goal, and requires the state only some basis to demonstrate a rational basis for its action. The latter standard thus provides a presumption of the provision's legal validity.

The right of an individual to hold political office has generally not been treated as "fundamental," Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), nor apparently is the opportunity of an individual to stand as a candidate for that office, Clough v. Guzzi, 416 F.Supp. 1057, 1066 (D.Mass. 1976). So, typically, in challenges to constitutional prohibitions against dual office holding or barring other state employment during a person's term of legislative service, absent evidence of invidious discrimination, examination has proceeded using a "rational basis" analysis. See Wilson v. Moore, 346 F.Supp. 635 (N.D.W.Va. 1972) (upholding bar against eligibility in legislature of one holding other lucrative office or employment under the state). Under a rational basis test, the state need only demonstrate that its legislative classification rationally relates to a legitimate governmental objective, and the state's classification will survive examination unless it is completely without justification. See Comer v. City of Mobile, 337 So.2d 742, at 750 (Ala. 1976) (prohibition in a reenactment of legislation establishing an Ethics Commission against any member appointed under original Act from again serving as a member of the commission

violative of equal protection where court found "no reasonable relationship between this membership prohibition and the purpose of this legislation . . . . ").

Assuming examination under a rational basis analysis, you should, then, use the opportunity provided in committee hearings and the debate on this provision to indicate the governmental objective sought to be satisfied by this provision and the relationship between that objective and the means sought to achieve it.

JBC:pl
92-067.plm

DIVISION OF LEGAL SERVICES

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240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM February 3, 1992

SUBJECT: Loyalty Oath and Oath of Office (Work Order No. 7LS-1909)

TO: Representative Dave Donley

FROM: Terri Lauterbach
Legislative Counsel

You have asked whether the loyalty oath and oath of office required from public officers under art. XII, secs. 4 and 5, Constitution of the State of Alaska, are preempted by federal law or are otherwise unconstitutional.

I have found no basis for believing that either oath is preempted by federal law. As to other constitutional issues, it does not appear to me that there are any problems with the oath of office, but there may be some questions about the loyalty oath. If challenged, however, the loyalty oath would probably be construed by the Alaska Supreme Court to include provisions that would save it from being unconstitutional.

DISCUSSION

Oath of Office

Article XII, sec. 5, Constitution of the State of Alaska, requires public officers to affirm that they will support the state and federal constitutions and faithfully discharge their official duties.[1/]

While federal law at 4 U.S.C. 101 does require state officers to affirm that they will support the federal constitution, this is not, in my opinion, the type of comprehensive law that regulates a field so thoroughly that federal preemption is a problem. Rather, the state requirement simply serves to implement the federal requirement and adds support of the state constitution as part of the federally-required oath.

Aside from questions of preemption, the validity of the oath itself is well-settled. Connell v. Higginbotham, et al., 403 U.S. 207 (1971).

[1/] There is a similar statutory oath requirement in AS 39.05.040 - 39.05.045.

Loyalty Oath

Article XII, sec. 4, Constitution of the State of Alaska, reads as follows:

> Disqualification for Disloyalty. No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution.

I have found no basis to believe that this loyalty oath is preempted by federal law.

As for other constitutional issues, there are two possible flaws, one relating to due process and the other to freedom of association.[2/]

A number of U.S. Supreme Court cases have determined that summary dismissal from public employment without a hearing or other inquiry violates due process rights of the employee. This notion has been applied specifically to cases in which an employee has been summarily dismissed after refusal to take a loyalty oath. See, Higginbotham, at 208, for citations to cases.

Since art. XII, sec. 4, does not refer to a pre-dismissal hearing upon failure to take the loyalty oath, there could be some question under Higginbotham about its constitutionality under the federal constitution's due process clause. However, Higginbotham concerned a statutory loyalty oath that failed to include a hearing requirement. I am fairly certain that if our state supreme court heard a challenge to art. XII, sec. 4, it would reconcile its provisions with the state constitution's due process clause and interpret art. XII, sec. 4, to mean that dismissal for failure to take the loyalty oath could only occur after an appropriate hearing.

A similarly narrowing construction would probably be applied by our state supreme court to save the loyalty oath from its potential to violate the officers' rights of association.

The potential flaw in the state loyalty oath with regard to association rights arises from its prohibition against mere membership in an organization that advocates violent overthrow of the state or federal government. The U.S. Supreme Court has made it "abundantly clear" that mere membership in a subversive organization does not constitute a person a sufficient threat to state or national security to warrant

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2/ "Freedom of association" is a common way of referring to "the right of the people peaceably to assemble," which is protected under art. I, sec. 6, Constitution of the State of Alaska, and the First Amendment in the federal constitution.

arbitrary exclusion from state employment. Gilmore v. James, 274 F.Supp 75 (D.C. Tex.), affirmed, 389 U.S. 572 (1968). The person might lack the knowledge that the organization supports violent overthrow. Even a "knowing" member might not support that particular aim of the organization but may support its more legitimate aims. As the court in Gilmore clearly stated,

> We believe that Elfbrandt [v. Russell, 384 U.S. 11 (1966)] states the principle which controls our decision: "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." Gilmore, at 92 [citing Elfbrandt at 19].

While Gilmore and Elfbrandt would seem to indicate an infirmity in the Alaska constitution's loyalty oath requirement, since it proscribes mere membership, it must be noted that both cases concerned statutes. As with the potential flaw discussed above relating to pre-dismissal hearings, I believe our state supreme court could construe the state loyalty oath requirement to include the proper scienter and "specific intent" by reconciling it with the state constitution's due process clause and the clause protecting freedom of association.

CONCLUSION

The validity of the state constitution's oath of office requirement is firm.

The validity of the state constitution's loyalty oath requirement is less firm but narrowing constructions by our state supreme court would likely save it if it were challenged.

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I hope you find the discussion of issues by this memorandum helpful. I have enclosed copies of the Higginbotham and Gilmore cases for your information. Please let me know if I can be of further assistance.

TML:pl
92-066.plm

Enclosure

[403 US 207]

STELLA CONNELL, Appellant,

v

JAMES M. HIGGINBOTHAM et al.

403 US 207, 29 L Ed 2d 418, 91 S Ct 1772

[No. 79]

Argued November 19, 1970. Decided June 7, 1971.

SUMMARY

The appellant, after being hired as a substitute classroom teacher in a Florida county school system, was later dismissed for refusing to sign a statutory loyalty oath of five clauses required of all Florida public employees. An action was commenced in the United States District Court for the Middle District of Florida challenging the constitutionality of the statute and the loyalty oath upon which the appellant's employment was conditioned. The three-judge District Court declared three of the five clauses contained in the oath to be unconstitutional, but upheld the remaining clauses which required each public employee to swear or affirm (1) "that I will support the Constitution of the United States and of the State of Florida," and (2) "that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence." (305 F Supp 445.)

On appeal, the United States Supreme Court affirmed in part and reversed in part. In a per curiam opinion expressing the views of five members of the court, it was held that clause (1) of the oath, requiring all applicants for public employment to pledge to support the federal and state constitutions, was constitutionally valid, but that clause (2) was unconstitutional since it resulted in the teacher's summary dismissal from public employment without hearing or inquiry required by due process.

MARSHALL, J., joined by DOUGLAS and BRENNAN, JJ., concurring in the result and agreeing that clause (1) of the loyalty oath was constitutional, would have based the decision as to the unconstitutionality of clause (2) on the ground that belief as such cannot be the predicate of governmental action.

STEWART, J., concurring in part and dissenting in part, agreed that clause (1) was clearly constitutional, but would have remanded the controversy involving clause (2) to the District Court to give the parties

Briefs of Counsel, p 1021, infra.

an opportunity to get from the state courts an authoritative construction of the clause's meaning, the clause being constitutionally infirm if meant to embrace the teacher's philosophical or political beliefs, but being constitutionally valid if meant to merely test whether clause (1) of the oath could be taken without mental reservation or purpose of evasion.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Sedition and Subversive Activities § 1 — loyalty oath — support of Constitution — validity

1. A section of a loyalty oath, requiring applicants for state public employment positions to pledge to support the Constitution of the United States and the state constitution, is constitutionally valid.

Constitutional Law § 745 — loyalty oath — overthrow of government — due process

2. A portion of a loyalty oath, requiring an applicant for state public

employment to swear or affirm "that I do not believe in the overthrow of the government of the United States or of the [state] by force or violence," is constitutionally invalid where it results in the summary dismissal from public employment, without a hearing or inquiry required by due process, of an employee who refuses to subscribe to the oath.

APPEARANCES OF COUNSEL

Sanford Jay Rosen argued the cause for appellant.
Stephen Marc Slepin argued the cause for appellees.
Briefs of Counsel, p 1021, infra.

OPINION OF THE COURT

Per Curiam.

This is an appeal from an action commenced in the United States District Court for the Middle District of Florida challenging the constitutionality of §§ 876.05–876.10 of Fla Stat (1965), and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The three-judge U. S. District Court declared three of the five clauses contained in the oaths to be unconstitutional,* and enjoined the State from conditioning

[403 US 208]

employment on the taking of an oath including the language declared unconstitutional. The appeal is from that portion of the District Court decision which upheld the remaining two clauses in the oath: I do hereby solemnly swear or affirm (1) "that I will support the Constitution of the United States and of the State of Florida"; and (2) "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

On January 16, 1969, appellant made application for a teaching position with the Orange County school system. She was interviewed by the principal of Callahan Elementary School, and on January 27, 1969, appellant was employed as a substitute classroom teacher in the fourth grade of that school. Appellant was dismissed from her teaching position on March 18, 1969, for refusing to sign the loyalty oath required of all Florida public employees, Fla Stat § 876.05.

[1] The first section of the oath upheld by the District Court, requiring all applicants to pledge to support the Constitution of the United States and of the State of Florida, demands no more of Florida public employees than is required of all state and federal officers. U. S. Const, Art VI, cl. 3. The validity of this section of the oath would appear settled. See Knight v Board of Regents, 269 F Supp 339 (1967), affd per curiam, 390 US 36, 19 L Ed 2d 812, 88 S Ct 816 (1968); Hosack v Smiley, 276 F Supp 876 (1967), affd per curiam, 390 US 744, 20 L Ed 2d 275, 88 S Ct 1442 (1968); Ohlson v Phillips, 304 F Supp 1152 (1969), affd per curiam, 397 US 317, 25 L Ed 2d 337, 90 S Ct 1124, (1970).

[2] The second portion of the oath, approved by the District Court, falls within the ambit of decisions of this Court proscribing summary dismis-

* The clauses declared unconstitutional by the court below required the employee to swear: (a) "that I am not a member of the Communist Party"; (b) "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"; and (c) "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

sal from public employment without hearing or inquiry required by due process. Slochower v Board of Education, 350 US 551, 100 L Ed 692, 76 S Ct 637

[403 US 209]

(1956). Cf. Nostrand v Little, 362 US 474, 4 L Ed 2d 892, 80 S Ct 840 (1960); Speiser v Randall, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958). That portion of the oath, therefore, cannot stand.

Affirmed in part, and reversed in part.

SEPARATE OPINIONS

Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan join, concurring in the result.

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness vel non to affirm "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court has left the clear implication that its objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebuttable proof of the proscribed belief. Due process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believe[s] in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he "believe[s] in the overthrow" or has any other sort of belief. "If

[403 US 210]

there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." Board of Education v Barnette, 319 US 624, 642, 87 L Ed 1628, 1639, 63 S Ct 1178, 147 ALR 674 (1943).

I would strike down Florida's "overthrow" oath plainly and simply on the ground that belief as such cannot be the predicate of governmental action.

Mr. Justice Stewart, concurring in part and dissenting in part.

The Court upholds as clearly constitutional the first clause of the oath as it comes to us from the three-judge District Court: "I will support the Constitution of the United States and of the State of Florida . . . ." With this ruling I fully agree.

As to the second contested clause of the oath, "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence," I would remand to the District Court to give the parties an opportunity to get from the state courts an authoritative construction of the meaning of

the clause. If the clause embraces the teacher's philosophical or political beliefs, I think it is constitutionally infirm. Baird v State Bar of Arizona, 401 US 1, 9–10, 27 L Ed 2d 639, 648, 649, 91 S Ct 702 (concurring opinion); Board of Education v Barnette, 319 US 624, 642, 87 L Ed 1628, 1639, 63 S Ct 1178, 147 ALR 674; Cantwell v Connecticut, 310 US 296, 303–304, 84 L Ed 1213, 1217, 1218, 60 S Ct 900, 128 ALR 1352. If, on the other hand, the clause does no more than test whether the first clause of the oath can be taken "without mental reservation or purpose of evasion," I think it is constitutionally valid. Law Students Civil Rights Research Council, Inc. v Wadmond, 401 US 154, 163–164, 27 L Ed 2d 749, 758, 759, 91 S Ct 720. The Florida courts should, therefore, be given an opportunity to construe the clause before the federal courts pass on its constitutionality.

[403 US 211]

See Fornaris v Ridge Tool Co. 400 US 41, 43–44, 27 L Ed 2d 174, 177, 178, 91 S Ct 156; Reetz v Bozanich, 397 US 82, 85–87, 25 L Ed 2d 68, 71, 72, 90 S Ct 788; Railroad Comm'n v Pullman Co. 312 US 496, 498–501, 85 L Ed 971, 973–975, 61 S Ct 643.

The Supreme Court of Florida has explicitly held that the various clauses of the oath are severable. Cramp v Board of Public Instruction, 137 So 2d 828, 830–831.

Pa. 39 F.Supp 367 ...
n last cited, the judge ...
ntion to language of A...
... in an article in V...
Federalist, wherein that
American policy forcefully
inevitable folly of a nation's
waiting of a formal declara-
against, or by it, before it
defensive force. Thus, as he
We must receive the blow be-
i even prepare to return it."

he Court of Appeals, Ninth
consistently sustained the
ality of the Universal Mili-
ng and Service Act; and it
ecognized and declared that
n and enforcement may not
ed in consequence of the ab-
existent state of war at the
either of its invocation or
age and approval. Cannon v.
es (9 Cir.) 181 F.2d 354, cert.
S. 892, 71 S.Ct. 199, 95 L.Ed.
Draft Board No. 1 of Silver
, Montana v. Connors (9 Cir.)
38; Richter v. United States
F.2d 591, cert. den. 340 U.S.
. 199, 95 L.Ed. 647. In the
, the Court of Appeals sus-
constitutional validity of the
f the selective service system
peace. Relevant to that is-
rt there said:

ce of his principal argument.
contends that Congress has
utional power to raise a peace
y by conscription. There is
to this claim. The govern-
the right to the military serv-
of its able-bodied citizens, and
en an emergency arises, justly
it service from all. In re Grim-
U.S. 147, 11 S.Ct. 54, 34 L.Ed.
te power to raise and support
is not limited to time of war.
s has the power to compel mili-
vice of a citizen in peace time
time, whenever it declares that
cessary or that an emergency
requiring the raising of an
(Citing United States v. Herling, supra; United States v. Garst, supra; and United States v. Lambert, supra) Emphasis added by the writer hereof.

The court is persuaded that the position thus reflected of the Court of Appeals, Ninth Circuit, need not be fortified by the citation of further authorities. It is firm, and well understood to be so.

[21] In the light of the familiar judicial recognition, upon a nationwide pattern, of the constitutionality of the Universal Training and Service Act, and especially of the adherence to, and leadership in, that view by the Supreme Court of the United States, this court has proceeded, and now proceeds, in the present litigation, with the conviction that the Act, and the Selective Service System, are constitutional, and are validly enforceable and administrable. That conviction underlies the memorandum opinion announcing its findings of fact and conclusions of law, and foreshadowing its final judgment, which the court has already prepared and filed herein.

And, while, possibly out of respect for the stature of the journalistic medium wherein Mr. Bernstein's article, supra, appears, that article and its tentatively advanced position have had the court's renewed and careful study, the court persists in its opinion that the statute, within which the present indictment was found and returned, and the submission of this case has been made, is valid and constitutional. And that opinion has not been either dissipated or impaired by the revisitation of Kneedler v. Lane, supra, of which, naturally, the court has long been aware, if for no other reason, in consequence of its citation, at least as a "make weight" factor, in the Supreme Court's opinion in Selective Draft Law Cases, supra.

The court, therefore, enters no novel order herein, but simply adheres to the findings and conclusions, and reiterates the order and directions, of the earlier memorandum in this case.

Everett M. GILMORE, Jr., et al., Plaintiffs,

v.

Jesse JAMES, Treasurer of the State of Texas et al., Defendants.

Civ. A. No. 3-1777.

United States District Court
N. D. Texas,
Dallas Division.

Aug. 30, 1967.

Judgment Affirmed Jan. 15, 1968.
See 88 S.Ct. 695.

Action by music instructor, university teachers and students for declaratory and injunctive relief that statute prescribing loyalty oath as a prerequisite for employment violated Federal Constitution. A three-judge United States District Court for the Northern District of Texas, Goldberg, Circuit Judge, and Taylor, District Judge, held that statute prescribing oath for employees whose wages are paid from state funds that employee is not and has not been a member of organizations listed by United States Attorney General as subversive or, if a member, that employee was unaware of organization's aims was constitutionally invalid because it applied to membership without specific intent to further illegal aims of such organizations as well as membership with specific intent.

Order in accordance with opinion.

1. Injunction ⚬114(2)

Whether music instructor had standing to seek injunction in three-judge district court against enforcement of state statute prescribing loyalty oath for employees receiving state funds as compensation would be determined by the effect of the actions of state officers in applying the statute and not by whether the statute as written was applicable to instructor. Vernon's Ann.Tex.Civ.St. arts. 2815h, § 20, 2815k and § 8(1), 6252-7; 28 U.S.C.A. § 2281.

2. Courts ⚬101

Allegation in complaint that effect of action of state officers in applying a

state statute is violative of the Constitution confers jurisdiction upon a three-judge court. 28 U.S.C.A. § 2281.

3. Courts ⇐101

Trustees of county junior college were "state officers" within statute conferring jurisdiction upon three-judge district court to enjoin enforcement of state statute by restraining the action of any state officer. 28 U.S.C.A. § 2281.

See publication Words and Phrases for other judicial constructions and definitions.

4. States ⇐44

Trustees and officers of public corporations are administrative officers of the state. Vernon's Ann.Tex.Civ.St. art. 2815k.

5. Municipal Corporations ⇐170

Where a statute embodies a policy of state-wide concern, an officer, although chosen in political subdivision and acting within that limited territory, may be charged with duty of enforcing the statute in the interest of the state and not simply in the interest of the locality he serves.

6. Courts ⇐101

Where trustees of county junior college were not performing a local function by enforcement of statute prescribing loyalty oath for employees receiving state funds as compensation and statute was an attempt to establish a state-wide policy, trustees were "state officers" within statute conferring jurisdiction upon three-judge district court to enjoin enforcement of a state statute if found to be unconstitutional. Vernon's Ann.Tex. Civ.St. arts. 2815h, § 20, 2815k and § 8(1), 6252–7; 28 U.S.C.A. § 2281.

7. Constitutional Law ⇐42

Where music instructor was aggrieved by statute prescribing loyalty oath for employees receiving state funds as compensation and statute was applied to him by county junior college, music instructor had standing to challenge constitutionality of statute in three-judge federal court regardless of whether college was authorized to apply the statute. Vernon's Ann.Tex.Civ.St. arts. 2815h, § 20, 2815k and § 8(1), 6252–7; 28 U.S.C.A. § 2281.

8. Action ⇐6

A federal court is not empowered to declare for the government of future cases, principles or rules of law which cannot affect result as to the thing in issue before it.

9. Injunction ⇐1

Sole function of action for injunction is to forestall future violations.

10. Abatement and Revival ⇐8(2)
Criminal Law ⇐43

Action for injunction is so unrelated to punishment or reparations for past violations that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured.

11. Injunction ⇐11

Real threat of future violation or contemporary violation of nature likely to continue or recur is sufficient to make cause of action for relief by injunction, and once established, it adds nothing that calendar of years gone by might have been filled with transgressions.

12. Injunction ⇐5

Notwithstanding that injunctive relief is mandatory in form, such relief is to undo existing conditions, because otherwise they are likely to continue.

13. Action ⇐6

Voluntary cessation of an alleged wrong does not moot the controversy.

14. Courts ⇐278

Where county college would receive appropriation from state Legislature for next academic year and would then be obligated by statute to require employees to take loyalty oath, music instructor's action to enjoin enforcement of statute requiring employees whose compensation comes from state funds to take loyalty oath was not a contingent controversy even though college had ceased requiring the oath. 28 U.S.C.A. § 2281; Vernon's Ann.Tex.Civ.St. art. 6252–7.

15. Courts ⊂=278

To disarm the court of power to enjoin, it must appear there is no reasonable expectation that wrong will be repeated.

16. Courts ⊂=278

Where county junior college would be obligated to require loyalty oath from its employees when college received appropriation of state funds at beginning of next academic year, there was reasonable expectation that alleged wrong would be repeated and three-judge district court would retain jurisdiction of music instructor's action to enjoin enforcement of statute prescribing loyalty oath for employees whose compensation comes from state funds as being unconstitutional even though music instructor's future employment depended upon enrollment of students in instructor's specialty. 28 U.S.C.A. § 2281; Vernon's Ann.Tex.Civ.St. art. 6252-7.

17. Courts ⊂=260.4

Doctrine that federal courts should abstain when plaintiffs have failed to exhaust their state remedies has no application where plaintiffs complain they are being deprived of constitutional civil rights.

18. Federal Civil Procedure ⊂=181

Music instructor whose employment was precluded by his refusal to take loyalty oath properly brought class action to enjoin enforcement of statute prescribing loyalty oath not only for his own benefit, but on behalf of all prospective teachers seeking employment by tax supported institutions of learning. 28 U.S.C.A. § 2281; Vernon's Ann.Tex.Civ. St. art. 6252-7.

19. Federal Civil Procedure ⊂=181

Where law student was denied employment in school library solely because his membership in organization named in attorney general's subversive organization list made impossible the execution of loyalty oath necessary incident of continued employment, student had standing to bring suit to enjoin enforcement of statute prescribing loyalty oath individually and as a representative of prospective employees of the state. 28 U.S.C.A. § 2281; Vernon's Ann.Tex.Civ. St. art. 6252-7.

20. Constitutional Law ⊂=42

A federal court will not pass upon validity of a state statute on complaint of those who fail to show injury by its enforcement.

21. Injunction ⊂=114(2)

Where teachers at state university willingly executed loyalty oath when their employment commenced, teachers would not be required to again take the oath and oath bound maker to nothing but the existence of present and past facts and did not bind him to avoid future subversive associations or abstain from further conduct of this kind, enforcement of statute prescribing loyalty oath would not impose prospective restraints on teachers' conduct and teachers did not have standing to enjoin enforcement. 28 U.S.C.A. § 2281; Vernon's Ann.Tex.Civ. St. art. 6252-7.

22. Injunction ⊂=74

Possible future statutory construction and its then application are too speculative and unpredictable to summon injunctive powers.

