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Congressional Redistricting: Is At-Large Representation Permitted in the House of Representatives?

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Summary

Section 2c of Title 2 of the U.S. Code requires members of the House of Representatives to be elected from single-member districts, however, Section 2a(c) requires Representatives to be elected at large if a state fails to create new districts after the reapportionment of seats following a decennial census. These apparently contradictory provisions raise questions about whether and under what circumstances federal law permits at-large representation in the House of Representatives. The legislative history of 2 U.S.C. § 2c is sparse because it was adopted as a Senate floor amendment to a House-passed private bill. In 1967, the same year that Section 2c was adopted, Congress had contemplated, but failed to pass, a more comprehensive bill that would have repealed Section 2a(c), thereby removing the apparent statutory inconsistencies. Addressing the tension between Section 2a(c) and Section 2c, as applied to a Mississippi redistricting plan, the Supreme Court in *Branch v. Smith*[1] held that a federal district court was required to craft single-member districts. Although the issue remains unsettled, it appears that Section 2a(c) could provide options to the House of Representatives to seat an at-large delegation. H.R. 415 (108th Cong.), would establish a commission to make recommendations on the method by which Members of the House are elected, including examining alternatives to the current method. Such recommendations, if ultimately enacted, could affect current federal statutory provisions governing single-member and at-large representation in the House of Representatives.

Background. Congressional efforts to establish standards for House districts have a long history. Congress first passed federal redistricting standards in 1842, when it

[1] 123 S. Ct. 1429 (2003).

added a requirement to the apportionment act of that year that Representatives "*should be elected by districts composed of contiguous territory equal in number to the number of Representatives to which each said state shall be entitled, no one district electing more than one Representative*." (5 Stat. 491.)[2] The Apportionment Act of 1872 added another requirement to those first set out in 1842, stating that districts should contain "*as nearly as practicable an equal number of inhabitants.*" (17 Stat. 492.)[3] A further requirement of "compact territory" was added when the Apportionment Act of 1901 was adopted stating that districts must be made up of "*contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.*" (26 Stat. 736.) Although these standards were never enforced if the states failed to meet them, this language was repeated in the 1911 Apportionment Act and remained in effect until 1929, with the adoption of the Permanent Apportionment Act, which did not include any districting standards. (46 Stat. 21.) After 1929, there were no congressionally imposed standards governing congressional districting; in 1941, however, Congress enacted a law providing for various districting contingencies if states failed to redistrict after a census—including at-large representation. (55 Stat 761.) In 1967, Congress reimposed the requirement that Representatives must run from single-member districts, rather than running at large.[4] (81 Stat. 581.)

Both the 1941 and 1967 laws are still in effect. The 1967 law, codified at 2 U.S.C. § 2c, requiring single-member districts, appears to conflict with the 1941 law, codified a 2 U.S.C § 2a(c), which provides options for at-large representation if a state fails to create new districts after the reapportionment of seats following a census. The apparent contradictions may be explained by the somewhat confusing legislative history of P.L. 90-196 (2 U.S.C. § 2c), prohibiting at-large elections.

Legislative History of Current Law. The legislative history of the 1967 law, mandating single-member districts (P.L. 90-196), is unusual. The portion of the bill that became 2 U.S.C. § 2c was a Senate amendment to a House-passed private immigration act—H.R. 2275, 90th Congress, "an act for the relief of Dr. Ricardo Vallejo Samala, and to provide for congressional redistricting." No hearings were held or reports issued on

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[2] In 1843, three states elected their delegations at large. At the beginning of the 28th Congress, the Clerk of the House declined to entertain a motion to exclude them and the Representatives were sworn in. After the delegations were seated, the House directed the Committee of Elections "to examine and report upon the certificates of elections, or the credentials of the Members returned to serve in this House." The committee's report found the 1842 law "not a law made in pursuance of the Constitution of the United States, and valid, operative, and [therefore not] binding on the states." Later the House adopted a resolution declaring the Representatives of the four states "duly elected," but omitted any mention of the apportionment law. See: Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907), pp. 170-173. In 1861, California elected three Representatives at large, and they too were seated. *Hinds*, p. 182.

[3] Section 6 of 17 Stat. 28 provided for a reduction of Representatives to states that "deny or abridge the right of any male inhabitants" granted the right to vote by the 14th Amendment. This provision of the law has never been enforced.

