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# REAPPORTIONMENT PROBLEMS

DICK DOBSON\*

## I. Introduction

Legislative apportionment has been a particularly vexatious problem in North Dakota since the first constitutional convention. The creation of electoral districts and the allocation of seats thereto has proven to be a nearly insoluble political puzzle.

Before statehood was achieved the reapportionment question troubled the territorial legislature. Nonetheless, the territorial lawmakers approached the problem enthusiastically. "Never was gerrymandering practiced with more avidity. A political deal could produce a new county or legislative district overnight or just as quickly abolish one."<sup>1</sup> One of the first acts passed at the first session of the territorial legislature, held at Yankton in 1862, established a new district for "that portion of territory lying on the Red River, including the settlements of Pembina and St. Joseph."<sup>2</sup> In 1864 the Red River Valley was deprived of all representation in both the house and council. This punishment was inflicted by the Republicans in power because the area voted Democratic in 1863.<sup>3</sup> However, the disenfranchised area recovered these seats a couple of years later.

In eight decades of statehood, the reapportionment problem has never been dealt with satisfactorily. Much of the time the legislature simply tried to ignore the problem. When action was taken, it was usually designed to preserve the *status quo* and safeguard incumbent legislators. The brief historical review following will provide a perspective for the North Dakota Constitutional Convention in hopes of fashioning a lasting solution to a difficult problem of fundamental importance.

## II. The First Constitutional Convention

When delegates to the 1889 Constitutional Convention gathered in

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1. H. LAMAR, *DAKOTA TERRITORY 1861-89: A STUDY OF FRONTIER POLITICS* 86 (1956).

2. N.D. SESS. LAWS ch. 3 (1862).

3. H. LAMAR, *DAKOTA TERRITORY 1861-89: A STUDY OF FRONTIER POLITICS* 86 (1956).

Bismarck to chart the path for a new state, they faced two apportionment problems: First, to set forth the basic elements for legislative districting. Second, to draw a map for use in the first elections.

The Convention adopted section 29 which gave the legislature power to reapportion itself, provided for single-senator districts of compact and contiguous territory, required that the "districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation,"<sup>4</sup> and prohibited attachment of one county to part of another to form a district. It also adopted section 35 which provided for the at-large election of representatives in senatorial districts and required the legislature to reapportion the districts at five-year intervals. The legislature was authorized to determine the number of seats but, under section 26, the senate could not be composed of fewer than 30 or more than 50 members and, under section 32, the house of representatives could not have fewer than 60 nor more than 140 members.

Debate in the convention centered around the issue of whether or not to allocate legislative seats solely and substantially on a population basis. Delegate Virgil B. Noble of Bottineau argued that each organized county should be entitled to at least one representative.<sup>5</sup> Delegate Martin N. Johnson<sup>6</sup> of Lakota replied:

Is there anything fair—any justice—in a system that would give 44 men in Billings County the same representation as the 1,035 voters of Nelson County? . . . What constitutes a state? Not area. It is men—high minded men—men whom their duties know. . . . In the name of justice, why is not a man in the Red River Valley as good as a man in the Badlands? . . . We are here to make laws for people, and not valleys, and rivers and inanimate objects.<sup>7</sup>

A motion to guarantee a representative for every county having at least 200 voters was voted upon and defeated.<sup>8</sup>

Meanwhile, a 25 man convention committee was struggling to give birth to the State's first legislative apportionment plan. The convention evidently recognized the problems involved and adopted the report as section 214 without debate.<sup>9</sup> The apportionment, which provided for 31 senators and 62 representatives, must have been based largely on guesswork. There had been a federal census in 1880

4. N.D. CONST. art. II, § 29 (1889).

5. DEBATES AND PROCEEDINGS OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION 323-324 (1889).

6. Johnson was elected to the U.S. House of Representatives in 1890 and served four two-year terms. He was elected to the U.S. Senate by the 1909 Legislature but died 7½ months after taking his seat.

7. DEBATES AND PROCEEDINGS OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION 328-329 (1889).

8. JOURNAL OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION 271-272 (1889).

and a territorial census in 1885, but county lines were shifting and population was growing rapidly.<sup>10</sup> The 1890 census showed that the senate districts varied from 3,187 inhabitants to 10,751.<sup>11</sup> In an effort to somewhat reduce population disparities, the committee gave five districts more than two representatives each and gave six districts only one representative each.