23. Injunction ⊂=114(4)

Where teacher was tendered bona fide offer of employment with tax supported college which teacher intended to accept if execution of loyalty oath was not made a condition of his employment and college was obligated by statute to condition employment upon signing of loyalty oath, teacher would be permitted to intervene in action by music instructor and others to enjoin enforcement of statute prescribing loyalty oath for employees whose compensation comes from state funds. 28 U.S.C.A. § 2281; Vernon's Ann.Tex.Civ.St. art. 6252-7.

24. Injunction ⊂=114(2)

Where student was no longer enrolled in state supported school and did not contemplate future enrollment in state supported school, enforcement of statute prescribing loyalty oath for students in state supported schools would

not injure student and student did not have standing to enjoin enforcement of statute. Vernon's Ann.Tex.Civ.St. art. 2908b; 28 U.S.C.A. § 1392 a; Fed. Rules Civ.Proc. rule 20, 28 U.S.C.A.

25. Courts ⇐273

Where venue in music instructor's action to enjoin enforcement by trustees of junior college of statute prescribing loyalty oath was proper in Northern District of Texas, venue would be proper as to board of regents of state university, state treasurer and state comptroller if they were properly joined as defendants. Vernon's Ann.Tex.Civ.St. art. 2908b; 28 U.S.C.A. § 1392 a; Fed.Rules Civ.Proc. rule 20, 28 U.S.C.A.

26. Federal Civil Procedure ⇐242

Joinder of defendants is proper if there is common question of law or fact and right to relief arose from same transaction. Vernon's Ann.Tex.Civ.St. art. 6252-7.

27. Courts ⇐273
Injunction ⇐114(3)

Exaction by trustees of county junior college, board of regents of state university, state treasurer and state comproller of loyalty oath from each of respective plaintiffs in action to enjoin enforcement of statute prescribing loyalty oath presented question of law common to all and the relief sought arose out of state-wide policy of conditioning state employment upon exaction of loyalty oath, trustees, regents, treasurer and comptroller were properly joined as defendants in action and venue was properly laid in Northern District of Texas. Vernon's Ann.Tex.Civ.St. art. 6252-7.

28. Constitutional Law ⇐90

Exposure of the false and the affirmation of truth are both ceded in the free range of association and expression. U.S.C.A.Const. Amend. 1.

29. Officers ⇐18

A state cannot condition an individual's privilege of public employment on his nonparticipation in conduct which, under the Constitution, is protected from direct interference by the state. U.S.C.A.Const. Amends. 1, 14; Vernon's Ann.Tex.Civ.St. art. 6252-7, § 1.

30. Officers ⇐18

If membership in a subversive organization constitutes activity which the state may not directly attaint, state would have no right to condition employment on nonmembership. U.S.C.A.Const. Amends. 1, 14; Vernon's Ann.Tex.Civ.St. art. 6252-7, § 1.

31. Constitutional Law ⇐274

Freedom of association is no more subject to state curtailment than any other First Amendment right. U.S.C.A. Const. Amends. 1, 14.

32. Constitutional Law ⇐274

Freedom of association is never more wisely invoked than in cases where the free exchange of thoughts and ideas among members of the academic community is threatened. U.S.C.A.Const. Amends. 1, 14.

33. Constitutional Law ⇐82, 274

First Amendment rights are not absolute, but it is only when the exercise of such rights threatens a clear and present danger to some substantial state interest that the state is justified in curtailing them. U.S.C.A.Const. Amends. 1, 14.

34. Officers ⇐18

While state has a vital interest in protecting itself from internal weakening by keeping subversives out of the government, the procedures devised for protecting that interest must withstand constitutional attack. U.S.C.A.Const. Amends. 1, 14.

35. States ⇐53

Mere membership of an individual, knowing or otherwise, in any of organizations designated by Attorney General of the United States as subversive does not constitute individual a sufficient threat to state or national security to warrant arbitrary exclusion from state employment. Vernon's Ann.Tex.Civ.St. art. 6252-7; U.S.C.A.Const. art. 2, § 1.

36. Constitutional Law ⊂=274

A law which applies to membership without the specific intent to further the illegal aims of the organization infringes unnecessarily on protected freedoms. U.S.C.A.Const. Amends. 1, 14; Vernon's Ann.Tex.Civ.St. art. 6252-7, § 1.

37. Constitutional Law ⊂=82

Oaths in support of government are not abhorrent to the Constitution.

38. Constitutional Law ⊂=274
Officers ⊂=19

Statute prescribing oath for employees whose wages are paid from state funds that employee is not and has not been a member of organizations listed by United States Attorney General as subversive or, if a member, that employee was unaware of organization's aims was constitutionally invalid because it applied to membership without specific intent to further illegal aims of such organizations as well as members' specific intent. U.S.C.A.Const. Amends. 1, 14; Vernon's Ann.Tex.Civ.St. art. 6252-7, § 1.

David R. Richards, American Civil Liberties Union, by Fred O. Weldon, Jr., Dallas, Tex., for plaintiffs.

Crawford C. Martin, Jr., Atty. Gen. of Tex., and W. O. Shultz, Asst. Atty. Gen., Austin, Tex., for defendants Jesse James, Robert Calvert and Board of Regents of University of Texas.

H. P. Kucera, of Strasburger, Price, Kelton, Martin & Unis, Dallas, Tex., for defendant Dallas County Junior College.

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

OPINION

GOLDBERG, Circuit Judge, and TAYLOR, District Judge.

Everett M. Gilmore, Jr. was a tuba instructor at Dallas County Junior College when that newly created institution began its academic curriculum in September, 1966. Upon his refusal to execute the non-subversive loyalty oath required of all instructors at the college,[1] Gilmore was dismissed.

1. State of Texas
County of Dallas

I, _____, the affiant herein, do solemnly swear (or affirm) as follows:

That the affiant is not, and has never been, a member of the Communist Party. (The term "Communist Party" as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of the Soviet Socialist Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means); and

That the affiant is not, and, during the preceding five year period, has not been a member of any organization, association, movement, group, or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, has designated as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of facts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; or in the event that the affiant has during such five year period been a member of any such organization, association, movement, group or combination, its name and the circumstances in detail which led him to join it are as follows:

_____

and at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

That the affiant is not, and, during the preceding five year period, has not been, a member of any "Communist Political Organization" or "Communist Front Organization" registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., Sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Control Board; or, in the event that the affiant has during such five year period been a member of any such organization, its name and the circumstances in detail which led him to join it are as follows:

_____

and at the time when he joined it and

He thereafter commenced against the trustees of the college this action for a declaratory judgment and injunctive relief,[1] alleging that he was deprived of his First Amendment rights of freedom of speech, belief, conscience and association by the enforcement by the college trustees of Article 6252-7, Vernon's Ann. Texas Revised Civil Statutes,[2] allegedly an unconstitutionally vague statute.

throughout the period during which he was a member, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist Party.

Affiant

Subscribed and sworn to before me this _____ day of _____, 19__, to certify which, witness my hand and official seal of office.

Notary Public, Dallas County, Texas

2. Plaintiff seeks injunctive relief, pursuant to Title 28 U.S.C.A., § 2281.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

3. Section 1. No funds of the State of Texas shall be paid to any person as salary or as other compensation for personal services unless and until such person has filed with the payroll clerk, or other officer by whom such salary or compensation is certified for payment, an oath or affirmation stating:

"1. That the affiant is not, and has never been, a member of the Communist Party. (The term 'Communist Party' as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of Soviet Socialistic Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means); and

"2. That the affiant is not, and, during the preceding five year period, has not been, a member of any organization, association, movement, group or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, (footnote omitted) has designated as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; or, in the event that the affiant has during such five year period been a member of any such organization, association, movement, group or combination, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

"3. That the affiant is not, and, during the preceding five year period, has not been, a member of any 'Communist Political Organization' or 'Communist Front Organization' registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Control Board; or, in the event that the affiant has during such five year period been a member of any such organization, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined it and throughout the period during which he was a member, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist Party."

Section 2. The Department of Public Safety shall obtain a list of the organizations, associations, movements, groups and combinations comprehended by Subdivisions 2 and 3 of Section 1 hereof, and shall furnish a copy of such list to the various agencies which expend funds of this State. Such agencies shall make copies of such list and shall furnish them to their employees in order that the employees can readily perceive whether they

In plaintiff Gilmore's first amended complaint he is joined by [illegible] Cunningham, a second year law student at the University of Texas School of Law in Austin, Texas. As a student in a state supported institution of higher learning, Cunningham has been required to comply with the provisions of Article 2909b, Vernon's Ann.Texas Revised Civil Statutes, by executing a loyalty oath similar to the one required of Gilmore. Cunningham seeks to enjoin the Board of Regents of the University of Texas from enforcing the provisions of the Texas statute requiring the student oath.

By plaintiff's second amended complaint, Robert Palter, Stuart Pullen and Thomas Mantle join the aforementioned duo. Palter is a full professor of philosophy at the University of Texas and has been so employed since September, 1964. Pullen has been an assistant instructor in government at the University of Texas since September, 1965. As a condition of their initial employment, Palter and Pullen were required to execute the oath prescribed by Article 6252-7. They attack that statute on two grounds: first, as a consequence of their attesting the oath, unconstitutional restrictions upon their rights of freedom of speech and association have resulted; they are required to conform to a standard of conduct which is not susceptible of accurate determination; and they may not repudiate the oath without facing loss of status and salary. Secondly, the oath was unconstitutionally applied to them and is now and will in the future be so applied to all members of the class which they allegedly represent, to-wit, prospective employees of the University of Texas. They seek to enjoin the Regents of the University of Texas from requiring continued compliance with the provisions of Article 6252-7 and to enjoin the requirement of such oath-taking by such members of their class.

Mantle is a student at the University of Texas. On March 22, 1967, he began employment in the library of the School of Law at Texas University. Subsequent to commencing his duties at the library, Mantle was informed by the personnel office of the university that as a condition of his employment it was necessary that he execute a loyalty oath prescribed by Article 6252-7.[4]

can lawfully and truthfully file the oath or affirmation required herein.

Section 3. • • •

Section 4. It is specifically provided, however, that the oath required herein shall supersede all other loyalty oaths now required by law or that may be required in appropriation Acts by the Legislature.

Section 5. If any portion of this Act should be held to be unconstitutional, the unconstitutionality of such portion shall not affect the validity or application of the remainder of the Act. Acts 1953, 53rd Leg., p. 51, ch. 41.

4. I, _____, the affiant herein, do solemnly swear (or affirm) as follows:

1. That the affiant is not, and has never been, a member of the Communist Party. (The term "Communist Party" as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of Soviet Socialistic Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means); and

2. That the affiant is not, and, during the preceding five year period, has not been, a member of any organization, association, movement, group, or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, has designated as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; and

3. That affiant is not, and, during the preceding five year period, has not been, a member of any "Communist Political Organization" or "Communist Front Organization" registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Controls Board.

_____
Affiant

Mantle was given a list of organizations designated by the Attorney General of the United States as totalitarian, fascist, communist or subversive,[5] asked to read the list and sign the oath. Upon discovering that an organization of which he was a member appeared on the list,[6] Mantle was compelled to decline to execute the oath and was thereupon dismissed from the employment by the university.

By motion to intervene, Michael Kahn became a party plaintiff. Kahn was an assistant professor of psychology at Yale University in New Haven, Connecticut. Consummating a period of negotiations Kahn was offered, on April 5, 1967, the position of associate professor of psychology at the University of Texas. He seeks to enjoin the regents of that university from requiring of him the Article 6252-7 oath, which has been made a condition of his employment, for the reason that his constitutional rights of freedom of speech and association are threatened to be impaired by the oath requirement.

Jurisdiction of all parties plaintiff is predicated on 42 U.S.C.A. §§ 1983, 1984 and 28 U.S.C.A. §§ 1331, 1343, 2201, 2202, 2281 and 2284.

By their pleadings and by their oral arguments defendants Dallas Junior College and the University of Texas raise a number of issues peculiar to each of the respective plaintiffs which must be disposed of before a consideration of the substantive nature of the oath is undertaken. We turn to these issues.

STANDING

a. Gilmore

Dallas County Junior College, hereinafter referred to as El Centro, was created by popular vote of the residents of Dallas County, Texas, in May, 1965, in accordance with the provisions of Article 2815h, Vernon's Ann.Texas Revised Civil Statutes.[7] Under the provisions of Article 2815k, Vernon's Ann.Texas Revised Civil Statutes, the newly elected Board of Trustees began to organize academic departments. A music department was established, and the director thereof was commissioned to solicit the employment of qualified musicians to instruct students in the playing of various musical instruments. A list of 25 such individuals was submitted by the director to the trustees, all of whom were approved. Gilmore was on this list.

El Centro's employment of any one of the individuals on the list of qualified musicians was contingent upon a student registering for instruction on the respective instrument to be taught by that individual. One student registered for instruction on the tuba for the fall semester, September, 1966, to January, 1967, and Gilmore's services were engaged.

No written contract was consummated by Gilmore and El Centro; their agreement was wholly oral. Gilmore was to be paid $150 a semester in quarterly installments of $37.50 each.

Gilmore began his teaching assignment in September, 1966. Apparently through inadvertence on the part of El Centro, he was not asked to execute the loyalty oath at that time. On October 15, 1966, when it was brought to Gilmore's attention that submission to the requirements of the oath was a condition of employment at El Centro, he declined to execute the same in a letter to the Director of Music. By letter of October 18, 1966, the Associate Dean of Instruction informed Gilmore that the college had "no choice but to accept [his] refusal and to seek another teacher." Two days thereafter Gilmore was sent a check by the college in the amount of $37.50, representing that portion of the agreed remuneration he had earned. Gilmore returned the check in a letter-appeal to the Board of Trustees in which he stated in part, "The termination of my employment by the college deprives me of constitutional protections and I request prompt reinstatement." By reply letter

5. See, Executive Order No. 10450 and first, second, third and fourth supplements thereto, December 9, 1953.

6. The Industrial Workers of the World

7. Tex.Rev.Civ.Stat., Art. 2815h, sec. 20.

the President of El Centro did inform Gilmore that,

"Your employment was [illegible] in the approved list of musician teachers or instructors, however, with the understanding that you would be called if and when your services were desired. Since you refused to sign the loyalty oath which the Attorney General has advised that our District must comply with, the District has no alternative but not to call on you for further service."

In his reply to plaintiff's complaints the Attorney General of Texas, representing defendant Texas University, avers that Article 6252–7 did not apply to El Centro for the reason that the college had not at the time of Gilmore's dismissal received funds appropriated by the Texas Legislature.[8] Presumably, in reliance on this pleading, and subsequent thereto, El Centro admitted that it had erroneously applied Article 6252–7 to Gilmore and tendered into the registry of the Court $150, representing the full salary Gilmore was to receive for the semester for which he had been retained to render his services.

El Centro defends against Gilmore's claims on three procedural grounds: (1) the oath, which under the terms of the statute did not apply to Gilmore, was erroneously required of him by the college and therefore he has no standing to attack the statute in a three-judge court, but must resort to a state court and seek damages; (2) any claim Gilmore had against the college is moot because he had no right to public employment; his services were wholly contingent upon a student's registering for tuba instruction, and the tender to the court of Gilmore's one semester's salary of $150 rectifies any harm done to him; and (3) Gilmore failed to exhaust his state remedies before entering federal court.

(1) Standing in a Three-Judge Court

[1, 2] Article 6252–7 is explicit in applying only to those individuals who receive state funds as part or all of their salary. Plaintiff Gilmore admits that El Centro was not in receipt of state funds to disburse to its instructors at the time he was dismissed. He nonetheless argues that the application to him of the statutory oath by the trustees of El Centro is sufficient to confer standing upon him to seek an injunction against the enforcement of Article 6252–7. Defendants cite to the court numerous authorities in support of the position that this court is without authority to interpret or construe the meaning of a state statute and urge us to refrain from undertaking to decide the question of Gilmore's amenability to Article 6252–7. Readily admitting that they erroneously applied Article 6252–7 to Gilmore, El Centro's trustee-defendants claim that we must accept that statute's mandate at face value and hold that because the statute did not apply to Gilmore as written he lacks standing to seek an injunction against enforcement of the statute.

Not only does this argument lack merit, it is inapposite. Whether Article 6252–7 applies to Gilmore as written is of no concern to us. We look only to the effect of the action of state officers applying a state statute under 28 U.S.C.A. § 2281. An allegation that the effect is violative of the Constitution confers jurisdiction upon a three-judge court.

[3, 4] We hold that for purposes of this action the trustees of El Centro are state officers within the meaning of 28 U.S.C.A. § 2281. Defendant El Centro admits in its uncontradicted pleadings that it is governed by the terms of Article 2815k, Texas Revised Civil Statutes. Section 8(1) of that statute states in part, "[t]he Junior Colleges * * * described in the foregoing Sections 1 through 8 are declared to be public corporations of the State of Texas * * *" The trustees and officers of such public corporations have been recognized, and we think properly so, as administrative officers of the State of Texas. Wichita

8. See n. 2, supra.

Falls Junior College District v. Battle, 5 Cir., 1953, 204 F.2d 632, 633.

However, a certain ambiguity arises from the above admission. Article 2815k, upon careful reading, indicates that the junior colleges to which it applies are those created by existing independent school districts. The statute specifically directs that such colleges are to be governed by the ordaining school district but may be divested by the district into the control of 15 appointed regents. El Centro is not administered by an independent school district or 15 regents but by 7 trustees. Consistent with control of a junior college by 7 trustees are the provisions of Section 20 of Article 2815h, Texas Revised Civil Statutes. That statute, unlike 2815k, makes specific reference to county junior colleges and provides for their creation and for determination of the trustees by popular vote of the residents of the county, the identical circumstance which gave rise to the creation of El Centro. That section further prescribes that the county junior college is to be designated a "body corporate", not a public corporation of the State of Texas.

[5, 6] Even assuming for purposes of argument that the trustees of El Centro are "county" officers, we are persuaded that under the facts of this case they must be held to answer as state officials. In determining the application of Section 2281 we "must have regard both to the nature of the legislative action which is assailed and to the function of the officer who is sought to be restrained * * *. Where a statute embodies a policy of state-wide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the state and not simply in the interest of the locality he serves." Spielman Motor Sales Co. v. Dodge, 1935, 295 U.S. 89, 94, 55 S.Ct. 673, 680, 79 L.Ed. 1322, 1325. The statute here under attack, Article 6252-7, is an attempt to establish a statewide policy, not a policy peculiar to the Dallas County Junior College District. Rorick v. Board of Commissioners of Everglades Drainage District, 1939, 307 U.S. 208, 212, 59 S.Ct. 808, 83 L.Ed. 1242, 1244. Neither were the trustees in the enforcement of the statute performing a local function. Wilentz v. Sovereign Camp, W. O. W., 1939, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994; City of Cleveland v. United States, 1945, 323 U.S. 329, 65 S.Ct. 280, 89 L.Ed. 274. They were enforcing a policy of statewide concern, i. e., that no public office shall be held in the absence of the execution of a non-subversive loyalty oath by the prospective officeholder. They were but a county cog in a statewide wheel.

El Centro admits it applied Article 6252-7 to Gilmore but contends that such application was erroneous, thereby defeasing him of standing to directly attack the statute.

[7] We are unable to accept this position. Gilmore was aggrieved by Article 6252-7 when it was applied to him by El Centro. Inquiry concerning whether or not El Centro was authorized to apply the statute is irrelevant. Constantine v. Southwestern Louisiana Institute, W.D. La.1954, 120 F.Supp. 417. El Centro's action in exacting the oath is directly attributable to Article 6252-7. Ex parte Bransford, 1940, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249.

(2) Mootness

[8-12] "[A federal] court is not empowered * * * to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue * * * before it." People of State of California v. San Pablo & T. R. R., 1893, 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747, 749. As an individual Gilmore's continued employment at El Centro was contingent upon students registering for tuba instruction in the ensuing semesters. He had no continuing status at the college such as tenure. Even assuming

that the dismissal of Gilmore violated his constitutional civil rights.

> "[t]he sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured. All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue." United States v. Oregon State Medical Society, 1952, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978, 984.

[13] El Centro, realizing that it erroneously applied the statute to Gilmore and the other instructors it had recruited in the fall of 1966, has discontinued exacting the oath from such instructors. Voluntary cessation of an alleged wrong does not, however, moot the controversy. United States v. W. T. Grant Co., 1953, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303; Walling v. Helmerich & Payne, 1944, 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29; Keyishian v. Board of Regents, 1967, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629; Gallagher v. Smiley, D.Colo.1967, 270 F. Supp. 86. Indeed, El Centro, by its own admission, will receive a considerable appropriation on September 1, 1967, from the Texas Legislature. Once in possession of state funds, the college will be statutorily obligated to require the oath.

[14-16] We do not, therefore, have a question of a contingent controversy. Giles v. Harris, 1903, 189 U.S. 475, 23 S.Ct. 639, 47 L.Ed. 909; District of Columbia v. Brooke, 1909, 214 U.S. 138, 29 S.Ct. 560, 52 L.Ed. 941; Anniston Mfg. Co. v. Davis, 1937, 301 U.S. 337, 57 S.Ct. 817, 81 L.Ed. 1143. The question is one of *when* the controversy will again arise. Gilmore is qualified and ready to instruct, his failure to sign the oath being the only impediment to his so doing; El Centro continues to offer tuba classes to its students. In adhering to the classic pronouncement of Judge Learned Hand that "[t]o disarm the court [of power to enjoin] it must appear that there is no reasonable expectation that the wrong will be repeated." United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 448, we are compelled to retain this power and to hold that there is a reasonable expectation that the alleged wrong will be repeated. In Lawrence v. Hancock, S.D. W.Va.1948, 76 F.Supp. 1004, the plaintiff, at the opening of the swimming season in 1946 and again in 1947, tried to gain admission to the public pool in Montgomery, West Virginia. On both occasions he was turned away. He filed suit in federal court seeking a declaratory judgment and an injunction prohibiting the pool officials from denying him the privilege of swimming in the pool. The defendant sought to defeat the claim by asserting that the controversy was moot because the lease under which the city had rented the pool facilities to those who had refused the plaintiff the enjoyment thereof had expired prior to commencement of the suit, and there was no indication that the city would again lease the pool or that its use would again be denied the plaintiff. The court granted the injunction stating "[t]he pool still exists, although temporarily closed. *If* it is opened to the public again, the plaintiff will be entitled to the rights he asserts." 76 F.Supp. at 1010. So it is with Gilmore. *If* a student registers for tuba instruction at El Centro, we think it a reasonable expectation that the oath will be again required of him. Defendant El Centro has offered the court no assurance that it will not be required. United States v. W. T. Grant Co., supra. Gilmore is entitled to have his rights declared.

(3) Exhaustion of State Remedies

[17] The doctrine that federal courts should abstain when plaintiffs have fail-

...ed to exhaust their state remedies. Alabama Public Service Commission v. Southern Railway Co., 1959, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002, has no application where the plaintiffs complain that they are being deprived of constitutional civil rights. Lane v. Wilson, 1939, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; Browder v. Gayle, M.D.Ala.1956, 142 F.Supp. 707.