[4] "At-large" representation means Representatives run statewide (as Senators do), instead of representing districts.

the at-large election prohibition that became 2 U.S.C. § 2c, "Number of Congressional Districts; number of Representatives from each District":

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at large may elect its Representatives at large to the Ninety-first Congress).[5]

H.R. 2275 was enacted after another bill (H.R. 2508, also 90th Congress) that included similar language pertaining to at-large representation failed final passage after two conferences—the first was recommitted in the House and the second was defeated in the Senate.[6] H.R. 2508 also included additional provisions regarding population equality plus geographical compactness and contiguousness. H.R. 2508 would have deleted subsection (c) of section 22 of the Apportionment Act of 1929, as amended, (codified as 2 U.S.C. §2a(c)) and substituted the bill's redistricting standards that also included a ban on at-large elections. Section 2a(c) of Title 2 currently provides:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.[7]

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[5] 2 U.S.C. § 2c.

[6] For a history of the efforts to pass H.R. 2508 in the 90th Congress, *see* "Congress Fails to Adopt House District Standards," *Congressional Quarterly Almanac*, vol. 23, (Washington: Congressional Quarterly, 1967), pp. 550-557.

[7] 2 U.S.C. § 2a(c). 2 U.S.C. § 2a(a) specifies the date and the mathematical formula used to apportion seats in the House of Representatives. It also sets the size of the House at 435: "the then existing number of Representatives." Section 2a(b) assigns the duty to the Clerk or the Sergeant at Arms of the House of Representatives to notify states of their allocation of Representatives after each Census.

It is clear from committee report language[8] and both the House- and Senate-passed versions of H.R. 2508[9] that 2 U.S.C. § 2a(c) would have been superseded by new language had it been enacted and approved by the President. H.R. 2275 (P.L. 90-196), which was enacted after the second conference report on H.R. 2508 was defeated in the Senate, did not amend 2a(c). Thus, Public Law 90-196 was codified in a separate part of the U.S. Code (2 U.S.C. § 2c), rather than as replacement language for 2 U.S.C. § 2a(c).

These apparently contradictory provisions raise questions about how Section 2(a)c, which provides for at-large House elections under certain circumstances, can be reconciled with Section 2c, which prohibits them. Section 2a(c) of Title 2 could be invoked if a state that had gained or lost Representatives after a census failed to complete the redistricting process before the first election following the reapportionment of seats among the states. One could argue, contrarily, that since Section 2a(c) was enacted in 1941 and Section 2c was enacted in 1967, the prohibition of at-large and multi-member districts in Section 2c implicitly repeals the contingencies for running at large provided in 2a(c), thus making Section 2a(c) a dead letter. Further buttressing the dead letter theory is the 40-year history of active court involvement in redistricting. When Section 2a(c) was enacted in 1941, courts were constrained by years of precedent limiting their entrance into the "political thicket" of redistricting. After the Supreme Court established the "one person, one vote" principle beginning with its 1962 landmark decision in *Baker v. Carr*,[10] and Congress passed the Voting Rights Act of 1965,[11] courts have intervened numerous times in the state redistricting process.

Supreme Court Addresses Tension Between Sections 2a(c) and 2c: *Branch v. Smith*. In *Branch v. Smith*,[12] decided on March 31, 2003, the Supreme Court addressed the issue of how these two statutory provisions can be reconciled. In the reapportionment following the 2000 census, Mississippi's delegation size was reduced from five Representatives to four. When it appeared that the legislature would not be able to pass a redistricting plan in time for candidates to file to run for office, both the Mississippi state court and a three-judge federal court drafted redistricting plans. The federal district court, however, decided that its plan would only be used if the Mississippi state court plan was not precleared by the U.S. Department of Justice, pursuant to the Voting Rights Act,[13] in time for the March 1 filing deadline for state and federal

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[8] U.S. Congress, Senate Committee on the Judiciary, *Congressional Redistricting*, report to accompany H.R. 2508, 90th Cong., 1st sess., S.Rept. 90-291, (Washington: GPO, 1967), pp. 6,7. U.S. Congress, House Committee on the Judiciary, *Federal Standards for Congressional Redistricting*, report to accompany H.R. 2508, 90th Cong., 1st sess., H.Rept. 90-191, (Washington: GPO, 1967), pp. 5,6.

[9] The relevant text of H.R. 2508 reads as follows: "subsection (c) is amended by striking out all of the language in that subsection and inserting in place thereof the following ...."

[10] 396 U.S. 186 (1962).

[11] 79 Stat. 437, codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1.

[12] 123 S. Ct. 1429 (2003).

[13] Section 5 of the Voting Rights Act requires preclearance by the Department of Justice or the U.S. District Court for the District of Columbia when a covered jurisdiction seeks to administer a change in voting procedures. 42 U.S.C. §1973c.

candidates. As the Justice Department did not preclear the state court plan by the deadline, the district court plan was used for the 2002 elections.