### III. The Early Years

Section 35 of the newly adopted North Dakota Constitution directed the legislature to cause, in 1895 and every 10th year thereafter, "an enumeration to be made of all the inhabitants of this state" and, "at its first regular session after each such enumeration, and also after each federal census," to proceed to reapportion itself.<sup>12</sup> This reapportionment was carried out by creating new districts and enlarging both houses to account for the growth of population and the organization of new counties, especially in the western part of the state. Further, some existing districts were divided and areas under-represented in the senate were given additional house members to compensate for deviations from the equal-population principle. The first two decades of the twentieth century were characterized by this method of apportionment.

The 1895 Legislature neglected to provide for a state census, so no action on reapportionment was taken until 1901.<sup>13</sup> The 1905 Legislature implemented the constitutional mandate for a state census.<sup>14</sup> Thus, the senate was enlarged from its original 31 seat size to 40, 47, and 49 seats by the 1901, 1907, and 1909 reapportionment acts respectively, and the house increased from 62 to 100 members in 1901, was reduced to 95 members in 1907, and increased to 103 members in 1909.

The reapportionment law enacted by the 1911 Legislature was a significant one, primarily because the boundaries and representation for 38 of the 50 districts established by it were destined to stand undisturbed for more than half a century. The act enlarged the senate to 50 members and the house to 111. The 50th District, however, was a special creature. An updated version of the former 40th Dis-

9. DEBATES AND PROCEEDINGS OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION 512 (1889).

10. The area which became North Dakota had a population of 36,909 in 1880 and 152,675 in 1885. The state's population was 182,719 in 1890.

11. The least populous district was the 24th (LaMoure County); the most populous was the 12th (Richland County).

12. N.D. CONST. art. II, § 35 (1889).

13. The 1890 Legislature did, however, make a minor correction in the original apportionment by adding a tier of four townships to the Third District. N.D. SESS. LAWS ch. 1 (1890).

14. N.D. SESS. LAWS ch. 168 (1905). A state census was taken in 1905, 1915 and 1925 but thereafter postponed by legislative action until repealed by omission from the 1961 Century Code.

trict (Eastern Cavalier County) which had been created in 1901, the 50th was given statutory life only *until the end of 1914*.<sup>15</sup> This was done so that State Senator C. W. Plain of Milton would not be removed from office midway through his third four-year term. The 50th was the least populous district with 6,357 inhabitants. The most populous was the 41st (McKenzie and Williams Counties) with 19,954.<sup>16</sup> Considering both senate and house membership, population per legislator ranged from 2,830 to 5,016 based on the 1910 census.<sup>17</sup>

The 1915 Legislature made minor changes on the electoral map. Cavalier County became a single district and Sioux County was attached to Adams and Hettinger Counties. This action stabilized the senate at 49 members and the house at 113. This was followed by a long period of inactivity as far as legislative reapportionment was concerned.<sup>18</sup>

#### IV. An Era of Inaction

The Nonpartisan Leaguers controlling the senate and the independents dominating the house could not agree on a reapportionment plan in 1921, so Governor R. A. Nestos called for action when he addressed the 1923 Legislature. "In redistricting," he said, "the membership of the Senate ought to be reduced to not more than 30 and the membership of the House to not more than 75. I believe that both efficiency and economy would be attained by this change."<sup>19</sup> The independents controlled both houses and ignored the governor's suggestion to cut membership. Instead, they promptly passed a bill that evoked protest from Nonpartisan League lawmakers. State Rep. J. C. Miller of Souris accused the independents of "crooked gerrymandering," pointing out that, among other things, the measure would give Stutsman County (population 24,575) two senators but retained McKenzie and Williams counties (with a combined population of 27,524) as a single-senator district.<sup>20</sup> State Rep. Fred E. Sims of Willow City declared, "This kind of gerrymandering is not only vile and vicious and infamous, it is absolutely contemptible. . . ."<sup>21</sup> Governor Nestos vetoed the bill, saying "a careful investigation of the provisions of the act reveals the fact that while there have been fair and proper changes in a few districts, that the act has failed

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15. N.D. SESS. LAWS ch. 256 (1911).