(4) Class Representation

[18] Questions have been raised in this suit regarding Gilmore's right to represent a class. In Hamer v. Campbell, 5 Cir., 1966, 358 F.2d 215, a Negro citizen brought a class action on behalf of Negro voters who had been denied the right to register to vote. The court held that she had the right to represent such class. In the same case, class representation was denied to a plaintiff who sought to represent all potential Negro candidates for office because the plaintiff was qualified to run, since she had paid her poll tax, whereas she purported to represent potential Negro candidates who had not paid their poll taxes, and who were thereby denied eligibility. In denying class representation, Judge John R. Brown said,

> Also, there was no showing that any other Negroes intended to run for municipal office in Ruleville. Thus, there was no class of potential Negro candidates, and even if there were, Mrs. Hamer could not represent it since she could have been a candidate had she chosen to do so. Without a class on the one hand or a proper representative on the other, a class action pursuant to Rule 23(a) must fail. It is elementary that "an individual suing in behalf of the members of a class must be a member of the class which he is supposed to represent." 358 F.2d, at 219.

In Thaxton v. Vaughan, 4 Cir., 1963, 321 F.2d 474, we find these words:

> Thus, the plaintiffs do not include any member of the class of persons against whom de facto discrimination is alleged to be practiced in the home. The absence of any direct evidence in the record of the attitude of the home inmates is indicative of the inadequacy of the plaintiffs to represent this relatively narrow category within the broad racial group to which they belong. The spurious class action permissible under Rule 23 a ... is a procedural device to avoid multiplicity of suits, but care must be taken that the plaintiffs fairly and adequately represent the group for which they purport to speak. 321 F.2d at 476.

These cases show the necessity for precise delineation of class representation. Armstrong v. Board of Ed. of City of Birmingham, N.D.Ala.1963, 220 F.Supp. 217; Bailey v. Patterson, 1962, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512. In Gantt v. Clemson Agr. College of S. C., 4 Cir. 1963, 320 F.2d 611, a Negro student sought enrollment in Clemson College and was refused. His case was accorded class representation in these words:

> Failure to rule that this was a class action and to grant appropriate injunctive relief was also error. ... The action was brought by the plaintiff not only for his own benefit, but on behalf of other Negro citizens of South Carolina similarly situated. This procedure is entirely proper under Rule 23(a) (3) of the Federal Rules of Civil Procedure. Other Negroes have in the past sought admission to Clemson, and doubtless there are other qualified Negroes who will do so. These, as well as Gantt, are entitled to freedom from racially discriminatory policy. 320 F.2d at 614.

It is our opinion that Gilmore is a proper representative of prospective teachers seeking employment by tax-supported institutions of learning in Texas.

b. Mantle

[19] Plaintiff Thomas John Mantle is a student at the University of Texas, who sought part-time employment at the University's law school library. His employment was confirmed by the head librarian and the morning he commenced work, Mantle was directed to the per-

[illegible] office at the University of Texas for [illegible] employment. Included [illegible] presented to Mantle by [illegible] of the University's Personnel Department was the loyalty oath prescribed by Article 6252-7, Texas Rev.Civ.Stat. Plaintiff read the oath and the list of organizations designated as subversive by the Attorney General under Executive Order No. 10450 and 1st, 2nd, 3rd and 4th supplements thereto, and discovered that he was a member of an organization included on the list, to-wit, The Industrial Workers of the World. Moreover, since he joined that organization knowing its aims and purposes,[9] and since his only defense to membership under the oath would be a disclaimer of knowledge of the proscribed purposes of the organization, Mantle realized that he could not execute the oath and so advised the Personnel Office. He was "informed that he must execute the oath as a condition of his employment," and because of his refusal to do so, he was denied employment at the University of Texas. Since we are here according to Gilmore representation of prospective teachers in the interest of clear delineation of class representation, see Hamer v. Campbell, supra; Thaxton v. Vaughan, supra, we accord to Mantle representation of prospective employees of the State of Texas.

In this context, Mantle's standing to sue is unassailable. His employment at the law library having been confirmed, the conclusion is inescapable that he was well qualified for the position he sought. He was denied employment solely because his membership in the aforesaid organization made impossible the execution of the oath, a necessary incident of continued employment, thereby denying him employment otherwise available to him. That his salary would be paid in part by state funds is not in dispute. Plaintiff Mantle, therefore, has standing to bring this suit individually and as a representative of the class herein defined.

c. Palter and Pullen

[20] A federal court will not pass upon the validity of a state statute on complaint of those who fail to show injury by its enforcement. Tyler v. Judges of the Court of Registration, 1900, 179 U.S. 405, 21 S.Ct. 206, 45 L.Ed. 252; Hendrick v. State of Maryland, 1915, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed 385; Fairchild v. Hughes, 1922, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499; Commonwealth of Massachusetts v. Mellon, 1923, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078.

9. Mantle's depositional testimony, in pertinent part, was as follows:

"Q. Now, you just said you were very interested in Socialism, and I thought you said you were—and believed in it personally, and I thought you said that in the context of why you became a member of the Industrial Workers of the World.

A. Yes.

Q. Well, are you telling me that they advocate Socialism?

A. Yes, * * * their particular brand of Socialism.

Q. What is their particular brand of Socialism?

A. Labor syndicalism.

Q. What is labor syndicalism?

A. It is a particular belief that * * * I believe that basically it is that all of the working people in the world, if they were to unite in one union, then this union would be the—become the dominant—I would say dominant force in society.

Q. In other words, it could overthrow all other governments, supplant all existing government authority? Just say 'Yes' or 'No'.

A. Yes.

Q. Does this organization believe in it? You have just said you believed in this—what was it? What was the term—'syndicalism'?

A. Yes.

Q. (By Mr. Shultz) At the time you joined the Industrial Workers of the World, did you know that this organization was on the list of subversive organizations compiled by the United States Attorney General?

A. Yes.

Q. You did?

A. Yes.

Q. You purposely joined it, knowing that?

A. I joined it knowing that, yes."

[21] While plaintiffs Palter and Pullen were required to execute the oath upon being employed by the University of Texas in 1964 and 1965, respectively, it does not appear that their compliance was other than free and willing. Furthermore, it has not been shown that they will ever again be required to execute it. Article 6252–7 appears to require only one execution, and plaintiffs have failed to uncover the slightest threat of its being required of them again during their entire tenure.

Nevertheless, plaintiffs urge that the enforcement of Article 6252–7 requires them " * * * " to conform to a standard of conduct which is not susceptible of accurate determination" and that they may not repudiate the oath. Again, however, plaintiffs' fears are entirely unjustified. The oath binds the maker to nothing but the existence of present and past facts. It does not bind him to avoid future associations or abstain from future conduct of any kind. We consider it to impose no prospective restraints of any character on plaintiffs' conduct.

[22] In short, these two plaintiffs have failed to show that they have been injured by an enforcement of Article 6252–7. There must be some probability of invaded rights before injunctive muscles are flexed. The "ifs" of future statutory construction and its then application are too speculative and unpredictable to summon injunctive powers. Congress of Racial Equality v. Douglas, 5th Cir. 1963, 318 F.2d 95, 101. In contradistinction, an injunction was sanctioned in Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377, where the President of the University of Washington and its Board of Regents had given notice that all teaching personnel would be required to subscribe to the oath on pain of dismissal. However, we hold that on the evidence presented to this court plaintiffs Palter and Pullen have wholly failed to establish the necessary standing to attack the constitutionality of Article 6252–7. Since they have no present cause of action, they cannot qualify as representatives of any class.

d. Kahn

[23] We granted plaintiff Kahn's motion to intervene because his claim presented questions of law and fact in common with the other plaintiffs in this cause. Federal Rules of Civil Procedure, Rule 24, U.S.C.A. The intervention of Kahn, if not compelled, is at least justifiably permissive under the liberalized aegis of Rule 28. Atlantis Development Corp., Ltd. v. United States, 5th Cir., June 12, 1967, 379 F.2d 818.

His standing as a plaintiff in this suit cannot be seriously challenged. Upon the evidence it is clear that he was tendered a *bona fide* offer of employment as a professor of psychology by the University of Texas Board of Regents which he intends to accept, provided that his execution of the loyalty oath required by Article 6252–7 is not made a condition of his employment. The Board of Regents concede that Kahn's employment is to be conditioned upon his signing the loyalty oath.

Obviously, the enforcement of Article 6252–7 by the State of Texas is effectively denying plaintiff Kahn the employment he otherwise would have. His injury is sufficient to provide standing to assert the unconstitutionality of that statute in this court.

Plaintiff Kahn would bring this action individually and as a representative of a class of professors, teachers, and other employees of state-supported educational institutions. However, we have concluded that, like Gilmore, he may properly represent only prospective professors and teachers seeking employment in educational institutions supported by the State of Texas. See Hamer v. Campbell, supra, and Thaxton v. Vaughan, supra.

e. Cunningham

[24] We need not decide Cunningham's standing as a plaintiff in this cause at the time suit was instigated. Evidence submitted on unchallenged affidavit subsequent to oral argument shows that he is not now and at no time after the conclusion of the first six

weeks of the 1967 Summer Session was an enrolled student at the University of Texas. Furthermore, it is not contended that he contemplates future enrollment in state-supported schools in Texas.

Consequently, we hold that upon the evidence the enforcement of Article 2998b threatens no injury to him. He does not possess the standing necessary to entitle him to assert the unconstitutionality of that state. United States v. Oregon State Medical Society, supra; Hamer v. Campbell, supra.

VENUE and JOINDER

[25] As discussed supra, the claim alleged by plaintiff Gilmore against the defendant El Centro is, for venue purposes, properly before this Court. There is, therefore, proper venue in the Northern District of Texas as to the Board of Regents of the University of Texas, the State Treasurer, and the Comptroller if these parties have been properly joined as defendants. 28 U.S.C.A. § 1392(a).[10]

Rule 20, Fed.Rules Civil Procedure, permits joinder of plaintiffs or defendants whenever there is a common question of law or fact and the claims involved arise out of a single transaction, occurrence, or series of transactions or occurrences.[11]

[26, 27] Since joinder of parties is dependent on the concepts of "common question of law or fact" *and* "same transaction", these tests must both be met in order for us to hold, as we do, that there is proper joinder of defendants in the case at bar. Music Merchants v. Capitol Records, E.D.N.Y.1957, 20 F.R.D. 462; Philadelphia Dressed Beef Co. v. Wilson and Co., E.D.Pa.1956, 19 F.R.D. 198. The exaction of the Article 6252-7 oath from each of the respective plaintiffs presents a question of law common to all. Eastern Fireproofing Co., Inc. v. United States Gypsum Co., D.Mass.1958, 160 F.Supp. 580, 581.

In United States v. Mississippi, 1965, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717, the suit was against the State of Mississippi, its state election commissioners and six county voter registrars, alleging the hampering of the voting rights of Negro citizens of the state. In apposition to our case, Justice Black, speaking for the Supreme Court, said:

> The District Court said that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately with reference to separate applicants. For this reason apparently it would have held the venue improper as to the three registrars who live outside the Southern District of Mississippi, and a fourth who lived in a different division of the Southern

10. 28 U.S.C.A. § 1392(a) provides:
"Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."
Commenting on § 1392(a), Professor Moore observed:
"As an exception to the general venue statute, it was Congress' intent that § 1392(a) preserve statewide venue in actions where multiple defendants reside in the same state, but in different districts."
1 Moore's Federal Practice § 0.143 (1965).

11. "Rule 20. Permissive Joinder of Parties.
Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

District, and it would have ordered that each of the other two registrars be sued alone. But the complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of their right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure * * *. These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which is dependent to a large extent upon 'question[s] of law or fact common to all of them.' Since joinder of the registrars in one suit was proper, the argument that venue as to some of them was not properly laid is also without merit. 28 U.S.C. §§ 1392(a), 1393(b) (1958 ed.). 380 U.S. at 142, 85 S.Ct. at 815, 13 L.Ed.2d at 726.

In the case at bar, the series of occurrences from which whatever right to relief there may be arises is the statewide policy of conditioning state employment upon the exaction of the loyalty oath detailed in Article 6252-7. Both tests having been met, we hold that joinder of defendants is permissible under Rule 20, Federal Rules of Civil Proc. and, therefore, that venue is properly laid in the Northern District of Texas.[12]

THE OATH

[28] The exaction of formalized fealty is a diminishing phenomena in our girding against real and substantial subversion. This case, however, presents a confrontation of the putative protection of such oaths with our cherished First Amendment freedoms. While there can be no compromise with subversion, concomitantly, there can be no fettering of the exploration in the realm of ideas. Exposure of the false and the affirmation of truth are both ceded in the free range of association and expression. These are among the self-evident truths that history and experience have not pailed. Suppression will not kill nefarious ideas, only exposure will. Our nation can survive occasional falsehood. Its permanence and vibrancy as a democracy demand that freedom which perchance permits the false to live for a day. Attempted suppression sometimes fortifies the false with undeserved dignity. Silence is often more contemptuous of its falsity.

Plaintiffs have challenged the constitutionality of Section 1 of Article 6252-7 on grounds (1) that its enforcement denies them the freedom of association guaranteed by the Fourteenth Amendment against state curtailment and (2) that it is unconstitutionally vague and uncertain.

Section 1, in effect, provides that no state funds may be paid to any person as wages who has not executed an oath attesting (1) that he is not and never has been a member of the communist party; (2) that he is not and during the past five years has not been a member of an organization listed by the Attorney General of the United States pursuant to Executive Order No. 10450, December 9, 1953, and first, second, third and fourth supplements thereto, or if he was a member during such period, he may explain that he did not have knowledge of the proscribed purposes of the organization at the time he joined or during the period he was a member; and (3) that he is not, and during the past five years has not been, a member of any organization registered under the Federal Internal Security Act of 1950 or, if he was a member during such period, that he did not have knowledge of the proscribed purposes of the organization at the time he joined or during the period he was a member.

It is at once evident that an individual seeking employment with the State of Texas must be summarily rejected if he

12. At oral argument, defendants waived their motion to sever and transfer under 28 U.S.C.A. § 1404 (a).

refuses to take the [illegible] oath. It is equally apparent that [illegible] who has ever been a member of the Communist Party or who has during the past five years been a member of a designated organization with knowledge of the unlawful purposes of the organization, must refuse to take the oath in order to avoid prosecution for perjury. The inevitable result of this statutory scheme is that all otherwise qualified persons who are or have been members of the Communist party and or other designated organizations with knowledge of their unlawful purposes are ineligible for state employment solely because of such membership.

The question we are called upon to decide is whether disqualification from state employment solely on grounds of present or past membership in such organizations is compatible with First Amendment liberties guaranteed against state infringement by the Fourteenth Amendment.

[29, 30] We start with the premise that a state cannot condition an individual's privilege of public employment on his non-participation in conduct which, under the Constitution, is protected from direct interference by the state. In Sherbert v. Verner, 1963, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965, 971, the Supreme Court pointed out that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions on a benefit or privilege." And in Keyishian v. Board of Regents, 1967, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629, the Court denounced the assumption of Adler v. Board of Education of City of New York, 1952, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, that the employment of teachers could be conditioned on their giving up constitutional rights which could not be directly curtailed. If membership in the organization designated by Section 1 of Article 6252-7 constitutes activity which the state may not directly attaint, then it must follow that the state of Texas has no right to condition employment on non-membership. We proceed to a determination whether such membership is constitutionally protected activity.

[31, 32] The First Amendment embodies a revered freedom of association which is no more subject to state curtailment than any other First Amendment right. The Supreme Court has repeatedly defended the individual's freedom to engage in associations of his choice for the advancement of his own beliefs and ideas. See National Association for Advancement of Colored People v. State of Alabama, ex rel. Patterson, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488; National Association for Advancement of Colored People v. State of Alabama ex rel. Flowers, 1964, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325; Elfbrandt v. Russell, 1966, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321; Keyishian v. Board of Regents, supra. That freedom is never more wisely invoked than in cases where the free exchange of thoughts and ideas among members of the academic community is threatened. Shelton v. Tucker, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Sweezy v. State of New Hampshire, 1957, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311.

[33, 34] Of course, the First Amendment rights are not absolute. But it is only when the exercise of such rights threatens a clear and present danger to some substantial state interest that the state is justified in curtailing them. Defendants contend that the state has a vital interest in protecting itself from internal weakening by keeping subversives out of the government. We agree. However, it is another question whether the procedures devised by the State of Texas for protecting that interest can withstand constitutional attack.

[35] We believe the Supreme Court has made it abundantly clear that the mere membership of an individual, knowing or otherwise, in any of the organizations designated by Article 6252-7 does not constitute him a sufficient threat to state or national security to warrant arbitrary exclusion from state employment.

[36] In Elfbrandt v. Russell, supra, the Court struck down a statutorily required oath which bound state employees not to become knowing members of designated "subversive" organizations. Employees who became members, without more, were subjected to prosecution for perjury and automatic dismissal. Justice Douglas, speaking for the majority, said:

> Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the "specific intent" to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. 384 U.S. at 17, 86 S.Ct. at 1241, 16 L.Ed.2d at 325.

We believe that *Elfbrandt* states the principle which controls our decision: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." 384 U.S. at 19, 86 S.Ct. at 1242, 16 L.Ed.2d at 326.

[37, 38] Oaths in support of the government are not abhorrent to the Constitution. Indeed, the Constitution provides one.[13] The vice of the oath condemned here is that it equates membership or association with non-allegiance. A statute which automatically disqualifies applicants on the basis of membership alone ensnares the innocent with the guilty. While such membership may furnish a basis for further inquiry into an applicant's present or past activities, it does not in itself constitute a threat to the state. An individual is entitled to be judged by his own conduct, not that of his associates. To the extent that Article 6252–7 disqualifies passive or dissenting members of such organizations, it is too broadly drawn. Even as to ignorant members, the statutory exculpation,[14] if any, is vague in its implementation. See Speiser v. Randall, 1958, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, with contemporary elucidation by Keyishian v. Board of Regents, supra.

By the terms of the Arizona statute construed in *Elfbrandt* the result of becoming a member of a proscribed organization was criminal punishment, whereas the only consequence of membership under Article 6252–7 is disqualification. But any doubts this court might have had concerning the applicability of the quoted portions of the *Elfbrandt* opinion to the case at bar are completely dispelled by the recently decided case of Keyishian v. Board of Regents, supra.

13. U.S.Const. Art. II, Sec. 1.

Cf. Gerende v. Baltimore City Board of Supervisors of Elections, 1951, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745, wherein the Supreme Court upheld a Maryland state loyalty oath as constitutionally permissible. Relying on *Gerende*, a 3-judge court in Maryland upheld a similar oath (modified to conform to *Elfbrandt*) in Whitehill v. Elkins, D.Md., 1966, 258 F.Supp. 589, prob. juris. noted, 1967, 386 U.S. 906, 87 S.Ct. 852, 17 L.Ed.2d 781.

14. Art. 6252–7:

* * * * *

2. * * * or, in the event that the affiant has during such five year period been a member of any such organization association, movement, group or combination, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

3. * * * or, in the event that the affiant has during such five year period been a member of any such organization, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined it and throughout the period during which he was a member, he did not know that its purposes was to further the goals of the Communist Party or that it was controlled by the Communist Party.

In *Keyishian*, faculty members of the State University of New York challenged the constitutionality of certain sections of the New York Education Law and New York Civil Service Law on the same grounds upon which these plaintiffs here launch their attack on Article 6252-7. Section 105(1)(c) of the Civil Service Law, McKinney's Consol. Laws, c. 7, and Section 3022.2 of the Education Law, McKinney's Consol. Laws, c. 16, made membership in proscribed organizations to be designated by the Board of Regents and/or membership in the communist party prima facie evidence of disqualification for appointment or retention of any position in New York public schools.

The New York statutory scheme did not require the execution of an oath, and no penalties other than disqualification resulted from membership in the designated organizations. Nevertheless, the Court adopted the rationale and language of *Elfbrandt* without hesitation. Accordingly, the fact that by the terms of Article 6252-7 membership results only in disqualification does not render *Elfbrandt* any the less controlling here; it merely emphasizes the applicability of *Keyishian*.

It may be observed that the Texas statute operates only to deny initial employment because of present or past associations, whereas the New York scheme operated to disqualify employees for proscribed associations at any time during their tenure. Article 6252-7 appears to require no sanctions for membership which is undertaken following the execution of the prescribed oath at the beginning of the employment relationship. However, we do not consider this distinguishment to affect our decision. There can be little difference in principle between discharging one because of his constitutionally protected associations and refusing to hire him for the same reasons. The result is an unconstitutional deprivation in either case.

We find that Section 1 of Article 6252-7 suffers from the same "impermissible overbreadth" which afflicted the statutory provisions struck down in *Elfbrandt* and *Keyishian*. While the statute may operate to denigrate associations not under the protective umbrella of the Constitution, it also condemns associations which are. For that reason it cannot stand.

Our finding that Section 1 of Article 6252-7 is constitutionally infirm pretermits a discussion of whether it is unconstitutionally vague and uncertain.

Counsel for the plaintiffs shall submit, on notice to the defendants, an appropriate order.

Lavon C. MYERS et al., Plaintiffs.

v.

FREEDOM NEWSPAPERS, INC., Defendant.

No. C 66-199.

United States District Court
N. D. Ohio, W. D.
Oct. 3, 1967.

Diversity action arising out of automobile accident was brought by Ohio resident against California corporation which was controlling partner in partnership operating Texas newspaper. On defendant's motion for order to transfer action to Western District of Texas, the District Court, Don J. Young, J., held that case would be transferred for convenience of parties and witnesses and in interests of justice where all witnesses with regard to condition of defendant's truck were in Texas, most of information concerning plaintiff's earning capacity and employment records was in Texas, physicians who treated plaintiff after accident would be available to testify in Texas and Texas law was applicable.

Motion granted.

Dickering Over the Districts

You can take redistricting out of the legislature but the politics remain.

Tim Storey

Most states now have new state legislative district maps in place for the upcoming fall elections, but at least 23 of them are being challenged in court.

Every 10 years the U.S. Census Bureau counts Americans, and then states begin the arduous and often agonizing task of redrawing political boundaries for state legislative and congressional seats. In most states, it's the lawmakers who do the map drawing, and routinely they do it in a politically charged, contentious atmosphere. Inevitably, passing a redistricting plan comes down to the closing days of the session and is adopted in a cloud of partisanship. Not long after, disgruntled members, editorialists and public interest groups call for reform. "There must be a better way," they declare.

But is there?

Donald Stokes, dean of Princeton's Woodrow Wilson School, points out that the United States is the only nation with representative districts that leaves remapping to the normal legislative process. As a two-time member of New Jersey's redistricting commission, he argues that the public interest—not political interests—is served best when lawmakers are removed from redistricting. And indeed, nine states rely on commissions to redraw district lines, contending that lawmakers' priorities are to maximize partisan control and entrench incumbents rather than develop fair plans that can stand up in court.

But others argue that politics will never be absent from a process inherently political. For after all, commission members are appointed by politicians and bring their own agendas to the table. Some in Pennsylvania have called for an overhaul of their commission system and suggested that redistricting be brought back into the legislative process because they believe that the commission system invests too much power in the hands of too few people. Pennsylvania has a five-person commission for legislative redistricting.

Nevertheless, the appeal of removing redistricting from the legislative environment can be particularly tantalizing at least once every 10 years.