After finding that the federal district court had properly enjoined the enforcement of the state court plan,[14] the Supreme Court turned to the issue of whether Section 2a(c) requires courts to order at-large elections if a state redistricting plan is not in place prior to court action. The original state plaintiffs and the United States as amicus curiae, had argued that the district court was required to draw single-member districts in crafting a congressional plan, while the original federal plaintiffs had contended that the district court was required to order at-large elections. Rejecting the original federal plaintiffs' argument, a majority of the Supreme Court held that the lower court was required to fashion a plan with single-member districts. However, writing two separate concurring opinions, a majority of the Court did not reach consensus as to the rationale behind its holding, thereby leaving the reconciliation of Sections 2a(c) and 2c unsettled.

In the first concurrence (written by Justice Scalia, joined by the Chief Justice, Justices Kennedy and Ginsburg), a plurality of the Court interpreted the at-large option in Section 2a(c)(5) as merely a "last-resort remedy," being applicable only in those cases where time constraints prevent a single-member plan from being drawn in time for an election.[15] According to the Scalia concurrence:

> §2a(c) is inapplicable *unless* the state legislature and state and federal courts, have all failed to redistrict pursuant to §2c. How long is a court to await that redistricting before determining that §2a(c) governs a forthcoming election? Until, we think, the election is so imminent that no entity competent to complete redistricting pursuant to state law (including the mandate of §2c) is able to do so without disrupting the election process. Only then may §2a(c)'s stopgap provisions be invoked. Thus, §2a(c) cannot be properly applied—neither by a legislature nor a court—as long as it is feasible for federal courts to effect the redistricting mandated by §2c. So interpreted §2a(c) continues to function as it always has, as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one.[16]

On the other hand, in a second concurrence (written by Justice Stevens, joined by Justices Souter and Breyer), a separate plurality of the Court, while agreeing that the district court properly enjoined enforcement of the state court's plan and drew its own single-member plan under 2 U.S.C. § 2c, concluded that Section 2c "impliedly repealed" Section 2a(c).[17] In a dissent, Justice O'Connor, (joined by Justice Thomas), found that when federal courts are asked to redistrict states that have lost representation after a reapportionment, and the existing plan has more districts than the new allocation permits

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[14] The Court affirmed the injunction on the basis of the district court's principal stated ground that the state-court plan had not been precleared under the Voting Rights Act and had no prospect of being precleared in time for the 2002 election. *Id.* at 1437.

[15] *Id.* at 1442.

[16] *Id.* (Scalia, J., concurring).

[17] *Id.* at 1447-51 (Stevens, J., concurring).

and no new plan has been promulgated with the correct number of districts, the courts are required to order at-large elections in accordance with 2 U.S.C. § 2a(c).[18]

Seating an At-Large Delegation Elected In Contravention of Section 2c. It could be argued that at-large elections will not be needed in the post-1960s era because the courts now intervene when the states reach impasse and fail to redistrict following the decennial census. Nevertheless, since the issue of whether federal law permits at-large congressional representation appears unsettled, if a House delegation were elected at large, it appears that their seating could be challenged in the House of Representatives on the grounds that their election violates Section 2c, which prohibits at-large elections.

A challenged delegation might raise the defense that since Congress did not expressly repeal the contingencies enumerated in Section 2a(c) when it enacted Section 2c, it has therefore recognized the possibility of an at-large delegation, which should be seated, despite having been elected in violation of Section 2c. Perhaps the best argument that the single-member district requirement might be ignored by the House in certain circumstances stems from 19th century House precedent. As noted in footnote 2 *supra,* at-large delegations were seated after they were prohibited in 1842. Moreover, a challenged delegation could argue that refusing to seat them would deprive an entire state of representation in the House. Thus, one would expect that the 19th century precedent would be followed today, although such precedent might be less compelling if the organization of the House were at stake.

One could also argue that the contingencies set forth in 2 U.S.C. § 2a(c) still serve as a useful insurance policy to provide representation for a state that cannot, following the release of census numbers, complete the post-census redistricting process in time for the first congressional election. In 1967 Congress could have repealed Section 2a(c), as provided in the more far-reaching redistricting standards bill (H.R. 2508). Instead, Congress adopted P.L. 90-196, codified at 2 U.S.C. § 2c, which prohibits multi-member districts, leaving Section 2a(c) in place, which permits them.

Legislation. On January 28, 2003, Representative Hastings introduced H.R. 415 (108th Cong.), a bill to establish a commission to make recommendations on the appropriate size of membership of the House of Representatives and the method by which Members are elected. Section 3(2) of H.R. 415 requires the commission to "examine alternatives to the current method by which Representatives are elected (including cumulative voting and proportional representation) to determine if such alternatives would make the House of Representatives a more representative body." Such recommendations, if ultimately enacted, could affect current federal statutory provisions governing single-member and at-large representation in the House of Representatives. H.R. 415 was referred to the House Committee on the Judiciary and no further action has been taken to date.

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[18] Id. at 1461 (O'Connor, J., dissenting).