16. The second least populous district was the 43rd (Renville County) with 7,840 inhabitants.

17. The 44th District (Mountrail County) was low, the Seventh (part of Grand Forks County) high.

18. The 1917 Legislature passed a reapportionment bill that merely recognized the organization of Grant County. N.D. SESS. LAWS ch. 2 (1917).

19. JOURNAL OF THE HOUSE OF THE EIGHTEENTH SESSION OF THE LEGISLATIVE ASSEMBLY 20 (1923).

20. *Id.* at 904.

21. *Id.* at 1415.

to correct the inequalities existing in other districts, and is therefore not just and equitable throughout."<sup>22</sup>

At the 1931 Session the independents finally gained enactment of a reapportionment law after taking care to split McKenzie and Williams Counties into separate districts. Even under these circumstances the bill passed by a narrow margin in both houses.<sup>23</sup> The act made minimal changes. Eight district boundaries were altered and the Ninth District (Fargo) picked up two house seats. However, several inequalities still remained.<sup>24</sup>

The legislature took no further action on reapportionment until the 1959 Session. During this time, the state's population declined and the rural-to-urban movement had set in. The 1959 Legislature attempted to work out a permanent solution to the reapportionment problem by submitting a proposed constitutional amendment to the people. Sections 26, 29 and 35 were to be amended in order to freeze the existing senate districts in perpetuity, assure every county at least one representative, require the legislature to reapportion the remaining house seats according to population after every federal decennial census, and provide for a five-member commission to do the job if the lawmakers failed. The amendment was adopted by an 84,002 to 66,529 vote at the 1960 primary election.<sup>25</sup> At that time, senate districts varied in population from 4,698 to 46,857.<sup>26</sup>

## V. The Reapportionment Revolution

The 1961 Legislature failed to reallocate house seats, so the commission created by the 1960 amendment was activated. The rural-dominated commission<sup>27</sup> agreed to a plan which would enlarge the house from 113 to 115 members but reduce representation of some urban districts.<sup>28</sup> In an attempt to forestall a legal challenge, the commission decided not to file its plan until just prior to the deadline it faced for doing so. Aggrieved urban citizens turned to the North Dakota Supreme Court for relief, but the court declined to take jurisdiction, pointing out that it had nothing to act on because the commission had not officially filed its proclamation.<sup>29</sup> Next, a law-

22. N.D. SESS. LAWS 541 (1923).

23. The vote was 28-20 in the senate, 58-55 in the house.

24. The 1930 census showed that Renville County had 7,263 inhabitants while the city of Fargo had 28,619.

25. Despite the seemingly obvious rural bias built into the amendment, the state's three most populous counties—Cass, Grand Forks and Ward—gave it 13,599 of its 17,473 vote majority.

26. The 43rd (Renville County) was low, the ninth (Fargo) was high.

27. Commission members were supreme court chief justice P. O. Sathre (chairman), secretary of state Ben Meier, atty. gen. Leslie R. Burgum and state reps. Ben J. Wolf, R—Zeeland and Arthur A. Link, D—Alexander.

28. The eight most populous districts, with 35½ percent of the state's population, would get 27 percent of the house seats. Secretary of state Meier dissented.

29. *State ex rel. Aamoth v. Sathre*, 110 N.W.2d 228 (N.D. 1961).

suit challenging the commission plan was filed in Federal District Court, but a three-judge panel stayed any action on the case.<sup>30</sup> The plaintiffs then returned to the North Dakota Supreme Court. This time, the court assumed jurisdiction and rejected the commission plan.<sup>31</sup>

Seventeen days later, on March 26, 1962, the United States Supreme Court handed down its historic *Baker v. Carr* decision, holding that voters who contend they do not have fair representation in state legislatures are entitled to a hearing in federal courts.<sup>32</sup> The Federal District Court for North Dakota later ruled that the 1963 Legislature had a "mandatory duty" to reapportion the House seats.<sup>33</sup> But the rural interests in the legislature were not ready to surrender. They pushed through a bill at the 1963 Session that sent the urban plaintiffs back to the federal court.<sup>34</sup> The plaintiffs were twice rebuffed<sup>35</sup> before the United States Supreme Court delivered on June 15, 1964, its *Reynolds v. Sims* decision, requiring seats in both houses of state legislatures to be apportioned on a one man-one vote basis.<sup>36</sup> The Federal District Court then declared sections 26, 29 and 35, as amended in 1960, unconstitutional and directed North Dakota's 1965 Legislature to reapportion both senate and house seats.<sup>37</sup>