Following a contentious redistricting battle in Virginia in 1991, Delegate Steven Agee announced that he would introduce a bill during Virginia's next regular session calling for the creation of a redistricting commission. In Louisiana, several prominent public figures such as former governor Buddy Roemer and Senator Dennis Bagneris, who chairs the committee that handled redistricting, have been joined by various newspaper editorial writers in calling for the creation of some sort of entity to draw Bayou State districts that will take the process out of the hands of the Legislature.

Currently, redistricting of legislative seats is the responsibility of the legislature in 39 states. (In Alaska the governor is charged with redistricting, and Maryland's governor submits legislative maps to the legislature.) Reformers contend that redistricting done within the normal legislative process creates a clear conflict of interest since the outcome will have so many political ramifications.

Nine states have lifted the task of redistricting out of the legislature and given an independent commission the

Tim Storey is NCSL's expert on redistricting.

Redistricting Via Commission

State	Members	Selection Requirements
Ark.	3	Governor, secretary of state and the attorney general serve.
Colo.	11	Legislature selects 4, governor 3, judiciary 4. Maximum of 4 from legislature; 6 from the same party. Each congressional district must have at least 1 but no more than 4 representatives; at least 1 member must live west of the Continental Divide.
Hawaii	9	Senate president selects 2, speaker 2, minority Senate 2, minority House 2. These 8 select 9th member to chair. No member may run for legislature in the two elections following redistricting.
Mo.	House—18 Senate—10	There are two committees. Governor picks 1 person from 2 lists submitted by the main political parties in each Congressional district to form the House committee. Governor picks 5 from lists of 10 submitted by the two parties to form the Senate committee. No member may hold legislative office for next 4 years.
Mont.	5	Majority and minority leaders of both houses each select a member. Those 4 select a 5th chair. If the 4 cannot select a 5th within 20 days, then a majority of the Supreme Court selects the chair. Public officials may not serve. Members may not run for office for 2 years.
N.J.	10	The chairs of the two major parties select 5 members each. If they cannot develop a plan in the allotted time, the chief justice of the Supreme Court appoints an 11th member.
Ohio	5	Board is the governor, auditor, secretary of state and 2 members selected by the legislative leaders of each major party.
Pa.	5	Majority and minority leaders of both houses each select 1 member. These 4 select a 5th to chair. If they fail to do so within 45 days, a majority of the Supreme Court will select the 5th. Chair may not be a public official.
Wash.	4	Majority and minority leaders of both houses each select 1. These 4 select a nonvoting chair. If they fail to do so by a specific date, the Supreme Court selects the 5th. No commission member may be a public official.

Todd Rosenkranz, NCSL

doned properties or construct new apartments for poor families. The tenants of these properties actually use their own labor in lieu of the more traditional down payment—a process called "sweat equity"—to prepare the apartments for residence; eventually the tenants own and manage the properties themselves.

El Hogar del Futuro, Spanish for "home of the future," is a non-profit community development corporation in Hartford that makes good use of the state's limited equity cooperative program. Started by the Catholic Church in the 1970s, El Hogar has built or rehabilitated 130 housing units in poor neighborhoods in Hartford. "We carefully select families for these projects while they are being built," explains Dennis Cunningham, director of El Hogar. The families must meet income eligibility criteria and agree to put 300 hours of sweat equity into the project.

Eight families invested 2,750 hours of "sweat equity" to renovate this building in Hartford, Conn., where they are now proud first-time homeowners in La Esquina Brillante.

A recent project called "La Esquina Brillante" (brilliant corner) was built in the Clay Hill neighborhood with funding from the state as well as Phoenix Mutual, a local insurance company. Cunningham always makes an effort to supplement the state's funds with those of private companies. In the case of Phoenix Mutual, "they realized the benefits to be gained from community involvement. The combined energy from the state, private and non-profit organizations and housing recipients is the key to our program's success," says Cunningham.

What has precipitated this new wave of state-level activity in housing? Without hesitation, housing specialists across the country say the impetus is a problem shared by communities urban and rural, wealthy and poor—a lack of *affordable* housing. Federal guidelines define housing as affordable if it consumes no more than 30 percent of a household's adjusted monthly income. The American Housing Survey of the U.S. Census found that in 1985, four of every five households living below the poverty line lived in housing that cost more than this standard. From 1978 to 1985, the number of low-rent housing units declined by 500,000 nationwide while the number of low-income renters rose by 3.6 million.

Exacerbating the problem, according to the Congressional Budget Office, is the reduction in appropriations for the subsidized housing programs of the Department of Housing and Urban Development (HUD), which fell from a peak of $32.2 billion in FY 1978 to $9.8 billion in FY 1988, a decline in inflation-adjusted funding of more than 80 percent.

Passage of the National Affordable Housing Act (NAHA) in 1990 demonstrated a renewed federal commitment to housing in the form of the new HOME block grant. But the act also requires a new level of state involvement and commitment to housing rehabilitation and construction. Each state is now required to produce a Comprehensive Housing Affordability Strategy (CHAS) in order to qualify for federal HOME and homelessness program funds. As they draft their housing plans, states must identify their housing needs and what they must do to meet them.

In Connecticut, the CHAS strategy is to scatter low-cost housing throughout the state and give highest priority for new construction funds to those wealthy and suburban communities that currently lack inexpensive housing. Sandy Bergin, CHAS task force coordinator from the Department of Housing says, "Our CHAS strives to promote housing choice and diminish the exclusionary practices that have perpetuated housing segregation in Connecticut."

State contracts for housing construction or renovation have traditionally been with for-profit homebuilders or local housing authorities. In recent years, however, non-profit community-based organizations, including community development corporations like El Hogar del Futuro, have become important participants in low-cost construction and rehabilitation. These organizations, when they have acquired the necessary experience in housing construction, are able to attract funds because they are non-profit and build or renovate housing for minimal cost.

NAHA requires that 15 percent of the funds from the new HOME block grant go to these community-based development organizations. States also are recognizing the value of working with these non-profit organizations to carry out housing construction and rehab programs. Connecticut, for example, goes beyond the federal guidelines by requiring that 30 percent of HOME funds be channeled to non-profit groups.

The CHAS process, the HOME block grant and the increased importance of non-profit community-based development organizations have brought new emphasis to the state role in construction and rehabilitation of affordable housing. And future efforts to turn the tide of homelessness will hinge on the ability of state governments to make use of every available resource.

"The states play a role that is hard to understate," said Benson Roberts at NCSL's 1991 Annual Meeting. "You guys provide the leadership that is really necessary to be responsive to local communities–a job that, quite frankly, the federal government will never be able to do."

The road ahead holds obstacles. Many of the successful state programs do require at least some commitment of state general fund money—and the fiscal woes of most states make even a minimal increase in housing allocations difficult. Furthermore, state mandates for local practices, such as Connecticut's new emphasis on affordable housing in high-rent communities, will face severe local challenges. Ultimately, however, states and localities will have to hammer out their differences in order to qualify for federal funds and to keep the numbers of homeless or near-homeless from increasing.

initial responsibility for redrawing the lines. The states are Arkansas, Colorado, Hawaii, Missouri, Montana, New Jersey, Ohio, Pennsylvania and Washington. The makeup of these commissions varies. Arkansas has a three-member commission composed of the governor, secretary of state and attorney general. In Washington, the redistricting commission comprises four members, one each appointed by the minority and majority leaders in each house of the Legislature. None of the commissioners may hold public office while serving on the commission. The four appointed members select a fifth non-voting chairman. Several states have specific restrictions barring commission members from running for the legislature in subsequent elections.

Of the states that completed redistricting in 1991, several used the commission system successfully. New Jersey held legislative elections in November under districts drawn by an 11-member commission earlier in the year. The New Jersey commission adopted plans that have not been challenged in court, and no challenge is expected. Each of the two state party chairmen appoints five members to the commission, and the 10 commissioners have 30 days to produce new district maps. If they are unable to do so, an 11th commissioner is appointed by the chief justice of the state Supreme Court to break the tie and ensure the adoption of a fair plan with the public's interest as its top priority.

In 1991, as in 1981, Princeton's Donald Stokes was tapped by the chief justice as New Jersey's 11th member. Stokes lauds the New Jersey system as a model because it infuses the process with the wisdom of politics yet eliminates the conflict of interest that he believes is inherent when the legislature redistricts itself. Stokes says that the conflict of interest is so clear that "legislatures have been catching hell for the mischief that results (since) the early 19th century period in which Elbridge Gerry gave us the term *gerrymander*."

In 1981, Stokes was joined by the commission's five Democrats to pass a plan, and in 1991, the five Republicans voted with Stokes.

Iowa's method of redistricting is the most radical of the states. The Iowa approach seeks to eliminate political concerns as the main force behind the line drawing. During the '60s and '70s, the courts repeatedly threw out redistricting proposals from the Iowa legislature; and in 1972, the Iowa Supreme Court imposed its own plan. With the frustrations of the past clear in their minds, Iowa lawmakers enacted the current redistricting statute in 1979.

Under Iowa law, the non-partisan Legislative Service Bureau submits a set of proposed redistricting maps to the legislature, which must approve or deny the plans without amending them. If the legislature rejects the first set of plans, the bureau supplies a second set also to be voted up or down without amendments. If the legislature rejects the second set, it gets a third set that it may amend. Only by stretching out the process to the third round can the legislature retake control of the line drawing.

Iowa's redistricting statute prohibits the Legislative Service Bureau from using any political data such as voter registration or past election results when drawing up the plans. Neither may the bureau take into consideration the residences of incumbent legislators. The bureau may use only population figures provided by the Census Bureau and apply criteria such as creating compact districts and preserving communities of interest.

Using this unusual system, Iowa became the first state in 1991 to adopt both state legislative and congressional districts, and no court challenges have been filed. Wyoming was actually the first state to complete redistricting using a process of apportioning seats out to counties, but their plans were thrown out by a federal court for violating the one person, one vote rule.

The Iowa experience was not without its anxious moments. One local television station declared the plans dead on arrival once the political results of the plans were revealed. The Iowa plans paired 20 of 50 incumbent senators and 40 of 100 incumbent representatives in the same districts; the Senate majority and minority leaders and the House speaker and majority leader were not spared. Nevertheless, the Iowa General Assembly accepted the first plans.

Iowa's ability to remove politics from redistricting is unusual. Even states with a commission or board admit that politics still play a key role. Mark McKillop, who was the supervisor of the Senate Democratic reapportionment project in Pennsylvania, responds to those wanting to strip the process of politics by saying, "They're kidding themselves if they think they can take politics out of it." He does endorse a commission system like the one used in Pennsylvania on the grounds of efficiency. "If this were done in the legislature, we would still be doing it," McKillop said.

Anne Lee, the reapportionment chair for the League of Women Voters in Hawaii, agreed that politics were still very evident in the commission process used in her state. She did point out that the commission lifted the contentious process from the Legislature, thus allowing them to focus on substantive issues rather than being consumed by redistricting. She also noted that each political party had an equal voice on the Hawaii commission instead of one party dominating the process, which might occur if it were done within the Legislature.

Many states successfully adopt each decade redistricting plans that stand up in court and are produced within the crucible of the normal legislative process. Virginia Delegate Ford Quillen pointed out that his state "produced a good product using the typical legislative committee system." He also said that it would be very difficult "to design a pure commission system where the commission members don't have their own agendas." One of the principal criticisms of commissions is that the members invariably have political motives, and it merely concentrates substantial power in the hands of a smaller group than the legislature.

Using a commission system does not guarantee that new district plans will not be challenged. The Hawaii commission had its plans thrown out in 1982 and replaced by temporary court-drawn plans. Missouri, Ohio and Pennsylvania are currently in court defending plans drawn by commissions.

It is certain that redistricting will continue to be a divisive and time-consuming chore for legislatures every 10 years. Redistricting plans, whether drawn by the legislature or an independent commission, will always have dramatic political results. Whether you are a winner or loser in the redistricting sweepstakes may determine which system you advocate.

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Juneau, Alaska 99801-2101

M E M O R A N D U M January 21, 1992

SUBJECT: Draft CSHJR 45 (State Affairs) (Legislative reapportionment) (Work Order No. 7-LS1035D)

TO: Representative Gene Kubina, Chair
House State Affairs Committee

FROM: Jack Chenoweth
Legislative Counsel

I have been assigned responsibility for further work on this measure.

Looking at the proposed committee substitute resolution with a fresh perspective, I'd like to propose a number of technical changes for the committee's consideration.

I

In sections 2 and 3, amending art. VI, secs. 1 and 2, respectively, a specific reference to the party responsible for districting (". . . districts shall be set by the Reapportionment Board . . .") has been omitted in this version. Somewhere in the measure the districting (i.e line drawing) responsibility should be formally assigned. Since redistricting is a function of reapportionment and reapportionment may be handled by the Reapportionment Board or the court, the handiest way to accomplish that would seem to me to be to expand the last sentence of subsection (a) of art. VI, sec. 10 (sec. 9 of the resolution) to read:

> The final reapportionment plan adopted under this section **shall set out election district and senate district boundaries** and [REDISTRICTING] shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

In this way, whichever entity actually reapportions is also required to redistrict.

II

The distinction between the establishment of the Reapportionment Board under art. VI, sec. 8 (sec. 7 of the resolution) and the enumeration of the responsibilities of that board under art. VI, sec. 10 (sec. 9 of the resolution) should be maintained. Since the duties of the board are set out at length in the latter section, and since reapportionment may in certain circumstances be accomplished by the court, the reference to reapportionment being conducted by the board set out in the earlier section may be omitted. The first sentence of subsection (a) of art. VI. sec. 8 should be revised to read:

> (a) There shall be a Reapportionment Board [THE GOVERNOR SHALL APPOINT A REAPPORTIONMENT BOARD TO ACT IN AN ADVISORY CAPACITY TO HIM].

III

In order to provide certainty to the several critical benchmark reference dates set out in art. VI, sec. 10--dates that may also be critical to the enforcement clause, art. VI, sec. 11--I would encourage adoption of the following changes in the new language being added in subsection (a) of that section:

> (a) Except as provided under (c) of this section, no later than **the date that is** eighteen months before the date of the first general election following the official reporting of each decennial census, the Reapportionment Board shall adopt a proposed reapportionment plan. . . . No later than **the date that is** fourteen months before the date of the first general election following the official reporting of each decennial census, the board shall adopt a final reapportionment plan.

and in the new language set out at the beginning of subsection (c):

> (c) If the data from a decennial census is not available to the board by **the date that is** sixteen months before the date of the first general election following a decennial census year . . .

These changes should allow the board, the court, and parties seeking to use the enforcement provision to determine deadlines with specificity.

JC:gc
92-034.glc
Enclosure

cc: Representative Dave Donley

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MEMORANDUM November 8, 1991

SUBJECT: CSHJR 45 (State Affairs)

TO: Representative Gene Kubina
Chair, House State Affairs Committee
Attn: Annie

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed is a draft CSHJR 45 (State Affairs), incorporating the changes to HJR 45 that you requested, with one exception. There is no lapse date for the transitional provision; I asked Dave Dierdorff about this, and he indicated, as I suspected he would, that a lapse date was not appropriate. Transitional provisions remain in the constitution, even when they are obsolete.

There is one provision of this resolution that I believe may violate the federal constitution: the provision (part of article VI, section 10(c)) that if census data is not available in time, the old districts stay in effect for the first post-census election. I believe that this provision may violate the equal protection clause of the Fourteenth Amendment, as construed by the U.S. Supreme Court in the one-person, one vote cases. The California Supreme Court in 1982 ruled that the old districts could not stay in place, when the legislature failed to produce a plan by 1982; instead the court imposed an interim plan. Assembly v. Deukmejian, 639 P.2d 939, 955-61 (Cal. 1982). However, the California court did not cite any direct authority that an interim plan was required, and three of the seven justices concluded that an interim plan was not required, and that the districts in effect during the 1970's could stay in effect for 1982. At any rate, as Laurie Otto notes, subsection (c) will likely never be invoked, as the census data will always be available by September of the following year.[1/]

[1/] Question: if this situation will never arise, why have a provision in the constitution addressing it? I suppose the answer is that there is an extremely remote possibility that it might arise. My feeling, though, is that the constitution - the foundational document of state government - should not concern itself with extremely remote possibilities. If the situation did arise, the supreme court could address it, just as the court very capably addressed the matter of reapportioning the state senate - which the constitution did not (and still does not) provide for - after the one person, one vote decisions of the U.S. Supreme Court.

With Laurie's agreement, I provided that if the Reapportionment Board, on its second try (if the supreme court rejects all the plans), still cannot come up with a plan that can win a two-thirds vote, then the supreme court is free to adopt any plan that it wants. I also eliminated the provision that all members serve at the pleasure of the entity appointing them. That provision would have greatly increased the likelihood of no two-thirds vote, since a member of one party who was expressing inclination to support another party's plan could then be removed by the entity that appointed the member solely because of the member's expressed inclination.

As I have told Annie, I will be leaving this office on Friday to go to work for the Department of Law, so any further work on this bill, and on other elections and reapportionment questions, will be done by someone else. I don't know yet who that someone else will be. I have enjoyed working with you and with the fine folks on your staff.

JBG:mi
91-184.mai

Enclosure

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MEMORANDUM February 5, 1991

SUBJECT: Constitutionality under U.S. Constitution of Article VI sections of Alaska constitution (Work Order No. 7LS0653)

TO: Representative Dave Donley
Attn: Laurie Otto

FROM: John B. Gaguine JBG
Legislative Counsel

Since the "one person, one vote" decisions of the U.S. Supreme Court in the early 1960s (Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506 (1964); and many others), it is obvious that many of the provisions of the reapportionment article of the Alaska Constitution, article six, are unconstitutional under the federal constitution. Some of these have been specifically held unconstitutional by the Alaska Supreme Court, and others have been simply ignored. You have asked for an analysis of the constitutionality of Article VI, sections 1 - 7.

Section 1 is still constitutional. That section provides that members of the house of representatives shall be elected by the qualified voters of the respective election districts. Under section 3, the election districts are to be reapportioned "immediately following the official reporting of each decennial census of the United States." This has been done by the governor and the Reapportionment Board (sections 8 - 10), and the most recent reapportionment of house districts (Article XIV, Sections 1 and 3, proclaimed by the governor in 1984) has been upheld by the Alaska Supreme Court. Kenai Peninsula Borough v. State, 743 P.2d 1352, 1358-61 (Alaska 1987).

Section 2 is not constitutional as written. It provides that members of the senate shall be elected by the qualified voters of the respective senate districts set forth in Article XIV, Section 2 of the original constitution, subject to changes authorized in Article VI. In Wade v. Nolan, 414 P.2d 689 (Alaska 1966), the Alaska Supreme Court reached the inescapable conclusion that those senate districts did not comport with the U.S. Constitution. The court also ruled that the governor and the Reapportionment Board could reapportion the senate on a constitutional basis, even though the

LEGAL OPINION – CONSTITUTIONALITY

Alaska Constitution only gave the governor and the board reapportionment authority as to the house.

Since Wade the Alaska constitution has been treated as though amended. The governor and the Reapportionment Board are now seen by all, including the courts, as having the power to reapportion the senate as well as the house. Thus, for instance, current Article XIV, Section 2, relating to senate districts, was promulgated by the governor, with the advice of the board, under Article VI, Section 10. Kenai Peninsula Borough, supra at 1364 (citing Egan v. Hammond, 502 P.2d 856, 874 (Alaska 1972)), notes that because the constitution has never been amended with regard to senate reapportionment, "the governor's implied power to reapportion senate districts therefore remains in force under Wade."

The first sentence of section 3 ("The governor shall reapportion the house of representatives immediately following the official reporting of each decennial census of the United States") is still constitutional, although, as noted, it is now being interpreted as allowing reapportionment of the senate as well. The second sentence ("Reapportionment shall be based upon civilian population within each election district as reported by the census") was ruled unconstitutional by the Alaska Supreme Court in Egan v. Hammond, supra at 868-69, because it totally disenfranchised the military in Alaska, in violation of several decisions of the U.S. Supreme Court. Egan also ruled that the portion of the sentence requiring use of census data in reapportionment was also unconstitutional, because it could not be severed from the unconstitutional "civilian population" part. Id, at 870-71.

However, the Egan court ruled, id. at 869, that the state could legitimately exclude some (but not all) military personnel as a permissible device for limiting the impact of transients and non-residents; specific formulas for such exclusion were upheld by the court in Groh v. Egan, 526 P.2d 863, 869-74 (Alaska 1974), and in Carpenter v. Hammond, 667 P.2d 1204, 1210-13 (Alaska), appeal dismissed, 464 U.S. 801, 78 L.Ed.2d 67 (1983). And the Groh v. Egan court ruled that, although the Reapportionment Board was not constitutionally required to use 1970 census data when it reapportioned in 1973, it did not abuse its discretion in using this data, especially since it explained in its order why using more recent data would be impractical. 526 P.2d at 867-69. Thus, the second sentence of section 3 still has considerable validity.

Sections 4 and 5 are rather turgid. I believe that their intent is that the governor, in reapportioning, should adhere to the election districts set out in original Article XIV even if such adherence leads to districts with quite different populations. If my reading is correct, then these sections are inconsistent with the U.S. Supreme Court decisions, which have only tolerated very small variances. At any rate, sections 4 and 5 appear to be a dead letters, no longer considered by the reapportionment boards or cited by the courts in their reapportionment decisions.

Insofar as section 6 refers to the retaining or combining election districts provided in sections 4 and 5, it too is unconstitutional and a dead letter. Its reference to the "civilian" population is also unconstitutional. Other than that, section 6 appears alive and well. No one has argued that the governor and the board may not or should not give consideration to local government boundaries, or that they may not or should not use drainage and other geographic features wherever possible in describing district boundaries. As to the requirement that house election districts contain "as nearly as practicable a relatively integrated socio-economic area," that was upheld in Carpenter, supra (where the court held that Cordova was improperly joined with House District 2, the Southeast "iceworm" district), even though the likely result would be to increase the population disparities between house districts. (The court in Kenai Peninsula Borough, supra at 1358-61, upheld a smaller "iceworm" district established by the Reapportionment Board as the result of Carpenter. Kenai Peninsula Borough also ruled, at 1364-65, that the "integrated socio-economic area" requirement did not apply to senate districts.)

Section 7 is clearly unconstitutional and dead. Like Section 2, its intent was to preserve senate districts based on geographic area and not population. Thus, although it allowed the governor to modify senate districts based on changes in election (house) districts, it required that each senate district retain its total number of senators and its approximate perimeter.

I hope that this memorandum has been of assistance to you. Please let me know if I can be of further assistance.

JBG:mi
91-020.mai

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MEMORANDUM February 5, 1991

SUBJECT: Reason for reapportionment board (W.O. 7LS0652)

TO: Representative Dave Donley
Attn: Laurie Otto

FROM: John B. Gaguine JBG
Legislative Counsel

You have asked why the framers of the Alaska constitution decided to provide for reapportionment of the legislature through a reapportionment board in the executive branch, rather than allowing the legislature to reapportion itself, as is the case in the vast majority of states. The Alaska Supreme Court addressed this question in Wade v. Nolan, 414 P.2d 689, 694-95 (Alaska 1966), which concerned reapportionment of the Alaska Senate after the U.S. Supreme Court's "one person, one vote" decisions: "Whereas, traditionally, reapportionment had been made the responsibility of state legislatures, the Alaska Constitutional Convention purposely avoided placing any authority or responsibility for reapportionment in the legislature. The Convention was aware of the notorious and frequent failure or downright refusal of state legislatures to comply with their constitutional or statutory duty to reapportion." I am attaching the relevant portion of the Wade opinion, where the court quotes at length from the comments of the Chairman of the Committee on Suffrage, Elections and Apportionment of the Alaska Constitutional Convention.