Caught up in the throes of a reapportionment revolution, it was perhaps surprising that the 1965 Legislature managed to pass any reapportionment plan at all. However, "it did pass the worst plan of several considered by it."<sup>38</sup> Patched together by a conference committee in the dying days of an overtime session, the plan became law without Governor William L. Guy's signature. This time, the federal court nullified the Legislature's act and ordered into effect a plan<sup>39</sup> which redistricted the entire state, creating 30 districts for the election of 49 senators and 98 representatives. In a radical departure from previous plans, it created five predominant urban multi-senator districts and attached parts of 12 counties to others to form single-senator districts.<sup>40</sup> Based on the 1960 census, population per senator ranged from 11,339 to 14,214.<sup>41</sup>

30. *Lein v. Sathre*, 201 F. Supp. 535 (D.N.D. 1962).

31. *State ex rel. Lein v. Sathre*, 113 N.W.2d 679 (N.D. 1962).

32. *Baker v. Carr*, 369 U.S. 186 (1962).

33. *Lein v. Sathre*, 205 F. Supp. 536 (D.N.D. 1962).

34. The bill reduced the number of house seats to 109. N.D. Sess. LAWS ch. 345 (1963).

35. See orders dated July 22, 1963, and March 30, 1964, in Docket No. 424, U.S. District Court for North Dakota.

36. *Reynolds v. Sims*, 377 U.S. 533 (1964).

37. *Paulson v. Meter*, 232 F. Supp. 183 (D.N.D. 1964). John D. Paulson of Fargo, a delegate to the Constitutional Convention, was a plaintiff in this suit.

38. See Brief of Applicants for Intervention in Support of Plaintiffs' Return to Defendant's Motion, filed in Docket No. 618, U.S. District Court for North Dakota.

39. *Paulson v. Meter*, 246 F. Supp. 36 (D.N.D. 1965). The plan implemented by the court was nearly identical to one that had been devised by R. R. Smith of Grand Forks, one of the plaintiffs in this suit.

40. Referring to these features of the Smith plan, the judges commented, "We find it not perfect." *Id.* at 44.

41. The most over-represented district was the 32nd (Burlingame County), a three-senator

## VI. New Problems

In 1971 it was argued that the legislature had no mandate to reapportion because all correlative sections of the North Dakota Constitution had been declared unconstitutional and no litigation was pending in the federal courts.<sup>42</sup> The legislature, however, felt obliged to try to reshuffle its seats in line with the 1970 census.

The task proved to be too complicated for the legislature. New problems had arisen: First, there was a political dispute over the multi-senator districts; Second, two military bases had been built in North Dakota and had grown to the size of cities over the past decade; and Third, the United States Census Bureau had ignored township and precinct boundaries in making its decennial headcount.

Republican legislators from the five urban districts, which elected from two-to-four senators each, wanted to retain the feature of at-large elections in these districts; but the Democrats wanted to subdivide those districts.<sup>43</sup> Some rural Republican lawmakers also opposed multi-senator districting, contending it gave urban residents an undue advantage. The North Dakota Supreme Court ruled that section 29, which, since statehood, had required single-senator districts, had been invalidated by federal judicial action.<sup>44</sup>

The 1970 census showed a population of 12,077 at Minot Air Force Base and 10,474 at Grand Forks Air Force Base. The bases were comprised almost entirely of a transient, non-voting population.<sup>45</sup> Two questions arose: First, should these federal installations be counted in drawing a reapportionment plan? Second, if so, should they be attached to nearby urban districts or be made part of the rural districts in which they were located? There was no agreement on either question.

To further complicate matters, the census had been taken in arbitrary census districts which in numerous instances bore absolutely no relationship to existing political subdivision lines. Thus, the federal judiciary was requiring state legislative reapportionment on an equal-population basis but an agency of the federal executive branch conducted its work in such a way as to deny a state the most elemental data it needed to do the job.

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district; the most under-represented was the Second (Divide and part of Williams counties).

42. Elmer W. Cart of Minot, a delegate to the Constitutional Convention, made this point in an appearance before the House Political Subdivisions Committee.

43. Republicans held 14 of the 15 senate seats and 27 of the 30 house seats from these districts at the 1971 Session.

44. State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53 (N.D. 1971). Lloyd B. Omdahl of Grand Forks, a delegate to the Constitutional Convention, was a plaintiff in this suit.