You have also asked whether the concerns that led to the establishment of the Reapportionment Board still exist They do not. In 1962, in Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, the U.S. Supreme Court overruled several decades of precedent and held that federal courts could hear suits challenging on equal protection grounds the malapportionment of state legislatures. (Such suits had previously been held non-justiciable.) Two years later the Court upheld the authority of a federal district court to impose its own interim reapportionment plan on a state legislature that had been unable to reapportion itself constitutionally. Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506 (1964). Thus, if the legislature had the responsibility of reapportioning

LEGAL OPINION - REASONS FOR BOARD

itself, and it failed to do the job adequately, the courts, either federal or state, could step in, as was decidedly not the case when the Alaska constitution was written and adopted.

If I may be of further assistance, please advise.

JBG:pl
91-067.plm

Enclosure

than according to population, the Convention was following the pattern established by the United States Constitution and later followed by many of the states of the Union with respect to one or the other of their legislative bodies. The Convention obviously did not want the Senate apportioned on a population basis; it had practical reasons for not doing so and had no reason to anticipate that it would ever be necessary to reapportion the Senate on a population or on any other basis, hence no specific provision was made for its reapportionment.

The question which is squarely presented is whether the acts of the Governor and his advisory Reapportionment Board in reapportioning the Senate were authorized by the Alaska Constitution.

Before attempting to discuss this question it is well to explain the origin of a unique feature of the reapportionment provisions of the Alaska Constitution. Whereas, traditionally, reapportionment had been made the responsibility of state legislatures, the Alaska Constitutional Convention purposely avoided placing any authority or responsibility for reapportionment in the legislature. The Convention was aware of the notorious and frequent failure or downright refusal of state legislatures to comply with their constitutional or statutory duty to reapportion. The Alaska Convention's reason for placing reapportionment responsibility in the Governor was well stated by its Chairman of the Committee on Suffrage, Elections and Apportionment, John S. Hellenthal, as follows:

> HELLENTHAL: * * * Now on the method of the composition of the reapportionment and redistricting board, because redistricting, as we have explained would be necessary, the Committee recommends that the stress be placed on the executive in determining which of these election districts and where redistricting shall take place, or reapportionment, and it recommends the creation of a five-man advisory board to advise the governor with regard to the redistricting and reapportionment. * * * The reason that this plan was adopted is that the students and writers seem generally in accord that reapportionment, for some reason or other, I don't know why, but it has been neglected where it has been left to the legislators. Maybe it's that human element I spoke of earlier, but anyway the experience of the nation shows that the thing is delayed—procrastination; that in the State of Washington they waited for years and years and years, and finally, only by resorting to the courts and the initiative were they able to reapportion Washington. It was costly, the people suffered. And based on that experience and the recommendations, and it's almost universal of the advisors, and by advisors I don't mean the men that were here necessarily—but the writers throughout the country, the executive board was chosen, an advisory board. (Minutes of the Alaska Constitutional Convention, January 11, 1956, at 1839).
>
> * * * * * *
>
> Now there are other plans. There is no end of variations of plans that can be devised for the reapportionment with the mandamus feature, and you could have variance where a board can be picked—three from the legislature, three nominated by the judicial council, if you want, three of them nominated by some other group of civilians, some appointed by the governor, and get a good cross-section, and they could have the authority themselves to make the redistricting and reapportionment. There is no end to it, but the best thought seemed to indicate that the people would be best helped if it [reapportionment] were an executive function. * * * But it is the inaction of the legislature, as testified to by the universal history of the 48 states, that we're trying to overcome. [Id. at 1859.]
>
> HELLENTHAL: It was felt that it [reapportionment] was a proper executive

function as contrasted to the legislative. * * * [Id. at 1863.]

In its "Report to the People of Alaska" issued in February of 1956 the Constitutional Convention stated:

> Representation [in the legislature] will be kept up to date every ten years by an automatic reapportionment carried out by the governor on the advice of a board representing each of the four major districts and subject to review by the courts. Thus, the constitution guards against what has become a great evil in many states: a legislature that becomes more and more unrepresentative and loses public confidence because it refuses to reapportion itself. Alaska Legislative Council, Legislative Apportionment in Alaska, 1912–1961, p. 4 (1962).

A reading of the Convention minutes in relation to the reapportionment provisions makes it abundantly clear that it was the specific intent of the Convention to grant no authority to and to place no responsibility in the legislature with respect to reapportionment. In a clear and clean-cut departure from tradition, all of the authority and responsibility for reapportionment granted or assigned was placed in the Governor, assisted by a Reapportionment Board, including the authority to make minor changes in Senate districts. In an effort to make the reapportionment provisions as nearly self executing as possible, the Convention provided that the Reapportionment Board should automatically commence to function after the decennial census, without any direction from the Governor; that it must submit its plan within ninety days and that the Governor must proclaim a plan within ninety days of receipt from the Board, explaining any deviation from the Board's plan. Any qualified voter was empowered to resort to the courts to force the Governor to perform his reapportionment duties or to correct any error in redistricting or reapportionment.

Baker v. Carr and Reynolds v. Sims resulted in court declarations in many states that one or both of the legislative bodies was malapportioned. In almost every instance the state constitution had made no provision for reapportioning the "frozen" body on an interim basis until the constitution could be amended. Because of the wide variations in factual situations, most of the court decisions dealing with the question of where the authority lay to reapportion a frozen legislative body on an interim basis are not of great assistance.

It is significant, however, that in some states where reapportionment was a legislative responsibility, the courts have approved reapportionment by those state legislatures on an interim basis even though the respective state constitutions gave no specific authority to reapportion the particular frozen legislative body. Illustrative is Buckley v. Hoff[12] decided by the United States District Court in Vermont. In a previous decision, that court had declared both the House and the Senate malapportioned. The constitution required the legislature to reapportion the Senate after each United States census, but the House was frozen to provide one representative for each inhabited town, forever. The General Assembly, consisting of the members of the Senate and House, was only empowered by the constitution to regulate the mode of filling vacancies in House seats. Without any specific constitutional authority, the General Assembly provided reapportionment plans for the Senate and the House which were approved by the court. The authority of the General Assembly to reapportion was not questioned.[13]

12. 243 F.Supp. 873 (D.Vt.1964).

13. See: Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation where reapportionment of "frozen" legislative bodies by the legislatures of New Jersey, Connecticut and North Dakota, was accomplished even though the constitutions gave no such specific authority. Pages 295–297, 374–375 and 394–396.

Alaska State Legislature

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Legislative Research Agency

November 20, 1991

RECEIVED
DEC 4 1991

MEMORANDUM

TO: Representative Dave Donley

FROM: Gordon S. Harrison, Director gsh

RE: **Waiving District Residency Requirements After Redistricting**

Some time ago you asked us to look for electoral laws of other states that waive the usual district residency requirements for a period after a legislative redistricting. We could not find any at the time, nor have we since seen any reference to existing laws of this kind (although they may well exist). However, there appear to be *constitutional* provisions in at least four states that relax district residency requirements immediately after redistricting. These are mentioned in footnotes to a table on electoral qualifications for legislators that appears in the *Book of the States, 1990-91*. Also, a constitutional study published prior to the 1970 Illinois constitutional convention recommends such a provision. The recommendation was apparently favorably received by the convention delegates and voters, as Illinois is one of the four states with such a provision.

Attachments

Table 3.5
THE LEGISLATORS: QUALIFICATIONS FOR ELECTION

State or other jurisdiction	House					Senate				
	Minimum age	U.S. citizen (years)	State resident (years)	District resident (years)	Qualified voter (years)	Minimum age	U.S. citizen (years)	State resident (years)	District resident (years)	Qualified voter (years)
labama	21	...	3 (a)	1	...	25	...	3 (a)	1	...
laska	21	...	3	1	★	25	...	3	1	★
rizona	25	★	3	1	...	25	★	3	1	...
rkansas	21	★	2	1	★	25	★	2	1	★
alifornia	18	3	3	1	★	18	3	3	1	★
olorado	25	★	...	1	...	25	★	...	1	...
onnecticut	18	...	...	★	★	18	...	...	★	★
elaware	24	...	3 (a)	1	...	27	...	3 (a)	1	...
lorida	21	...	2	★	★	21	...	2	★	★
eorgia	21	★	(a)	1	...	25	★	(a)	1	...
awaii	18	...	3	(b)	★	18	...	3	(b)	★
daho	18	★	...	1	★	18	★	...	1	★
llnois	21	★	...	2 (c)	...	21	★	...	2 (c)	...
ndiana	21	★	2	1	...	25	★	2	1	...
owa	21	★	1	60 da.	...	25	★	1	60 da.	...
ansas	18	...	...	★	★	18	...	...	★	★
entucky	24	...	2 (a)	1	...	30	...	6 (a)	1	...
ouisiana	18	...	2	1	★	18	...	2	1	★
laine	21	5	1	(r)	...	25	5	1	(r)	...
laryland	21	...	1 (a)	6 mo. (d)	★	25	...	1 (a)	6 mo. (d)	★
lassachusetts	18	...	...	1	...	18	...	5	★	...
lichigan (e)	21	★	...	(b)	★	21	★	...	(b)	★
linnesota	21	...	1	6 mo.	★	21	...	1	6 mo.	★
lississippi	21	...	4 (a)	...	★	25	...	4	...	4
lissouri	24	...	...	1 (f)	2	30	...	...	1 (f)	3
lontana (g)	18	...	1 (a)	6 mo. (h)	★	18	...	1 (a)	6 mo. (h)	★
ebraska	U	U	U	U	U	21	...	...	1	★
evada	21	...	1 (a)	(b)	★	21	...	1 (a)	(b)	★
ew Hampshire	18	...	2	★	...	30	...	7 (a)	★	...
ew Jersey	21	...	2 (a)	1	★	30	...	4 (a)	1	★
ew Mexico	21	...	...	★	...	25	...	...	★	...
ew York	18	★	5	1 (i)	...	18	★	5	1 (i)	...
orth Carolina	(j)	★	1	1	★	25	★	2 (a)	1	★
orth Dakota	18	...	1	(b)	★	18	...	1	(b)	★
hio(k)	18	...	...	1	★	18	...	...	1	★
klahoma	21	...	...	(b)	★	25	...	...	(b)	★
regon	21	★	...	1	...	21	★	...	1	...
ennsylvania	21	...	4 (a)	1	...	25	...	4 (a)	1	...
hode Island(l)	18	...	...	...	★	18	...	...	...	★
outh Carolina	21	...	...	(b)	★	25	...	...	(b)	★
outh Dakota(k,l)	25	★	2	(b)	★	25	★	2	(b)	★
ennessee	21	★	(a)	1 (b)	★	30	★	3	1 (b)	★
exas	21	★	2	1	★	26	★	5	1	★
tah	25	★	3	6 mo. (b)	★	25	★	3	6 mo. (b)	★
ermont	18	...	2	1	...	18	...	2	1	...

THE LEGISLATORS: QUALIFICATIONS FOR ELECTION—Continued

State or other jurisdiction	House					Senate				
	Minimum age	U.S. citizen (years)	State resident (years)	District resident (years)	Qualified voter (years)	Minimum age	U.S. citizen (years)	State resident (years)	District resident (years)	Qualified voter (years)
Virginia	21	. . .	. . .	★	★	21	. . .	. . .	★	★
Washington	18	★	. . .	(b)	★	18	★	. . .	(b)	★
West Virginia(l)	18	. . .	(a)	1	★	25	. . .	(a)	1	★
Wisconsin	18	. . .	1	(b)	★	18	. . .	1	(b)	★
Wyoming	21	★	(a)	1	. . .	25	★	(a)	1	. . .
Dist. of Columbia	U	U	U	U	U	18	. . .	1	★	★
American Samoa (l)	25	★ (m)	5	1	. . .	30 (n)	★ (m)	5	1	. . .
Guam (o)	U	U	U	U	U	25	★	5	. . .	. . .
No. Mariana Islands	21	. . .	3	. . .	★	25	. . .	5	. . .	★
Puerto Rico(p)	25	★	2 (a)	1 (q)	. . .	30	★	2 (a)	1 (q)	. . .
U.S. Virgin Islands (o)	U	U	U	U	U	21	★	3	. . .	★

Note: This table includes constitutional and statutory provisions.

Key:

U — Unicameral legislature; members are called senators, except in District of Columbia.

★ — Formal provision; number of years not specified.

. . . — No formal provision.

(a) Additional state citizenship requirement. Alabama, Delaware—three years. Georgia, New Jersey-House, two years; Senate, four years. Mississippi—four years. New Hampshire—seven years. North Carolina—two years. Pennsylvania—four years. West Virginia—five years.

(b) Must be a qualified voter of the district; number of years not specified.

(c) Following redistricting, a candidate may be elected from any district that contains a part of the district in which he resided at the time of redistricting, and reelected if a resident of the new district he represents for 18 months prior to reelection.

(d) If the district was established for less than six months, residency is length of establishment of district.

(e) No person convicted of a felony or breach of public trust within preceding 20 years or convicted of subversion shall be eligible.

(f) Only if the district has been in existence for one year; if not, then legislator must have been a one year resident of the district(s) from which the new district was created.

(g) No person convicted of a felony is eligible to hold office until final discharge from state supervision.

(h) Shall be a resident of the county if it contains one or more districts or of the district if it contains all or parts of more than one county.

(i) After redistricting, must have been a resident of the county in which the district is contained for one year immediately preceding election.

(j) A conflict exists between two articles of the constitution, one specifying age for House members (i.e., "qualified voter of the state") and the other related to general eligibility for elective office (i.e., "every qualified voter . . . who is 21 years of age . . . shall be eligible for election").

(k) No person convicted of embezzlement of public funds shall hold any office.

(l) Disqualification for bribery. In South Dakota and West Virginia, disqualification also for perjury or other infamous crimes. In American Samoa, also for felony.

(m) Or U.S. national.

(n) Must be registered matai.

(o) Disqualification for felony or crime involving moral turpitude unless person received pardon restoring civil rights.

(p) Read and write the Spanish or English language.

(q) When there is more than one representative district in a municipality, residence in the municipality shall satisfy this requirement.

(r) Must be district resident at time of nomination.

THE ILLINOIS CONSTITUTION:

AN ANNOTATED and COMPARATIVE ANALYSIS

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Prepared for ILLINOIS CONSTITUTION STUDY COMMISSION

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Foreign Employment: "12 prohibit legislators to hold a job with a foreign country."

Federal Employment: "43 forbid legislators to hold a job with the national government."

State Employment: "38 state that legislators shall hold no position under the state government."

County Employment: "3 forbid legislators to hold a position with a county government."

Municipal Employment: "3 ban legislators from employment by municipalities."

(State Constitutional Provisions Affecting Legislatures 19-20 (May 1967))

In the Citizens Conference tabulation, Illinois is included under the first three categories but not under the last two.

The United States Constitution provides:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." (art. I, § 6.)

The Model State Constitution is silent on dual office holding.

Dual Office Holding (General): About a dozen states prohibit state officers from holding offices, usually of trust or profit, under any foreign government. In several of these states, the prohibition also runs to any other state government. Approximately 18 states extend the same prohibition to United States offices, frequently with exceptions. The most common is for service in the National Guard. A few states exclude postmasters, but usually only those above a maximum compensation. Some 15 states prohibit, in greater or lesser degree, dual office holding within the state.

The United States Constitution prohibits any office holder from accepting any "present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state" without the consent of Congress. The Constitution also prohibits the President from receiving any emolument from any state. The Model State Constitution is silent on the subject.

Comment

Age, Residency, Citizenship: In view of the fact that, under the United States Supreme Court's "one man-one vote" rule, regular redistricting will have to take place, consideration should be given to the problem of the legislator who finds that, after redistricting, his residence has been separated from the geographical area which he used to represent. If such a legislator wishes to run for re-election, he has at least one problem and possibly two. He has to run in a new district where he may not be well known and he may be faced with running against a legislator who

has always been in the new district and is well known. In the proposed 1967 New York Constitution this eventuality was covered, though it must be conceded that the drafting problem was most complex. The proposed provision read as follows:

"Every member of the legislature shall be at least twenty-one years old and eligible to vote in this state. He shall have been domiciled in the state for the three years preceding his election and for the twelve months preceding his election in his legislative district. If, however, any redistricting plan for senate or assembly has been certified pursuant to section two of this article since the last general election for the legislature, he shall have been domiciled for the twelve months preceding his election in a county in which all or part of the new district is located or in a county contiguous to such district if such district be composed of a whole county and all or parts of another county or counties."

Dual Office Holding: This subject, as well as the related problem of conflict of interest, was strong in the minds of the delegates to the 1870 Convention. One of the results of this concern was a proliferation of different provisions. (In addition to Sec. 3, see Secs. 15 and 25 of this Art., *infra,* pp. 176 and 230; Sec. 5 of Art. V and Sec. 4 of Art. VIII, *infra,* pp. 267 and 409.) Consideration should be given to consolidating such provisions as are to be retained in one section or, if legislators are to be treated differently from other government officials, then in two sections. (For some policy considerations on this subject, see the *Comment* on Sec. 15, *infra,* p. 177-8.)

Disqualification for Crimes

Sec. 4. No person who has been, or hereafter shall be convicted of bribery, perjury or other infamous crime, nor any person who has been or may be a collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the General Assembly, or to any office of profit or trust in this State.

History

The 1818 and 1848 Constitutions contained comparable provisions concerning paying over public moneys due, and contained provisions giving the legislature "full power to exclude from the privilege of . . . being elected any person convicted of bribery, perjury or any other infamous crime." (The word "any" before "other" was omitted in 1848.) In the 1870 Convention, the proposal as originally offered changed the part concerning convicted persons from power to exclude by law to a command to the legislature to exclude. A delegate suggested that the Convention ought to make the decision and be done with it. Accordingly, an amendment was offered embodying the suggestion. (Debates 572.) The amendment was accepted and the Committee on Revision and Adjustment combined it with the proposed section on accounting for public

DRAFT

INTRODUCTION

This report focuses on the role that independent redistricting commissions play in the state legislative redistricting process. It does not deal with reapportionment. Redistricting and reapportionment, while often used interchangeably, are two different things. Reapportionment is the process of allotting the seats of a legislative body among a given number of units. Redistricting is the redrawing of the boundary lines after the number of seats has been allotted through reapportionment.

Goals

While independent commissions are a relatively new phenomena, this report describes what caused their creation, their roles in redistricting today, and the advantages and disadvantages of using an independent redistricting commission.

HISTORY/BACKGROUND

The history of legislative redistricting has been one of the legislature itself doing the redistricting.1 Since the formation of the nation, legislatures have redistricted themselves based on a variety of criteria and they had free reign to do so in whatever manner they pleased.

As a result, prior to thirty years ago, there were several examples of districting plans based on malapportionment. The most common was where a small minority of the population could elect a majority of the lawmakers based on districting plans that held an overwhelming rural bias.

Such a case existed in Missouri. Before the courts stepped into the redistricting arena, the Missouri Constitution guaranteed every county, regardless of population, at least one seat in the House of Representatives. The result was that in 1965, 82 rural counties, which contained less than one-fifth of the state's total population, controlled a majority of seats in the house.2 The vote of the rural voter carried more clout than that of the urban dweller.

Redistricting Changes

In the early 1960s, the United States Supreme Court intervened in the redistricting process to change the rules of how a legislature could redistrict. Starting with the case of Baker v. Carr (1962), where the Supreme Court held that

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1. "Independent Commissions: The Next Step in the Reapportionment Revolution?" McGehee, John Michael. p. 2.
2. Reapportionment Politics: The History of Redistricting in the 50 States. p. 181.

redistricting plans could be challenged in court, the methods of legislative redistricting began to change drastically. Later cases include Gray v. Sanders (1963), which established the "one man, one vote" rule, and Reynolds v. Sims (1964), which declared that the constitutional standard of equal protection required that both houses of a bicameral state legislature had to be reapportioned, and therefore redistricted, on a population basis. The Supreme Court ruled that the equal protection clause of the Fourteenth Amendment to the Constitution meant that every person's vote had to have equal weight. Chief Justice Warren wrote, "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."3 Therefore, the only practical way to have equality in voting strength was to have population equality between districts.

With the major changes brought about by the court decisions mandating population equality as the dominant factor in redistricting, gerrymandering was brought to the forefront of the redistricting process. A gerrymander is defined as the process of drawing districts with odd shapes to create an unfair partisan advantage.4 The party in power, seeking to maintain its majority in the legislature, creates districts that favor the election of a candidate from its party. While the political gerrymander enrages the opposing party and disturbs the proponents of "good government," the plans have withstood legal challenges, with the courts saying that redistricting is a political decision that should be handled in the political arena. (However, this may change with the recent Supreme Court decision, Davis v. Bandemer (1986), which held that a redistricting plan resulting from a partisan gerrymander is now a justiciable issue).

The result of these changes is that legislative redistricting has been turned on its head. All plans now must consider equality of population as the major factor in any redistricting plan and the court has demonstrated that it is willing to step in and take part in the redistricting process. In addition, legislatures have the ability to gerrymander districts, which gives them a powerful, and many would say unfair, tool in the redistricting process. These changes have resulted in the opening up of a brave new world of redistricting which bares little resemblance to the redistricting of prior years.

Independent Commissions

A new option coming out of the redistricting upheaval of the 1960s was the use of an independent redistricting commission. While a few states used one before the 1960s, their existence expanded after the redistricting revolution. Many states saw the

3. Reynolds v. Sims
4. Wattson, Peter S. "How To Draw Redistricting Plans That Will Stand Up In Court." p. 2.

new problems that existed with the legislatures developing redistricting plans and decided that it was impossible for a legislature to draw a fair plan. These states opted to remove redistricting from the hands of the legislature and place it in the care of an independent redistricting commission. The commission was free of the legislature and it had the sole responsibility for redistricting. The hope was that the establishment of an independent commission would fix the perceived problems of the redistricting process.

Commission creation developed with the intention of having a disinterested body draw up the redistricting plan. One of the major causes of a gerrymander is that the legislators drawing up the plan have a direct interest in its operation. They create the districts that regulate upcoming elections. The worry is that incumbents will sculpt districts that best suit their desires to be re-elected, rather than develop districts that will be fair and competitive. The general feeling is that the gerrymander subverts the democratic process. It is hoped that independent commissions will make redistricting a technical and scientific exercise and eliminate the partisanship and gerrymandering that exist when the legislature is in charge of promulgating the redistricting plan.

While the independent commission is the more popular name for this redistricting body, some states have chosen to form an independent redistricting board. Despite the difference in the name, both have the same function: to redistrict the state independent of the legislature.