45. Minot Air Force Base straddles Tatman and Waterford townships; Grand Forks Air Force Base is located in Mekinock Township. The number of votes cast (nearly all of them by resident civilians) in those townships at the 1970 general election was: Tatman 95, Waterford 51, Mekinock 110.



## VII. The Second Constitutional Convention

The foregoing account of the history of reapportionment in North Dakota suggests several points for the Constitutional Convention to consider when it attempts to rewrite the legislative article. From these a solution may be gleaned.

It seems clear that the legislature is not equipped to reapportion itself. It has failed in the past and there is no reason to expect that it could succeed in the future. The same problems would remain if the duty of reapportionment was assigned to a board of legislative leaders or their appointees. Such a board would amount to little more than a politically biased conference committee. It must be remembered that the purpose of reapportionment is to assure every voter an equal voice in electing legislators—not to guarantee incumbents re-election or to give one political party or the other an advantage. To fulfill that purpose, and to insure that reapportionment will be accomplished on a periodic schedule, the task must be given to a non-legislative, non-political body. Creating a commission consisting of state officials or gubernatorial appointees would be an unsatisfactory solution. The possibility of political bias would be present. Further, the executive branch really should not become involved in legislative reapportionment. A commission named by the chairmen or central committees of the major political parties would probably become deadlocked. A Commission elected directly by the people would invite partisan involvement and add more offices to an over-sized ballot.

There is only one way to solve reapportionment problems—through the judicial branch. The judiciary became deeply involved in this political thicket in the 1960's and it is likely they will remain there a long while. Yet the task can not be left at the doorstep of the supreme court. The justices are not mapmakers. Nor would it be desirable to give the task to a commission appointed by the supreme court justices. This could place the justices in the awkward position of ruling on the work of their appointees. However, a citizens' commission named by the district judges should be given serious consideration.<sup>47</sup> The district judges have a tradition of non-partisanship, and could be expected to carefully weigh their appointments. The commission probably should be restricted to about six members, i.e., one from each judicial district.<sup>48</sup>

In addition to setting up a commission, delegates to the Consti-

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46. For a discussion of methods used in other states, see NAT'L. MUNICIPAL LEAGUE, LEGISLATIVE REDISTRICTING BY NON-LEGISLATIVE AGENCIES (1967).

47. Starzinsler, *The British Pattern of Apportionment*, 41 VA. Q. REV. 321 (1965).

48. There also is a need for judicial redistricting in North Dakota. The 1973 Legislature or the North Dakota Supreme Court may be encouraged to address that issue if a constitutional provision similar to the one outlined above was adopted.

tutional Convention should consider permitting reapportionment on a basis of votes cast at a preceding general election, or voter registration.<sup>49</sup> This would solve problems caused by the federal census and the military installations. The number of votes cast at a major election usually reflects rather accurately the state's resident population. Going to a votes-cast basis might also quiet the mounting dispute over whether college students should vote at college or home. Students would be counted for reapportionment purposes where they cast their ballots; the federal census counts them at their college towns.

Delegates should also consider returning to the single-senator districting system. It simply is not fair to allow a voter in an urban district to participate in the election of four senators while his neighbor in a rural district participates in the election of only one senator. It has been shown mathematically that multi-member electoral "systems contain inherent inequalities in representation."<sup>50</sup> In decisions to date, the United States Supreme Court has not charted a clear path on this issue. Yet one fact is certain: Single-member districts are the essence of equal representation.<sup>51</sup>

In conclusion, it would seem to be abundantly clear that if the Constitutional Convention does not provide a workable system for legislative reapportionment, North Dakota will forfeit a state responsibility to the federal judiciary.

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49. Hawaii uses registered voters as the base for legislative apportionment. See *Holt v. Richardson*, 240 F. Supp. 724 (D. Hawaii 1965); *Holt v. Richardson*, 238 F. Supp. 468 (D. Hawaii 1965).

50. Banzhaff, *Multi-Member Electoral Districts—Do They Violate the "One-Man, One-Vote" Principle?*, 75 *YALE L. J.* 1309 (1966).

51. A survey by the Citizens Conference on State Legislatures, Kansas City, Mo., in 1971 rated North Dakota 31st among the 50 states in the "representative" category.