REDISTRICTING COMMISSIONS IN THE STATES

Today, eighteen states use independent redistricting boards or commissions in some manner. Of those eighteen, nine have given the commission the responsibility for developing the redistricting plan, thereby totally removing the legislature from the redistricting process; four states use commissions to advise the redistricting authority; and five states use them as backups in case the redistricting authority fails to act by a certain deadline. Here are some charts that briefly describe their composition and deadlines.

INITIAL REDISTRICTING COMMISSIONS: STATE LEGISLATIVE PLANS

STATE	ROLE	NUMBER OF MEMBERS	SELECTION REQUIREMENTS	FORMATION DATE	INITIAL DEADLINE	FINAL DEADLINE
Arkansas	Develop a plan	3	Commission is the governor, secretary of state, and the attorney general	none listed	by February 1, 1991	plan becomes official 30 days after it is filed
Colorado	Develop a plan	11	-Legislature selects 4 (speaker of the house, house minority leader, senate majority and minority leaders, or their delegates) -Governor selects 3 -Judiciary selects 4 -Maximum of 4 from the legislature -Maximum of 6 from the same political party -Each congressional district must have at least 1 person, but no more than 4 people representing it on the commission -At least 1 member must live west of the continental divide	by August 1, 1991	90 days after the availability of the census data, or after the formation of the committee, whichever is later	March 15, 1992
Hawaii	Develop a plan	9	-President of the senate selects 2 -Speaker of the house selects 2 -Minority senate party selects 2 -Minority house party selects 2 -These 8 select the 9th member, who is the chair -No commission member may run for the legislature in the two elections following redistricting	by March 1, 1991	90 days after the commission forms	150 days after commission formation
Missouri	Develop a plan	House - 18 Senate - 10	-There are two separate redistricting committees -Governor picks one person from each list of two submitted by the two main political parties in each congressional district to form the house committee -Governor picks 5 people from two lists of 10 submitted by the two major political parties in the state to form the senate committee -No commission member may hold office in the legislature for 4 years after redistricting	within 60 days of the census data becoming available	5 months after the commission forms	6 months after formation
Montana	Develop a plan	5	-Majority and minority leaders of both houses of the legislature each select one member -Those 4 select a 5th, who is the chair -If the 4 cannot select a 5th within 20 days, then a majority of the supreme court will select the chair -Members cannot be public officials -Members cannot run for public office in the two years after the completion of redistricting	the legislative session after the census data is available	The commission must give the plan to the legislature at the first regular session after its appointment	30 days after the plan is returned by the legislature
New Jersey	Develop a plan	10	-The chairs of the two major parties select 5 members each -If these 10 members cannot develop a plan in the allotted time, the chief justice of the state supreme court will appoint an 11th member	December 1, 1990	February 1, 1991, or one month after the census data becomes available	The initial deadline, or one month after the 11th member is picked
Ohio	Develop a plan	5	Board is the governor, auditor, secretary of state, and two people selected by the legislative leaders of each major political party	Between August 1 and October 1, 1991		October 5, 1991
Pennsylvania	Develop a plan	5	-Majority and minority leaders of the legislative houses each select 1 member -These 4 select a 5th to chair -If they fail to do so within 45 days, a majority of the state supreme court will select the 5th member -The chair cannot be a public official	none listed	90 days after the availability of the census data or after commission formation, whichever is later	30 days after the last public exception that is filed against the initial plan
Washington	Develop a plan	4	-Majority and minority leaders of the house and senate each select one -These 4 select a non-voting 5th to chair the commission -If they fail to do so by January 1, 1991, the state supreme court will select the 5th by February 5, 1991 -No commission member may be a public official	January 31, 1991	none listed	January 1, 1992

ADVISORY COMMISSIONS: STATE LEGISLATIVE PLANS

STATE	ROLE	NUMBER OF MEMBERS	SELECTION REQUIREMENTS	INITIAL DEADLINE	FINAL DEADLINE
Alaska	Advisory to the governor	5	-Governor selects all 5 -Members cannot be public officials or public employees -Each of the 4 regions of the state must have at least on representative on the board	The board submits a plan to the governor within 90 days of receiving the census data	-Governor issues the final plan within 90 days after receiving the board's plan -Governor must justify any changes that he makes in the board's proposal
Iowa	Advisory to the legislature	5	-Senate majority leade: selects 1 -Senate minority leader selects 1 -House majority leader selects 1 -House minority leader selects 1 -These 4 select the 5th, who is chair -Commission members cannot hold public office or political party office	This commission is advisory only and does not draw up any plans	
Maine	Advisory to the legislature	15	-3 from the majority party in the house -3 from the minority party in the house -2 from the majority party in the senate -2 from the minority party in the senate -The chairs of the 2 major political parties -2 members from the public (1 democrat, 1 republican) -These 2 pick a third member from the public	90 days after the 1993 legislature convenes	-Legislature must enact a plan by a 2/3 vote by 30 days after receiving the commission plan
Vermont	Advisory to the legislature	6	-Chief justice appoints the chair -Governor appoints 1 member from each political party who received 25% of the vote in the last gubernatorial election -Those parties then each select 1 -Secretary of state is a non-voting member -No commissioner may be a member of the legislature	February 1, 1991	Legislature must adopt the official plan at the biennial session following the decennial census

BACKUP COMMISSIONS: STATE LEGISLATIVE PLANS#

STATE	ROLE	NUMBER OF MEMBERS	SELECTION REQUIREMENTS	FORMATION DATE	FINAL DEADLINE
Connecticut	Backup to the legislature	9	-President pro tem selects 2 -Speaker of the house selects 2 -Senate minority leader selects 2 -House minority leader selects 2 -These 8 must select the 9th within 30 days	After the legislative deadline which is August 1, 1991	October 31, 1991
Illinois	Backup to the legislature	8	-Senate president selects 2 -Speaker of the house selects 2 -Senate minority leader selects 2 -House minority leader selects 2 -In each pairing of two, one is to be a legislator and the other is not -Maximum of 4 from the same political party -If the commission cannot develop a plan by August 10, 1991, then the state supreme court will select 2 people and one of this pair will be chosen at random to be the commission tiebreaker	July 10, 1991, which follows the legislative deadline of June 30, 1991	October 5, 1991
Mississippi	Backup to the legislature	5	-Commission is composed of the chief justice of the supreme court (chair), attorney general, secretary of state, speaker of the house, and president pro tempore of the senate	60 days after the legislative deadline, which is the last day of the regular session	180 days after legislative adjournment
Oklahoma	Backup to the legislature	3	-Board is composed of the attorney general, superintendent of public instruction, and state treasurer	90 days after the convening of the first regular session following the decennial census	None listed, but the state supreme court has the right to compel the commission to act
Texas	Backup to the legislature	5	-Board is composed of the lieutenant governor, speaker of the house, attorney general, comptroller of public accounts, and commissioner of the general land office	Within 90 days after the final adjournment of the 1991 legislative session	90 days after formation

#The responsibility for redistricting in these states originally lies with the legislature. These commissions take action only if the legislature fails to develop a plan by its redistricting deadline.

Role

Of the eighteen states, half use commissions to develop the entire plan, four use commissions to advise the redistricting authority, and five have commissions to redistrict only if the legislature fails to redistrict by its deadline. The commissions that promulgate a redistricting plan have the most power because the legislature has been removed from the redistricting process. The advisory commissions are influential only to the extent that the redistricting authority listens to them. The commissions that draw up an initial plan are more powerful than those that draw no plans. The backup commissions only comes into play after the legislature fails to enact a plan. They act as a safety valve, providing the state another opportunity to redistrict before the court system becomes involved.

Composition

The number of commission members ranges from three in Arkansas to eighteen in Missouri. Even though the numbers span this wide range, commissions and boards separate into two basic catagories: "small" and "large." The small commission has less than six members while the large commission has more than eight members. A small commission has an advantage in that it should have an easier time developing a plan because it has fewer people that have to reach agreement. Its disadvantage comes from the fact that with the fewer members it has, the fewer viewpoints that are represented. A large commission benefits from the fact that many viewpoints are represented on the commission. Technically, the more viewpoints on the commission, the better represented the people of the state will be in the redistricting process. Some states [Alaska, Colorado, and Missouri (senate)] write this into law by requiring that each segment of the state be represented on the redistricting commission. That way, the viewpoints of the whole state, rather than just one segment, are represented on the commission. The drawback of a large commission is that with more people, it is harder to get them all to agree on a plan.

These commissions may not be as independent as they appear. Even though commissions were established to be independent of legislatures, certain legislators hold great influence over their formation. Of the nine states that have commissions which develop the plan, six commissions have members who are either legislators or chosen by the legislature. Of the three states remaining, two of them have their composition dictated by the executive branch and only one commission, New Jersey, has its composition determined by a group outside of the direct political process. But even in that case the members are determined by the heads of the two major parties, so the influence is shifted from members of the government to the political parties themselves. Very likely, the result is that these independent commissioners will be tied to the political agenda of the people who select

them and that greatly restricts the independence of the commission.

Direct Comparison

While eighteen states choose to use commissions in some form, most states leave redistricting responsibilities with the legislature. By no means is there a consensus on the effectiveness of these commissions. Many good government groups, such as Common Cause, feel that commissions are the best way to redistrict; while other interests feel that commissions are unnecessary and anti-democratic. The use of an independent commission has many pros and cons. Here is a brief summary of both sides:

PROS	CONS
-An ideal redistricting plan is drawn by a body that has no direct stake in the final outcome	-The reliance on a commission assumes that the public has little ability to look out for its own interest
-A commission takes the politics out of an extremely political and divisive issue, and the process would become scientific and technical, thereby enabling a fair plan to be drawn	-Redistricting will always be a political issue. It is not possible to take the politics out of it. Therefore, the legislature, which is best equipped to deal with political issues, should redistrict
-Commissions are more willing to create a plan where the districts would be more balanced, thereby allowing for competitive elections	-Commissions are anti-democratic in their nature and less accountable to the public than the legislature
-Commission creation serves the public interest and its operation is in the best interests of good government	-Bipartisan commissions will inevitably feel the strains of partisan discord. Therefore, the process should be left to the legislature, which is designed to deal with partisanship
-Incumbents who redraw the political map are made the judge and jury; and are thus susceptible to exploiting this conflict of interest, which undermines the democratic process	-Pluralism requires that policy be created by the give and take of groups in competition. By creating a commission, pluralism is undermined

-Commissions reduce the need for court intervention because the plans they draw will be fair to start with

-Redistricting is not a perfectible exercise. Conflict will exist, so the best that can be done is to manage the conflict through the legislature

-As long as legislatures redistrict, the specter of a gerrymander will hang over any plan drawn. The only way to eliminate the gerrymander is to have an independent commission redistrict

-While the idea of a gerrymander is distasteful to most people, giving redistricting to a commission may be going a step too far. The court system is a sufficient check on the temptation for the legislature to gerrymander

PERFORMANCE TEST

Purpose

One way to judge whether or not using an independent redistricting commission is better than having the legislature redistrict is to see how effective each method has been. This is done by judging whether or not the redistricting authority in each state has lived up to its redistricting expectations. Those that meet expectations are rated as "successful" and those that have not are judged as failing. This test judges successes to be only those states who meet the strict criteria of a redistricting success. Those that do not meet these criteria will be classified as having failed to successfully redistrict.

Methodology

Most states conduct legislative redistricting every ten years, after the data from the Federal Census becomes available. The results of the redistricting process in the 1970s and 1980s are used to judge the effectiveness of a state's redistricting body. A success is achieved when the body responsible for legislative redistricting develops the final plan without any interference from an outside force (i.e. the court system); and that final plan is the one that lasts through the decade. A failure is any state whose legislative redistricting is done by a group other than the one that was originally responsible for it (i.e. a backup commission developing a plan after the legislature fails to enact one); or if a body outside of the redistricting process forces the redistricting authority to alter its final plan (i.e. the court system overturning a plan and forcing the redistricting authority to draw a new one). This test only considers 48 states because the redistricting power in Alaska and Maryland rests with the governor. In the two decades, these are the results:

LEGISLATIVE SUCCESSES

1980s	1970s[5]
Connecticut	Arizona
Delaware	Colorado
Florida	Delaware
Georgia	Florida
Indiana	Georgia
Iowa	Idaho
Kansas	Illinois
Kentucky	Indiana
Louisiana	Kentucky
Maine	Massachusetts
Massachusetts (house)	Nebraska (unicameral)
Mississippi	Nevada
Nebraska (unicameral)	New Hampshire
Nevada	New York
New Hampshire	North Carolina
New York	Oklahoma
North Dakota	Rhode Island
Oklahoma	South Carolina
Rhode Island (house)	South Dakota
South Carolina (house)	Tennessee
Utah	Texas (house)
Vermont	Utah
Virginia (senate)	Vermont
Washington	Virginia (house)
West Virginia	West Virginia
Wisconsin	Wisconsin
Wyoming	Wyoming

1980s*
House plan success rate: 66% (25 of 38)
Senate plan success rate: 62% (24 of 39)
Overall success rate: 64% (49 of 77)

1970s
House plan success rate: 67%% (26 of 39)
Senate plan success rate: 63% (25 of 40)
Overall success rate: 65% (51 of 79)

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5. All data on the 1970s comes from "Independent Commissions: The Next Step in the Redistricting Revolution?" by John Michael McGehee

*Percentages are formulated by dividing the number of total plans into the number of successful plans. In 39 states, there are 77 plans (Each state must draw a house and a senate plan, with the exception of Nebraska, which is unicameral)

COMMISSION SUCCESSES

STATE	REDISTRICTING AUTHORITY
1980s	
Colorado	Commission
Missouri	Commission
Montana	Commission
New Jersey	Commission
Ohio	Board
Pennsylvania	Commission
1970s	
Arkansas	Board
Hawaii	Commission
Missouri (senate)	Commission
Montana	Commission
Ohio	Board
Pennsylvania	Commission

1980s
Commission/Board success rate: 67% (12 of 18)

1970s
Commission/Board House success rate: 63% (5 of 8)
Commission/Board Senate success rate: 75% (6 of 8)
Combined commission/board success rate: 69% (11 of 16)

LEGISLATIVE FAILURES

STATE	CAUSE OF FAILURE
1980s	
Alabama	Justice Department forced two redraws
Arizona	District Court overturned both plans
California	Voters rejected initial plan in 1982
Idaho	Court overturned both plans
Illinois	Legislature failed to act by the deadline
Massachusetts (senate)	Court overturned plan
Minnesota	Legislature failed to meet the deadline
New Mexico	Court forced a redraw
North Carolina	Court forced a redraw
Oregon	Court forced a redraw
Rhode Island (senate)	Court forced a redraw
South Carolina (senate)	Court forced a redraw
South Dakota	Court forced a partial redraw

Tennessee	Court forced a redraw
Texas	Court forced a redraw after the 1982 election
Virginia (house)	Court forced a redraw

House failures: 34% (13 of 38)
Senate failures: 38% (15 of 39)
Overall failure rate: 36% (28 of 77)

1970s

Alabama	Court drew the plan
California	Court drew the plan
Connecticut	Legislature failed to meet deadline
Iowa	Court drew the plan
Kansas	Court drew the plan
Louisiana	Court forced a redraw
Maine	Court drew the plan
Minnesota	Court drew the plan
Massachusetts	Court drew the plan
New Mexico	Court forced a redraw
North Dakota	Court drew the plan
Oregon	Court forced a redraw
Texas (senate)	Legislature failed to meet deadline
Virginia (senate)	Court drew the plan
Washington	Court drew the plan

House failures: 33% (13 of 39)
Senate failures: 37% (15 of 40)
Overall failure rate: 35% (28 of 79)

COMMISSION FAILURES

STATE	REDISTRICTING AUTHORITY	CAUSE OF FAILURE
	1980s	
Arkansas	Board	Court forced a partial redraw in 1989
Hawaii	Commission	Court overturned plans
Michigan	Commission	Court ruled the commission was unconstitutional, so it drew the plan

Commission failures: 33% (3 of 9)

	1970s	
Michigan	Commission	Court drew plan
Missouri (house)	Commission	Court drew plan
New Jersey	Commission	Court forced a redraw

Commission failure: 31% (5 of 16)

Summary

The data shows that the ratings are stable from one decade to the next. Commissions have a slightly better percentage point rating than do legislatures. On average, for every three plans that a commission draws, it succeeds on slightly more than two. For every three plans the legislature draws, it succeeds on slightly less than two. Overall, it appears that no matter who does the redistricting, the overall success rate percentage will hover in the mid-sixties.

These statistics deal with just two rounds of redistricting. While the statistics show that commissions and legislatures have had about the same success rate in the past (about two out of three), that could change drastically in the next redistricting period. The existence of commissions has been brief and it will take more redistricting rounds before their success rate can be definitively judged. The best one can do now is look at the data and form some preliminary conclusions.

CONCLUSION

Commissions were created in the hope of reforming the redistricting process, however there are pros and cons to using these commissions. There is no evidence that commissions are free of the evils of gerrymandering, nor does the performance test show that one redistricting method outperforms the other. The jury remains out as to whether or not independent legislative redistricting commissions are the way to go.

The rise in the creation of independent redistricting commissions came out of the desire to correct the problems that existed in redistricting when the legislature did it. However, even if a state opts to use an independent commission, these problems may remain. There are other factors that influence the redistricting process regardless of what the redistricting authority is. The main factor is the composition of the state's population. A state with a homogenous population should have an easier redistricting job than a state with a heterogeneous population. Heterogeneity can arise from differences in ethnicity, political affiliation, and geography. States with such a diversity in population will encounter redistricting controversy no matter what the redistricting authority is. Redistricting is the process of drawing lines. When many groups need to be considered, the process of drawing a line will give an advantage to one group over another. No plan can satisfy everyone because there will always be some group who feels that the redstricting plan is unfair. States must be cautious and realize that redistricting problems may not be controllable by the redistricting authority. The creation of an independent commission may not cure the redistricting problems that exist within a state.

Section 4 - Method.

Reapportionment shall be by the method of equal proportions, except that each election district having the major fraction of the quotient obtained by dividing total civilian population by forty shall have one representative.

Section 5 - Combining Districts.

Should the total civilian population within any election district fall below one-half of the quotient, the district shall be attached to an election district within its senate district, and the reapportionment for the new district shall be determined as provided in Section 4 of this article.

Section 6 - Redistricting.

The governor may further redistrict by changing the size and area of election districts, subject to the limitations of this article. Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

Section 7 - Modification of Senate Districts.

The senate districts, described in Section 2 of Article XIV, may be modified to reflect changes in election districts. A district, although modified, shall retain its total number of senators and its approximate perimeter.

Section 8 - Reapportionment Board.

The governor shall appoint a reapportionment board to act in an advisory capacity to him. It shall consist of five members, none of whom may be public employees or officials. At least one member each shall be appointed from the Southeastern, Southcentral, Central, and Northwestern Senate Districts. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

Article XIV

Apportionment Schedule

Section 1 - Election Districts.

Members of the house of representatives shall, according to the reapportionment proclamation of the governor, dated February 15, 1984, be elected from the election districts and in the numbers shown below:

Election District	Name of District	Number of Representatives
1	Ketchikan-Wrangell-Petersburg	2 (Seats A & B)
2	Inside Passage	1
3	Paranof-Chichagof	1
4	Juneau	2 (Seats A & B)
5	Kenai-Cook Inlet	2 (Seats A & B)
6	Prince William Sound	1
7	North Kenai-South Anchorage	1
8	Campbell-Hillside	2 (Seats A & B)
9	Turnagain-Sand Lake	2 (Seats A & B)
10	Mid-Town	2 (Seats A & B)
11	Spenard	2 (Seats A & B)
12	Downtown	2 (Seats A & B)
13	Elmendorf AFB-Mountain View	2 (Seats A & B)
14	South Muldoon	2 (Seats A & B)
15	Chugiak-Eagle Rivers-Ft. Richardson	2 (Seats A & B)
16	Matanuska-Susitna	2 (Seats A & B)
17	Interior Highways	1
18	Southeast North Star Borough	1
19	Outer Fairbanks	1
20	Fairbanks City	2 (Seats A & B)
21	West Fairbanks	1
22	North Slope-Kotzebue	1
23	Norton Sound	1
24	Interior Rivers	1
25	Lower Kuskokwim	1
26	Bristol Bay-Aleutian Islands	1
27	Kodiak-East Alaska Peninsula	1

In all two member house districts candidates will run for designated seats indicated by Seat A and Seat B. Candidates will file for one of the available seats. Each qualified voter in the district may cast one vote for their choice among the candidates for each seat. The candidate receiving the greatest number of votes cast for each seat is elected.

Section 2 - Senate Districts.

Members of the senate shall, according to the reapportionment proclamation of the governor, dated February 15, 1984, be elected from the election districts and in the numbers shown below:

Senate District	Composed of Election Districts	Number of Senators
A	Ketchikan-Wrangell-Petersburg	1
B	InsidePassage-Baranof-Chichagof	1
C	Juneau	1
D	Kenai-Cook Inlet	1
E	Prince William Sound-North Kenai-South Anchorage-Matanuska-Susitna	2 (Seats A & B)
F	Campbell-Hillside-Mid-Town	2 (Seats A & B)
G	Turnagain-Sand Lake-Spenard	2 (Seats A & B)
H	Downtown-Elmendorf AFB-Mountain View	2 (Seats A & B)
I	Muldoon-Chugiak-Eagle River-Fort Richardson	2 (Seats A & B)
J	Interior Highways-Southeast-North Star Borough	1
K	Outer Fairbanks-Fairbanks City-West Fairbanks	2 (Seats A & B)
L	North Slope-Kotzebue-Norton Sound	1
M	Interior Rivers-Lower Kuskokwim	1
N	Bristol Bay-Aleutian Islands-Kodiak-East Alaska Peninsula	1

In all two member senate districts candidates will run for designated seats indicated by Seat A and Seat B. Candidates will file for one of the available seats. Each qualified voter may cast one vote for their choice among the candidates for each seat. The candidate receiving the greatest number of votes cast for each seat is elected.

Section 3 - Description of Election Districts.

The election districts set forth in Section 1 shall include the following territory:

1. Ketchikan-Wrangell-Petersburg - District 1 is an area within a line proceeding from Dixon Entrance in a northerly direction up Clarence Strait, passing west of Zarembo Island, northerly up Duncan Canal, across Frederick Sound to a point west of Cape Fanshaw, then northeasterly to the Canadian border and southerly along the Canadian border to the point of beginning at Dixon Entrance, excluding the area on Annette Island. The district includes the Ketchikan Gateway Borough, Wrangell, Petersburg, Hyder, Saxman, Meyers Chuck, and Kupreanof. It has a population of 16,601.58 and a variance of -9.9 percent. It will elect two house members to designated seats and one senator.

2. Inside Passage - District 2 is composed of that portion of Southeast Alaska between Dixon Entrance and Boundary Point 187 on the U.S./Canadian International Boundary that is not contained in Districts 1, 3, and 4. Included within its boundaries are the communities of Yakutat, Haines, Skagway, Klukwan, Gustavus, Hoonah, Angoon, Kake, Metlakatla, Thorne Bay, Klawock, Craig, and Hydaburg. The district has a population of 8,924.35 and a variance of -3.1 percent. It will elect one house member and, with District 3, one senator.

3. Baranof-Chichagof - District 3 consists of Baranof Island, Yakobi Island, Chichagof Island, and all of the smaller adjacent islands offshore, excluding the area within the City of Hoonah. The communities on the islands include Sitka, Pelican, Elfin Cove, Tenakee Springs, and Port Alexander. The district has a population of 8,448.97 and a variance of -8.3 percent. It will elect one house member and, with District 2, one senator.

4. Juneau - District 4 boundaries coincide with those of the City and Borough of Juneau. The district has a population of 19,332.75 and a variance of +4.9 percent. It will elect two house members to designated seats and one senator.

5. Kenai-Cook Inlet - District 5 includes all of the coastal areas on the east and west sides of Cook Inlet inside the Kenai Peninsula Borough, that lie south and west of Nikiski. Communities within the district include Kenai, Soldotna, Sterling, Ninilchik, Anchor Point, Homer, Seldovia, Port Graham, and English Bay. The district has a population of 19,189.95

and a variance of +4.2 percent. It will elect two house members to designated seats and one senator.

6. Prince William Sound - District 6 includes the area along Prince William Sound from Boundary Point 187 on the U.S./Canadian International boundary on the east to the Kenai National Moose Range boundary on the west. Included in the district are the communities of Hope, Cooper Landing, Moose Pass, Seward, Whittier, Valdez, Chitina, McCarthy, Tatitlek, and Cordova. It has a population of 8,753.19 and a variance of -4.9 percent. It will elect one house member, and with Districts 7 and 16, two senators to designated seats.

7. North Kenai-South Anchorage - District 7 contains the Nikiski area on the northern Kenai Peninsula, and the southeastern reaches of the Municipality of Anchorage, including the community council areas of Old Seward/Oceanview, Rabbit Creek, Turnagain Arm, and Girdwood Valley. Its northern boundary proceeds east from Turnagain Arm along Klatt Road to the New Seward Highway, southerly on the New Seward Highway to Huffman Road, westerly along Huffman Road to the Old Seward Highway, southerly on the Old Seward Highway to DeArmoun Road, east on DeArmoun Road to Rabbit Creek, and easterly and southerly along Rabbit Creek. The district has a population of 9,580.1 and a variance of +4.0 percent. It will elect one house member and, with Districts 6 and 16, two senators to designated seats.

8. Campbell-Hillside - District 8 is bounded on the south by Rabbit Creek, DeArmoun Road, the Seward Highway, and Klatt Road, and on the west by Turnagain Arm. Dimond Boulevard and Abbott Road form the northern boundary, and the Chugach Mountains are the eastern boundary. This district includes the neighborhood council areas of Bayshore/Klatt, Huffman/O'Malley, Mid-Hillside, Hillside East and Glen Alps. The district has a population of 19,230.7 and a variance of +4.4 percent. It will elect two house members to designated seats and, with District 10, two senators to designated seats.

9. Turnagain-Sand Lake - District 9 is bounded by a line beginning at Turnagain Arm and proceeding east on Dimond Boulevard to Arctic Boulevard, then north to International Airport Road, then west to Spenard Road, then northerly to Fish Creek and continuing north to W. 36th Avenue, then west to Wisconsin Street and north on Wisconsin to Northern Lights Boulevard, then east on Northern Lights to Minnesota Drive and north on Minnesota Drive to Chester Creek, then west on

Chester Creek to Knik Arm. The district includes the community council areas of Turnagain and Sand Lake. It has a population of 19,155.9 and a variance of +4.0 percent. It will elect two house members to designated seats and, with District 11, two senators to designated seats.

10. Midtown - District 10 is bounded by a line beginning at the intersection of Arctic Boulevard and Dimond Boulevard, then north to International Airport Road, east to the Old Seward Highway, north to Chester Creek, easterly to Bragaw Street and E. 20th Avenue, east to Pine Street, south to Tudor Road, then westerly and southerly along the Bureau of Land Management boundary to Birch Road, south to Abbott Road, and west along Abbott Road to the New Seward Highway, north to Dimond Boulevard, and west to the point of beginning. The district includes the community council areas of Rogers Park, Tudor, Taku-Campbell, Lake Otis, and University. It has a population of 18,183.5 and a variance of -1.3 percent. It will elect two house members to designated seats and, with District 8, two senators to designated seats.

11. Spenard - District 11 is bounded by District 10 on the east, International Airport Road on the south, Wisconsin Street, Fish Creek, and Spenard Road on the west, and Chester Creek and W. 23rd Avenue on the north. It includes the community council areas of Spenard and North Star. It has a population of 18,804.1 and a variance of +2.1 percent. It will elect two house members to designated seats and, with District 9, two senators to designated seats.

12. Downtown - District 12 is bounded by Chester Creek on the south, Bragaw Road on the east, Commercial Drive and the Elmendorf reservation boundary on the north and the inlet on the west. Included are the community council areas of Government Hill, Downtown, Penland Park, South Addition, Fairview, and parts of the areas of North Mountain View and Airport Heights. The district has a population of 18,678.4 and a variance of +1.4 percent. It will elect two house members to designated seats and, with District 13, two senators to designated seats.

13. Elmendorf Air Force Base-Mountain View - District 13 is bounded by a line beginning at the intersection of Bragaw Street and E. 20th Avenue proceeding east to Baxter Road, north to DeBarr Avenue, east to Muldoon Road, north to E. 4th Avenue, west to Patterson Street, north to the Glenn Highway, east on the Glenn Highway to the common boundary between Elmendorf Air Force Base and Fort Richardson, then following the Elmendorf military reservation boundary to Commercial

Drive, then east to Mountain View Drive, then southwesterly to the Glenn Highway, then east to Bragaw Road and south to the point of beginning. The district includes the community council areas of Russian Jack Park, North and South Mountain View, Airport Heights, and North Muldoon. It has a population of 19,173.1 and a variance of +4.1 percent. It will elect two house members to designated seats and, with District 12, two senators to designated seats.

14. South Muldoon - District 14 includes Stuckagain Heights and the community council areas of Northeast, South Muldoon, and Scenic Park. The District is bounded by District 13 on the north, District 15 on the north and east, District 8 on the east and south, and District 10 on the south and west. District 14 has a population of 18,265.4 and a variance of -.8 percent. It will elect two house members to designated seats and, with District 15, two senators to designated seats.

15. Chugiak-Eagle River-Fort Richardson - District 15 includes the northern portion of the Municipality of Anchorage from Fort Richardson on the west to the municipality's border on the north and east, and by District 14 on the south. It includes the community council areas of Eklutna Valley, Chugiak, Birchwood, and Eagle River Valley. Also included are Fort Richardson, and the area of the North Muldoon community council area bounded by Chester Creek, Muldoon Road, E. 4th Avenue, Patterson Street, and the Glenn Highway. The district has a population of 18,395 and a variance of -.1 percent. It will elect two house members to designated seats and, with District 14, two senators to designated seats.

16. Matanuska-Susitna - District 16 is comprised of the Matanuska-Susitna Borough, including the communities of Talkeetna, Willow, Houston, Big Lake, Wasilla, Bodenburg Butte, Palmer, Sutton, Peter's Creek, Montana, and Chickaloon. It has a population of 17,692.23 and a variance of -3.9 percent. It will elect two house members to designated seats and, with Districts 6 and 7, two senators to designated seats.

17. Interior Highways - District 17 is made up of those areas outside of the Matanuska-Susitna Borough and the Fairbanks North Star Borough which are along the Glenn, Parks, Richardson, and Alaska Highways. Included are Paxson, Gulkana, Glennallen, Copper Center, Tonsina, Tazlina, Eagle, Delta, Fort Greely, Tanacross, Tok, Tetlin, Northway, Nenana, Anderson, Healy, and Cantwell. The district has a population

of 8,753.57 and a variance of -4.9 percent. It will elect one house member and, with District 18, one senator.

18. Southeast North Star Borough - District 18 encompasses the southeast section of the Fairbanks North Star Borough. It includes North Pole, Eielson Air Force Base, Salcha, and Harding Lake. Its population is 9,300, with a variance of +.9 percent. It will elect one house member and, with District 17, one senator.

19. Outer Fairbanks - District 19 includes Livengood, Ester, Goldstream Road, the Steese Highway, the eastern half of Farmers Loop Road, Fort Wainwright, Chena Hot Springs Road, Circle, Central, and Circle Hot Springs. It has a population of 8,934.3 and a variance of -3.0 percent. It will elect one house member and, with Districts 20 and 21, two senators to designated seats.

20. Fairbanks City - District 20 is bounded by the Noyes Slough and University Avenue on the west, the Fairbanks International Airport on the southwest, the Tanana River on the south, and Fort Wainwright on the east. The Creamers Field area is included as the northern edge of the district. The district has a population of 18,319.7 and a variance of -.5 percent. It will elect two house members to designated seats and, with Districts 19 and 21, two senators to designated seats.

21. West Fairbanks - District 21 includes the western half of Farmers Loop Road and the area west of Noyes Slough and University Avenue to, but not including, the Ester area. It has a population of 9,247.1 and a variance of +.4 percent. It will elect one house member and, with Districts 19 and 20, two senators to designated seats.

22. North Slope-Kotzebue - District 22 includes the areas of the North Slope Borough, Arctic Slope Regional Corporation, and the Northwest Alaska Native Association. It has a population of 8,999.06 and a variance of -2.3 percent. The district will elect one house member and, with District 23, one senator.

23. Norton Sound - District 23 includes the area of the Bering Straits Regional Corporation; Shishmaref, Diomede, Teller, Nome, Koyuk and Saint Michael, and the coastal communities as far south as Hooper Bay and Paimiut. Chevak is also included along with Yukon River villages down river from Mountain Village. The district has a population of 9,338.86 and a variance of +1.4 percent. It will elect one house member and, with District 22, one senator.

24. Interior Rivers - District 24 includes the communities on or near the great interior rivers, the Yukon, the Koyukuk, and the Kuskokwim, as far down river as Mountain Village on the Yukon and Tuluksak on the Kuskokwim. The district has a population of 8,936.12 and a variance of -3.0 percent. It will elect one house member and, with District 25, one senator.

25. Lower Kuskokwim - District 25 includes the Kuskokwim River communities down river from Akiak and Akiachak, and the coastal communities from Newtock to Platinum. It has a population of 9,432.35 and a variance of +2.4 percent. It will elect one house member and, with District 24, one senator.

26. Bristol Bay-Aleutian Islands - District 26 includes all of the Bristol Bay Native Corporation area except Ivanof Bay, Perryville, Chignik Lake, Chignik, and Chignik Lagoon. Included are the remainder of the Alaska Peninsula communities, the Aleutian communities, the Bristol Bay communities as far west as Twin Hills, and communities as far up river as Aleknagik and Koliganek. The Bristol Bay Borough is also included. The district has a population of 9,157.61 and a variance of -.6 percent. It will elect one house member and, with District 27, one senator.

27. Kodiak-East Alaska Peninsula - District 27 covers the Kodiak Island Borough and the Alaska Peninsula communities of Ivanof Bay, Perryville, Chignik Lake, Chignik, and Chignik Lagoon. It has a population of 9,592.4 and a variance of +4.1 percent. It will elect one house member and, with District 26, one senator.

Article XV

Schedule of Transitional Measures

Section 1 - Continuance of Laws.

All laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed.

Section 2 - Saving of Existing Rights and Liabilities.

Except as otherwise provided in this constitution, all rights, titles, actions, suits, contracts, and liabilities and all civil, criminal, or administrative proceedings shall continue unaffected by the change from territorial to

Leg. Ref. 3868
A.G. 206-753-6804

To:

cc:

Subject:

Mass. Wins Redistricting Fight

BOSTON (AP) - Massachusetts on Thursday won the right to keep its 11 congressional seats in a court ruling that could set the stage for a Supreme Court battle with Washington state over representation in Congress.

Massachusetts was to lose one seat this year, due to population shifts calculated in the 1990 U.S. Census, while Washington gained a seat.

But a special panel of three federal judges agreed with Massachusetts that it was improper to include people living overseas, such as military personnel, in apportioning congressional seats. State officials claimed the census undercounted the number of overseas residents from Massachusetts, leading to the loss of a seat.

Washington officials said they would appeal the decision to the U.S. Supreme Court, which on March 4 is hearing a congressional apportionment case filed by Montana. It, also, is challenging the apportionment of the 435 House seats.

If Massachusetts wins, Washington state would lose a ninth seat it gained.

Officials in both Massachusetts and Washington expressed confidence their states would win a Supreme Court showdown.

Washington officials say they already have certification from the chief clerk of the U.S. House of Representatives saying Washington is entitled to a ninth congressional seat.

''We feel we're on fairly firm ground in claiming that there's no way to alter that,'' said David Brine, spokesman for Washington's Secretary of State.

The federal court gave Massachusetts until March 30 to come up with an 11-district plan. Failure to do so would cost the state the seat.

In the lawsuit, Massachusetts argued that overseas federal employees should not be included in the population count because census figures for them were faulty.

The three judges agreed in a unanimous decision, saying the Census Bureau relied on ''precisely the same data that it had consistently found to be too unreliable'' in the past.

All states must redraw their congressional districts after the federal census, which takes place every 10 years. The apportionment of seats is based on the census numbers as well as a complex formula that assures that the U.S. House of Representatives remains at 435 members.

The panel included U.S. Circuit Judge Hugh Bownes of New Hampshire, U.S.

District Judge Francis Boyle of Rhode Island and U.S. District Judge Douglas Woodlock of Massachusetts.

Assistant Attorney General James Johnson of Washington said he didn't believe the three-judge panel had jurisdiction.

Joseph Krovisky, a spokesman for the U.S. Department of Justice, which represented the federal government in the case, had no comment on any future action.

AP-NY-02-21-92 0933EST

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, Plaintiffs, v. ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, Defendants.	CIVIL ACTION NO. 91-11234-WD

FINAL DECREES AND ORDERS
February 20, 1992

In accordance with the Memorandum issued this day, it is hereby ORDERED, ADJUDGED and DECREED:

1. That 2 U.S.C. §2(a)(a), insofar as it requires apportionment of seats in the House of Representatives among the states by the method known as equal proportions, is not in violation of the United States Constitution;

2. That the administrative practice of the Executive Branch Defendants in counting overseas federal employees in the 1990 census for the purpose of apportioning seats in the United States House of Representatives among the states was arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. §706(2)(A), and that consequently the use of the overseas census counts by the

defendants in the certification of state entitlements to seats in the House of Representatives was improper;

3. That the Executive Branch Defendants shall submit to defendant Anderson on or before March 31, 1992, a statement showing the number of Representatives to which each state would be entitled as a result of the 1990 decennial census under 2 U.S.C. §2(a)(a), without inclusion of the overseas census counts in the apportionment count;

4. That defendant Anderson, as he is the Clerk of the United States House of Representatives, shall on or before April 10, 1992, send the executive of each state a recertification of the number of Representatives to which such state is entitled in accordance with paragraph 3 of this Order;

5. That the plaintiff Commonwealth of Massachusetts shall, on or before March 30, 1992, submit a certification to be docketed in this action affirming that there has been prepared a plan--adopted by the General Court of the Commonwealth and approved by the Governor--for the redistricting of eleven Congressional seats in Massachusetts, in accordance with the 1990 decennial census, without inclusion of the overseas census counts;

6. That the failure of the Commonwealth of Massachusetts to certify the adoption and approval of the plan called for by

paragraph 5 of this Order on or before March 30, 1992 will relieve the defendants of their obligations under paragraphs 3 and 4 of this Order.

Hugh H. Bownes
Senior United States Circuit Judge

Francis J. Boyle
United States District Judge

Douglas P. Woodlock
United States District Judge

Statement Submitted for the Record
of the Hearing on H.R. 2661 before
The Subcommittee on Census and Population
House Post Office and Civil Service Committee
August 1, 1989

Michael R. Darby
Under Secretary of Commerce for Economic Affairs

The United States Department of Commerce stands by our existing policy of counting all persons in the 1990 Decennial Census. The Department of Justice has advised previous Congresses based on constitutional considerations that illegal aliens must be included within the census counts for purposes of apportioning congressional representation. Moreover, based on practical considerations, the Department has determined that changing our procedures to exclude illegal aliens would be both infeasible and undesirable.

We believe there are compelling legal and public policy grounds for counting all persons irrespective of their citizenship. The Census Bureau's enumeration procedure has been guided by the requirement in the 14th amendment to count "the whole number of persons in each State." The Census Bureau has interpreted its constitutional charge and its statutory mandate to require counting every person who has a usual residence in any State. The concept of 'usual residence' dates back to the Census Act of 1790 and, while the wording of various Census Acts has changed over the decades, the concept has remained the same -- to enumerate all inhabitants.

The Department of Commerce strongly believes that to change existing policy would be entirely infeasible and would considerably undermine critical efforts being undertaken by the Bureau to assure an effective and complete count in 1990.

First, we have no way of effectively determining the legal status of individual respondents. Any attempt to reduce the "whole number of persons" of particular ethnic groups by some statistical allowance for an estimated number of illegal aliens is clearly objectionable in counting observed whole persons as fractions.

Second, adoption of this policy would undermine far-reaching progress in the area of outreach directed at the minority community. Given the importance of these programs to achieve a full and accurate count, we oppose undertaking policies which are likely to disrupt our cooperation with community organizations which provide assistance to our efforts.

-over-

Finally, the Bureau is reluctant to undertake actions which would undermine the general public's perception of the confidentiality of census data. The absolute prohibition on any disclosure of confidential census data and the public's acceptance of these assurances are essential to the accuracy of census results.

Given that a decision to exclude undocumented aliens from the census apportionment counts would be neither feasible nor desirable, we strongly oppose the enactment of H.R. 2661.

Enumeration and Residence Rules of the 1990 Census

Prepared for the Alaska Reapportionment Board

by Kathryn Lizik
Alaska Department of Labor
February 28, 1991

The purpose of this report is to provide information on how the enumeration and residence rules for the 1990 Census affected the population count.

Enumeration Rule

Traditionally, the Census Bureau has interpreted the U.S. Constitution to mean "count all persons who are inhabitants of the U.S." as of Census day, rather than just citizens, property owners, or adults. This enumeration rule addresses "who to count". As the rule implies, all persons residing within Alaska were counted during the 1990 Census. However, this does not mean that they were all included in the state count.

Residence Rules

The Census Act of 1790 established the concept of usual residence as the guiding principle for determining where to count a person. The usual residence concept requires the Census Bureau to count a person where he or she lives and sleeps most of the time or where he or she considers their usual residence. Clear, well-communicated residence rules are needed to minimize both over- and under-counting. With few exceptions, it is this residence concept that the Bureau used in 1990. These residence rules address "where to count".

There are, however, situations where a need exists to establish special rules for those persons whose usual residence is not the place where they are on Census day or whose usual residence is ambiguous. In many cases, these individuals fill out an individual census report (ICR) which collects, among other information, the address of the housing unit they consider to be their usual place of residence. This address allows the eventual matching of the ICR to the original census questionnaire assigned to the housing unit and adds the person to that location. This address matching takes place nationwide and allows the individual to be counted back to any state.

The following list identifies those situations where special rules are utilized.

1) **Persons away from their usual residence on census day.** This category includes persons traveling, living temporarily in hotels and motels, or maintaining a usual home elsewhere. These people are not counted at the temporary location but are allocated back to their usual residence.

On Census day, these persons are asked to provide the address of their usual residence. This address is then matched to the census form for that address, and they are added to the count for that location. If these people cannot be matched to a specific residence, the bureau assumes that a neighbor or family member already reported these persons at the usual residence.

2) **Persons with multiple residences.** The 1990 questionnaire allows these persons to self identify one residence as their usual residence.

3) **Persons with no permanent residence.** All persons who do not claim a usual home elsewhere (the homeless, those in transient quarters, or those living temporarily with

friends or relatives) will be counted in the area they are contacted. A special enumeration of pre-identified transient locations was conducted about one week prior to Census day to capture this transient population.

4) **Persons away at college.** The residence of college students is identified as the location of the college they are attending.

5) **Persons away at boarding school.** Students below the college level, away attending boarding school, are counted at their parental home, due to their age and dependency on their parents.

6) **Crews of merchant vessels.** Some crew members have no home other than the ship on which they work, others maintain a home on shore that they consider to be their usual residence. For those crew with a shore based residence, their SCR or Shipboard Census Report will be matched to the census form for the residence they report and they will be added to that location.

For crew who consider the ship their residence, the following rules guide where they are counted:

a) For ships berthed in a U.S. port on Census day, the crew will be counted at that port.

b) For ships not berthed at a U.S. port but in territorial waters, the crew is counted at the port of destination, provided it is within the U.S. or its territories.

c) For ships in territorial waters headed for a non U.S. port, the ships port of departure will be used.

d) Crew of merchant ships not within territorial waters or that are not american flag vessels, will not be counted.

The above rules also apply to crew of canneries, freezer ships, and tuna ships.

7) **Land based military personnel.** Members of the armed forces, including the U.S. Coast Guard, are counted at the area where they are permanently stationed, subject to the conditions as described below (see Residency of Military Personnel Based on the Census Bureau Guidelines).

8) **Crews of military ships.** If the person's usual residence is the ship, the person will be counted at the homeport location where the ship is actually docked. Crew members will also be able to identify a usual residence ashore and be matched to their home address.

9) **Movers.** If an individual is in the process of moving to a new location he or she will be counted at their Census day address.

10) **Migrant workers.** Residents of migrant worker camps may designate the camp as their residence. If they have a usual residence other than the camp, the ICR will cross match them to that address.

11) **Institutionalized residents.** This category includes all residents living under formally authorized, supervised care or custody. The facilities housing this population include correctional schools, penitentiaries, wards for juveniles, specialized hospitals, nursing homes for the elderly, and homes for the physically and mentally handicapped.

The Census Bureau differentiates between long-term and short-term facilities. Persons residing in long-term facilities (for example, penitentiaries, and mental hospitals) will be counted as residents of the institution. Persons residing in short-term facilities (such as county jails and general hospitals) will be given the opportunity to identify a usual place of residence if they have one.

RESIDENCY OF MILITARY PERSONNEL BASED ON CENSUS BUREAU GUIDELINES

For purposes of census enumeration all active duty military personnel were distributed a MCR (military census report) on-base, whether or not they lived in on-base barracks and housing units, or off-base housing units. For barracks based personnel, this was the only census form they filled out.

If the MCR listed that the address where the individual usually stayed at least 4 nights a week was the barracks, the individual was counted as an on-base resident.

All on and off-base personnel living in housing units, however, also received and filled out regular census questionnaires just like the rest of the civilian population.

If the MCR listed that the residence address was either an on- or off-base housing unit, the MCR was search/matched to the census questionnaires collected from the housing units, to verify the non-barracks location. When a match occurred, the count was assigned to the housing unit. If it was on-base, the count became part of the total on-base count. If it was off-base, the count became part of the regular off-base block count.

If the MCR listed that the residence address was out of state, the search/match would look for the listed address for the out of state residence. These search/matches were limited, however, to the three states (AK, CA, WA) served by the Census Bureau's processing office in San Diego. If a match occurred, the individual was added to that out of state address. If an address for any other state than the 3 listed above was filled in on the MCR, a match did not occur and the count by default was added to the base count.

It is my opinion that based on the above procedures, most on-base barracks personnel would have been counted at their base location due to two factors:

1) Matches were limited to only two other states than Alaska. Since tours of duty

originate from bases nationwide and the service is made up of individuals from 50 states, it is highly unlikely all non-state matches would have by chance been exclusively from California or Washington State.

2) The MCR form is constructed to generally elicit an on-base residence response. The address information block lies within Question 2 which sets the respondent up to automatically write in his or her on-base residence. The instructional guidelines do not provide extensive definitions of how one determines ones residency. "Where you usually stay at least 4 nights a week" is only one of many considerations.

I have requested from the Census Bureau a report which would show how many MCR's were matched to out of state locations. To date, that report has not been generated, and may not become available during the scope of the redistricting time frame.

For the on-base and off-base housing unit respondents, the regular census questionnaire also provided the opportunity to list a usual residence location. In this case, however, if an out of state address were given, the address matching would be conducted nationwide and the individual adjusted back to the out of state residence reported. In order for this match to be successful, a specific out of state street address is required.

DRAFT

AFTER COMPLETING THIS FORM

- Please check it to be sure you have answered all the required questions completely.
- To return your form, please follow the instructions on the envelope that the form came in.

THANK YOU FOR YOUR COOPERATION.

The Census Bureau estimates that, on average, each respondent will take 7 minutes to complete this form, including the time for reviewing instructions and answers. Comments about this estimate should be directed to the Associate Director for Management Services, Bureau of the Census, Washington, DC 20233, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

DRAFT

FORM D-20B (11-14-88)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1990 INDIVIDUAL CENSUS REPORT

1. Please print your name —

Last name | First name | Middle initial

2a. Are you — Mark (X) the box that applies.

(1) ☐ A person WHO USUALLY LIVES HERE or who stays here most of the week while working?

(2) ☐ A person with NO USUAL PLACE OF RESIDENCE?

Please continue with question 3, on page 2

(3) ☐ A person AWAY FROM YOUR USUAL HOME FOR A SHORT TIME, such as on a vacation or business trip?

Is there someone at your usual address who will include you on the census form there?

☐ Yes
☐ No

Print your home address in b, and continue with question 3, on page 2.

b.

House number, street name, apartment number
Rural route number / Box number
City
County or foreign country
State / ZIP Code
Telephone number — Include area code
Names of nearest intersecting streets or roads

FOR CENSUS USE

DO	ID	ARA	Block	PN

FOR CENSUS USE

Person with _____ children under 15 years present with him/her

Add	DO	ID	ARA	Block	PN
Y N					

◄——— FOLD LINE

OMB No. XXXX-XXXX: Approval Expires XX/XX/XX

AFTER COMPLETING THIS FORM

1 Please check it to be sure you have answered all the required questions completely.

2. Then return your form to the person in charge of distributing these reports.

3. Military personnel living away from this installation, but within the census area, will also receive a census form at home. To ensure that such personnel are assigned to the correct jurisdiction, it is important that YOU MAKE SURE YOU ARE INCLUDED ON BOTH FORMS — this report and the census form sent to your home.

THANK YOU FOR YOUR COOPERATION.

The Census Bureau estimates that, on average, each respondent will take either 2 minutes (100-percent items only) or 7 minutes (sample items as well) to complete this form, including the time for reviewing the instructions and answers. Comments about these estimates should be directed to the Associate Director for Management Services, Bureau of the Census, Washington, DC 20233, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

This form may be reproduced before distribution if additional copies are needed.

FORM D-21
(6-13-88)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1990 MILITARY CENSUS REPORT

This is your official Census form. Your cooperation in carefully filling out the form will help make the census successful. If you do not know the exact answer to any question, please give your best estimate.

This census is authorized by Title 13, United States Code, and you are required by law to answer the questions to the best of your knowledge.

The same law protects the confidentiality of your answers. Census employees are subject to fine and/or imprisonment for any disclosure of your answers. The person on base collecting your information is sworn in as a census employee and is subject to these same penalties.

Thank you for your cooperation.

1. **Please print your name —**
Last name | First name | Middle initial

2a. **What is the name of your unit?**

b. **What is the address where you usually stay at least 4 nights a week?**

Building or barracks number or identification (if applicable)

House No. | Street name | Apt. No.

City | County or foreign country

State | ZIP Code

Names of nearest intersecting streets or roads

c. **Is the above address on a military installation or base?**

☐ Yes — Give name 7 ☐ No

d. **Is the place where you usually stay family-type housing (house, apartment, etc.) or group quarters (barracks, BOQ, hospital, etc.)?**

☐ Family-type housing — **How many persons, including yourself, were living at the above address on April 1, 1990?**

_____ Persons — *Please complete questions 3 through 7 on page 2. Then return your form to the person in charge of distributing these reports.*

☐ Group quarters — *Continue with question 3 and follow the instructions at the bottom of page 2.*

FOR CENSUS USE					FOR CENSUS USE				
cd N	DO	ID	ARA	Block	PN	DO	ID	ARA	Block	PN

2a. Do you have a residence (house, apartment) where you usually stay when off duty?

1 ☐ Yes — *Go to 2b* 2 ☐ No — *Skip to 3*

b. What is the address of that residence? Include house number, street name, city, State, and ZIP Code.

House number Street name

Base name (If on-base)

City State ZIP Code

3. Sex — Mark (X) ONE box.

1 ☐ Male 2 ☐ Female

4. Race — Mark (X) ONE box for the race you consider yourself to be.

1 ☐ White
2 ☐ Black or Negro
3 ☐ Indian (Amer.) (Print the name of the enrolled or principal tribe.)
4 ☐ Eskimo
5 ☐ Aleut

Asian or Pacific Islander (API)

6 ☐ Chinese
7 ☐ Filipino
8 ☐ Hawaiian
9 ☐ Korean
10 ☐ Vietnamese
11 ☐ Japanese
12 ☐ Asian Indian
13 ☐ Samoan
14 ☐ Guamanian
15 ☐ Other API
16 ☐ Other race (Print race)

5. Age and year of birth

a. Age b. Year of birth (1)

6. Marital status — Mark (X) ONE box.

1 ☐ Now married 3 ☐ Divorced 5 ☐ Never married
2 ☐ Widowed 4 ☐ Separated

7. Are you of Spanish/Hispanic origin?

Mark (X) ONE box.

1 ☐ No (not Spanish/Hispanic)
2 ☐ Yes, Mexican, Mexican-Am., Chicano
3 ☐ Yes, Puerto Rican
4 ☐ Yes, Cuban
5 ☐ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.)

• What are the last 4 digits of your Social Security Number?

X X X — X X — ☐☐☐☐

If the last four digits are 8333 or more, please continue with question 8. Persons who continue with question 8 represent a sample randomly selected on the basis of these digits. If the digits are less than 8333, stop here and return the form.

8. In what U.S. State or foreign country were you born?

(Name of State or foreign country; or Puerto Rico, Guam, etc.)

9. Are you a CITIZEN of the United States?

1 ☐ Yes, born in the United States — *Skip to 11*
2 ☐ Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas
3 ☐ Yes, born abroad of American parent or parents
4 ☐ Yes, U.S. citizen by naturalization
5 ☐ No, not a citizen of the United States

10. When did you come to the United States to stay?

0 ☐ 1987 to 1990
1 ☐ 1985 or 1986
2 ☐ 1982 to 1984
3 ☐ 1980 or 1981
4 ☐ 1975 to 1979
5 ☐ 1970 to 1974
6 ☐ 1965 to 1969
7 ☐ 1960 to 1964
8 ☐ 1950 to 1959
9 ☐ Before 1950

11. At any time since February 1, 1990, have you attended regular school or college? Include only schooling which leads to a high school diploma or a college degree.

1 ☐ No, have not attended since February 1
2 ☐ Yes, public school, public college
3 ☐ Yes, private school, private college

12. How much school have you COMPLETED?

Mark (X) ONE box for the highest level COMPLETED or degree RECEIVED. If currently enrolled, mark the level of previous grade attended or highest degree received.

35 ☐ Less than 9th grade
36 ☐ 9th grade
37 ☐ 10th grade
38 ☐ 11th grade
39 ☐ 12th grade, NO DIPLOMA
40 ☐ HIGH SCHOOL GRADUATE — high school DIPLOMA or the equivalent (For example: GED)
41 ☐ Some college but no degree
42 ☐ Associate degree in college — Occupational program
43 ☐ Associate degree in college — Academic program
44 ☐ Bachelor's degree (For example: BA, AB, BS)
45 ☐ Master's degree (For example: MA, MS, MEng, MEd, MSW, MBA)
46 ☐ Professional school degree (For example: MD, DDS, DVM, LLB, JD)
47 ☐ Doctorate degree (For example: PhD, EdD)

13. What is your ancestry or ethnic origin?

(For example: German, Italian, Afro-Amer., Croatian, Cape Verdean, Dominican, Ecuadoran, Haitian, Cajun, French Canadian, Jamaican, Korean, Lebanese, Mexican, Nigerian, Irish, Polish, Slovak, Taiwanese, Thai, Ukrainian, etc.)

FOLD ALONG THIS BROKEN LINE FOR SEALING

14a. **Did you live at the address reported in question 2b 5 years ago (on April 1, 1985)?**

1 ☐ Yes — *Skip to 15a*
2 ☐ No or no address in 2b

b. **Where did you live 5 years ago? If you had no residence except on a ship, report the home port of that ship on April 1, 1985.**

(1) **Name of U.S. State or foreign country**

(If outside U.S., print answer above and *skip to 15a.*)

(2) **Name of county in the U.S.**

(3) **Name of city or town in the U.S.**

(4) **Did you live inside the city or town limits?**

1 ☐ Yes 2 ☐ No, lived outside the city/town limits

15a. **Do you speak a language other than English at home?**

1 ☐ Yes 2 ☐ No — *Skip to 17a*

b. **What is this language?**

(For example: Chinese, Italian, Spanish, Vietnamese)

c. **How well do you speak English?**

1 ☐ Very well 2 ☐ Well 3 ☐ Not well 4 ☐ Not at all

16.

17a. **Have you ever been on active-duty military service in the Armed Forces of the United States or ever been in the United States military Reserves or the National Guard?** Active duty does not include training in the Reserves or National Guard.

1 ☐ Yes, now on active duty
2 ☐ Yes, on active duty in past, but not now
3 ☐ Yes, service in Reserves or National Guard only } *Skip to 20*
4 ☐ No }

b. **Was active-duty military service during** — Mark (X) a box for each period in which you served.

1 ☐ September 1980 or later
2 ☐ May 1975 to August 1980
3 ☐ Vietnam era (August 1964—April 1975)
4 ☐ February 1955—July 1964
5 ☐ Korean conflict (June 1950—January 1955)
6 ☐ World War II (September 1940—July 1947)
7 ☐ World War I (April 1917—November 1918)
8 ☐ Any other time

c. **In total, how many years of active-duty military service have you had?** Years

18.

19.

20. *If you are female* — **How many babies have you ever had, not counting stillbirths?** Do not count stepchildren or children you have adopted.

0 ☐ None 1 ☐ 1 2 ☐ 2 3 ☐ 3 4 ☐ 4 5 ☐ 5 6 ☐ 6 7 ☐ 7 8 ☐ 8 9 ☐ 9 10 ☐ 10 11 ☐ 11 12 ☐ 12 or more

21a.

21b. **How many hours did you work LAST WEEK (at all jobs)?** Subtract any time off; add overtime or extra hours worked.

Hours OR 0 ☐ Did not work last week — *Skip to 28*

22. **Did you work on this ship LAST WEEK?**

1 ☐ Yes . . . . . } *Skip to 28*
2 ☐ No, different ship }
3 ☐ No

At what location did you work LAST WEEK? If you worked at more than one location, print where you worked most last week.

a. **Address (Number and street)**

(If the exact address is not known, give a description of the location such as the name of the building or the nearest street or intersection, etc.)

b. **Name of city, town, or post office**

c. **Is the work location inside the limits of that city or town?**

1 ☐ Yes 2 ☐ No, outside the city/town limits

d. **County**

e. **State** f. **ZIP Code**

23a. **How did you usually get to work LAST WEEK?** If you usually used more than one method of transportation during the trip, mark (X) the box of the one used for most of the distance.

1 ☐ Car, truck, or van
2 ☐ Bus or trolley bus
3 ☐ Streetcar or trolley car
4 ☐ Subway or elevated
5 ☐ Railroad
6 ☐ Ferryboat
7 ☐ Taxicab
8 ☐ Motorcycle
9 ☐ Bicycle
10 ☐ Walked
11 ☐ Worked at home — *Skip to 28*
12 ☐ Other method

If "car, truck, or van" is marked in 23a, go to 23b. Otherwise, skip to 24a.

b. **How many people, including yourself, usually rode to work in the car, truck, or van LAST WEEK?**

1 ☐ Drove alone
2 ☐ 2 people
3 ☐ 3 people
4 ☐ 4 people
5 ☐ 5 people
6 ☐ 6 people
7 ☐ 7 to 9 people
8 ☐ 10 or more people

24a. **What time did you usually leave home to go to work LAST WEEK?** 1 ☐ a.m. 2 ☐ p.m.

b. **How many minutes did it usually take you to get from home to work LAST WEEK?** Minutes — *Skip to 28*

25.

26.

27.

FOLD ALONG THIS BROKEN LINE FOR SEALING.

28. **Are you now on active duty in the U.S. Armed Forces?**

1 ☐ Yes, Navy
2 ☐ Yes, Marine Corps
3 ☐ Yes, Coast Guard
4 ☐ Yes, Army
5 ☐ Yes, Air Force
6 ☐ No — Describe the kind of business of your employer →

29. **Occupation**

a. **What kind of work are you doing?**

(For example: aircraft engine mechanic, electronic technician, able seaman, sonar technician, tactical intelligence officer)

b. **What are your most important activities or duties?**

(For example: repair seaplanes, research on electronic components, maintain ship's gear, repair sonar equipment, edit intelligence manuals)

c. *If Armed Forces:*

(1) **What is your primary job specialty?** If you have more than one specialty, list the one at which you spend the most time.

MOS/Rating/Designator/AFSC →

(2) **What is your paygrade?** Enter two-character code. (For example: E-4, 0-3)

Paygrade

30.

31a. **Last year (1989), did you work, even for a few days, at a paid job, business, farm or on active-duty military service?**

1 ☐ Yes 2 ☐ No — *Skip to 32*

b. **How many weeks did you work in 1989?** Count paid vacation, paid sick leave, and military service.

Weeks

c. **During the weeks WORKED in 1989, how many hours did you usually work each week?**

Hours

32. **Income in 1989 —**

Mark (X) the "Yes" box below for each income source you received during 1989. Otherwise, mark (X) the "No" box.

If "Yes," enter the total amount received during 1989.

If exact amount is not known, please give best estimate.

If net income in 32b, c, or d was a loss, write "Loss" above the dollar amount.

a. **Pay as a member of the ARMED FORCES including special, incentive, and bonus pay. Also wages, salaries, tips, and commissions from CIVILIAN JOBS —** Report total amount from all jobs BEFORE DEDUCTIONS for taxes, bonds, dues, or other items.

1 ☐ Yes → $ .00
2 ☐ No
Annual amount — Dollars

b. **Self-employment income from own nonfarm business, including proprietorship and partnership —** Report NET income after business expenses.

1 ☐ Yes → $ .00
2 ☐ No
Annual amount — Dollars

c. **Farm self-employment income —** Report NET income after operating expenses. Include earnings as a tenant farmer or sharecropper.

1 ☐ Yes → $ .00
2 ☐ No
Annual amount — Dollars

d. **Interest, dividends, net rental income or royalty income, or income from estates and trusts —** Report even small amounts credited to an account.

1 ☐ Yes → $ .00
2 ☐ No
Annual amount — Dollars

e. **Any other income received regularly, such as social security, public assistance or welfare payments, child support, or unemployment compensation —** Do NOT include lump-sum payments such as money from an inheritance or the sale of a home.

1 ☐ Yes → $ .00
2 ☐ No
Annual amount — Dollars

33. **What was your total income in 1989?** Add entries in questions 32a through 32e; subtract any losses. If total amount was a loss, write "Loss" above amount.

$ .00
Annual amount — Dollars
OR 0 ☐ None

OMB No. 0607-0628: Approval Expires 07/31/91

AFTER COMPLETING THIS FORM

1. Please check it to be sure you have answered all the required questions completely.

2. Then return your form to the person in charge of distributing these reports.

3. Military personnel living away from this installation, but within the census area, also will receive a census form at home. To ensure that such personnel are assigned to the correct jurisdiction, it is important that YOU MAKE SURE YOU ARE INCLUDED ON BOTH FORMS — this report and the census form sent to your home.

THANK YOU FOR YOUR COOPERATION.

The Census Bureau estimates that, on average, each respondent will take either 2 minutes (first seven questions) or 7 minutes (all thirty-three questions) to complete this form, including the time for reviewing instructions and answers. Comments about these estimates should be directed to the Associate Director for Management Services, Bureau of the Census, Washington, DC 20233, Attn: CEN-90, and to the Office of Management and Budget, Paperwork Reduction Project CEN-90, Washington, DC 20503.

CENSUS '90

This form may be reproduced before distribution if additional copies are needed.

FORM D-23

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1990 SHIPBOARD CENSUS REPORT

This is your official Census form. Your cooperation in carefully filling out the form will help make the census successful. Estimates may be made where exact answers are not known.

This census is authorized by Title 13, United States Code, and you are required by law to answer the questions to the best of your knowledge

The same law protects the confidentiality of your answers. Census employees are subject to fine and/or imprisonment for any disclosure of your answers.

Thank you for your cooperation.

1a. Please print your name –
Last name First name Middle initial

b. What is the name of the ship where you are assigned?

c. What is the name of the operator of the ship?
If U.S. Government, specify Navy, Coast Guard, etc.

Please continue ⟶

FOR CENSUS USE						FOR CENSUS USE				
dd N	DO	ID	ARA	Block	PN	DO	ID	ARA	Block	PN

method of equal proportions (see box, right) to determine the number of Representatives each State receives.

> *"... as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."*
>
> — *Wesberry v. Sanders*

But our job doesn't end there. Court decisions and legislation have given the Census Bureau a major role in redistricting, the process by which State it is only in the last two decades that the Census Bureau has played a role in the redistricting process.

U.S. Supreme Court decisions handed down during the 1960's clarified the Constitution's intention to provide equality of representation for all Americans. In 1964, the *Wesberry v. Sanders* decision held that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." That same year, in *Reynolds v. Sims*, the Court ruled that State legislative districts must be "as nearly of equal population as is practicable."

Both U.S. Congressional Districts and State legislative districts must be

Who Is Counted?

The U.S. Constitution (Amendment 14, Section 2) states, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ." Consequently, the Census Bureau counts *all* persons — the "whole number" — who are residents of the United States.

Specifically excluded are persons living on the grounds of a foreign embassy, ministry, legation, chancellery, or consulate. Since these locations are legally considered foreign soil, people living there are not considered U.S. residents. Also, citizens of foreign countries temporarily visiting or traveling in the United States are not counted because they have not established a residence.

Americans temporarily abroad on vacations or business trips are counted at their usual place of residence within the United States. For the second time in history, Defense Department employees overseas, both military and civilian, and their families are included in the census count.

Proportions Guides Apportionment

How does the method of equal proportions work?

Adopted in 1941 (title 2, Section 2a, United States Code), the method of equal proportions helps us compile a priority list of the States. Priority value is determined by dividing a State's population by the geometric mean of its current and next seats.

Following the 1980 census, each of the 50 States was awarded one seat out of the current 435 total. Then, the 51st seat went to the State that had the highest priority value for its second seat.

In computing the apportionment from the 1980 State totals, seat 51 went to California, whose priority value under the method of equal proportions was 16,736,300. The next seat, number 52, went to New York, with a second-seat priority value of 12,414,877, and Texas received seat number 53, with a priority value of 10,060,986.

Once the number of seats assigned to the individual States is determined, the task of drawing the new congressional districts is generally that of each State legislature.

where we microfilm them and use optical scanning devices to extract data. We compile preliminary housing unit counts for each block and then send them to officials of the appropriate county, county subdivision, and incorporated place. Called "local review," this process gives officials the opportunity to examine our counts and to identify blocks where they believe there are discrepancies.

Once we have completed the collection and processing, we begin to compile final counts in the Census Bureau's Washington office.

Census Day may be our most conspicuous deadline, but it's not our only one. Now we face several deadlines in processing the final census counts.

Off to the President

Next, the Census Bureau must prepare the final, official State population counts required for the apportionment of the U.S. House of Representatives. These official counts are reported to the President on or before December 31, 1990, a brief 9 months after Census Day.

According to the U.S. Code, the President must then report these figures to the Congress. He does this in early January 1991, during the first week of the 102nd Congress. This report will show —

- the population of each State
- the total number of Representatives (435)
- the number of Representatives each State may have

The apportionment section of the U.S. Code also tells the steps that are to be followed after the Congress receives the President's report. Within 15 calendar days, the Clerk of the House of Representatives must send to each State's Governor a certificate showing how many Representatives the State may send to the next Congress.

STRENGTH IN NUMBERS

Your Guide to 1990 Census Redistricting Data From the U.S. Bureau of the Census

gress and for State legislatures

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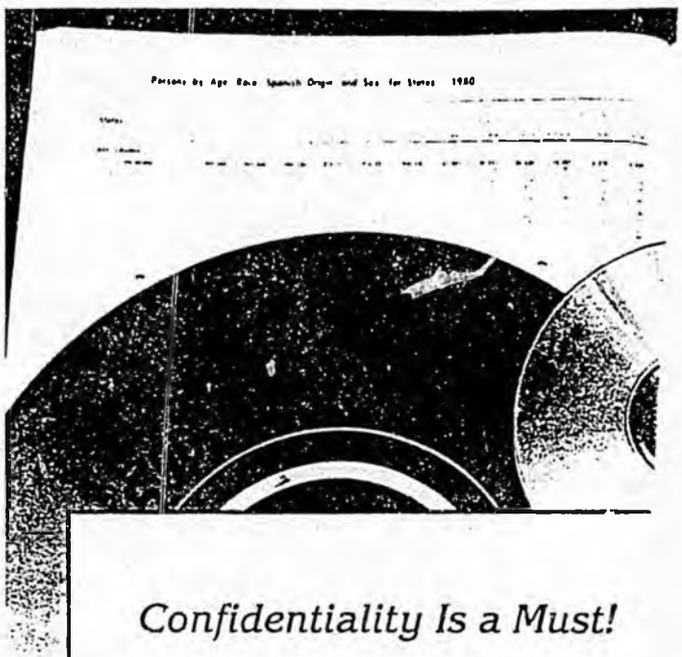

Confidentiality Is a Must!

Title 13 of the United States Code
Census Bureau. Section 9 of Title
of information gathered by the Cer
neither the Secretary of Commerce
ployee of the Department of Comr
use the information furnished unde
any purpose other than the statist
supplied.

It states that no Census Bureau
particular establishment or indivic
sworn officers and employees of t
information supplied in response
ever, the law specifies that, after
opened to public inspection and