Congressional Redistricting: The Constitutionality of Creating an At-Large District

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Summary

This report discusses the constitutionality of legislation, such as the District of Columbia House Voting Rights Act of 2009, H.R. 157 (111th Congress), that would create an at-large congressional district. While it is not without doubt, based on the authority granted to Congress under the Constitution to regulate congressional elections and relevant Supreme Court precedent, it appears that federal law establishing a temporary at-large congressional district would likely be upheld as constitutional.

H.R. 157, among other provisions, would expand the U.S. House of Representatives by two members to a total of 437 members. The first of these two new seats would be allocated to create a voting member representing the District of Columbia. The second seat would be assigned in accordance with 2000 census data and existing federal law, resulting in the addition of a fourth congressional seat in the state of Utah that would be a temporary at-large district.

On March 2, 2009, the House Judiciary Committee reported the bill, as amended (H.Rept. 111-22), but no further action was taken by the House. On February 26, 2009, the Senate passed a related bill, S. 160, by a vote of 61-37. During the 110th Congress, the House passed similar legislation, H.R. 1905, by a vote of 241 to 177. A companion bill, S. 1257, was considered by the Senate, but a motion to invoke cloture failed by a vote of 57 to 42.

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H.R. 157 (111th Congress), the District of Columbia House Voting Rights Act of 2009

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This report discusses the constitutionality of the aspect of this legislation that would create an at-large congressional district. For discussion of other issues relating to this legislation, *see* CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, by (name redacted); CRS Report RS22579, *District of Columbia Representation: Effect on House Apportionment*, by (name redacted); and CRS Report RL33830*District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by (name redacted).

Brief Constitutional Analysis

The U.S. Constitution provides the states with primary authority over congressional elections, but grants Congress the final authority over most aspects of such elections. This congressional power is at its most broad in the case of House elections, which have historically been decided by a system of popular voting.[3] Article I, § 4, cl. 1 provides that

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.[4]

The Supreme Court and lower courts have interpreted this language to mean that Congress has extensive power to regulate most elements of congressional elections,[5] including a broad authority to protect the integrity of those elections.[6]

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[1] H.R. 157 (111th Cong.) § 3(a).

[2] *Id.* at § 2.

[3] U.S. CONST. Art. I, §2, cl. 1 provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States."

[4] U.S. CONST. Art. I, §4, cl. 1.

[5] 285 U.S. at 366. *See* United States v. Gradwell, 243 U.S. 476, 483 (1917) (finding that Congress has full authority over the federal election process, from registration to certification of results); United States v. Mosley, 238 U.S. 383, (continued...)

The Constitution does not specify how members of the House are to be elected once they are apportioned to a state. Originally, most states having more than one Representative divided their territory into geographic districts, permitting only one member of Congress to be elected from each district. Other states, however, allowed House candidates to run at-large or from multi-member districts or from some combination of the two. In those states employing single-member districts, however, the problem of gerrymandering, the practice of drawing district lines in order to maximize political party advantage, quickly arose.[7]

Accordingly, Congress began establishing standards for House districts. Congress first passed federal redistricting standards in 1842, when it 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.)[8] 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.) 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.)[9] 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,

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386 (1915) (holding that Congress has the authority to enforce the right to cast a ballot and have a ballot counted); In re Coy, 127 U.S. 731, 752 (1888)(determining that Congress has authority to regulate conduct at any election coinciding with a federal contest); Ex parte Yarbrough, 110 U.S. 651, 662 (1884) (holding that Congress has the authority to make additional laws for free, pure, and safe exercise of the right to vote).

[6] For example, the Supreme Court has noted that the right to vote for members of Congress is derived from the Constitution and that Congress may therefore legislate broadly under this provision to protect the integrity of this right. *See* Smiley v. Holm, 285 U.S. 355, 366 (1932). Furthermore, the Court in *Smiley* found that the authority to regulate the "times, places and manner" of federal elections: embrace[s] [the] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.... [Congress] has a general supervisory power over the whole subject. *Id*.

[7] The term "gerrymander" originated in 1812 when an odd shaped congressional district, which resembled a salamander, was created by the Massachusetts legislature. In a play on words it was referred to as a gerrymander, named after Elbridge Gerry, then governor of Massachusetts. CONGRESSIONAL QUARTERLY INC., CONGRESSIONAL DISTRICTS IN THE 1980S 617 (M.V. Gottron, ed. 1983).

[8] 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 at-large 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 report found the 1842 law to be "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 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), at 170-173. In 1861, California elected three Representatives at-large, and they too were seated. *See Hinds, supra*, at 182. More recently, for example, during the 89th Congress in 1965, Maryland elected one Representative at-large (in addition to seven Representatives from districts); Texas elected one Representative at-large (in addition to 23 Representatives from districts); and Hawaii elected both of its two Representatives at-large, all of whom were seated. *See Biographical Directory of the United States Congres*s 1774-2005, H.R. DOC. NO. 108-222 at 431-35.

[9] 46 Stat. 21.

which did not include any districting standards. After 1929, there were no congressionally imposed standards governing congressional redistricting; in 1941, however, Congress enacted a law providing for various 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. (81 Stat. 581.)

Both the 1941 and 1967 laws are still in effect, codified at 2 U.S.C. §§ 2a and 2c. In *Branch v. Smith*,[10] the Supreme Court considered the operation and inherent tension between these two provisions.[11] The question of congressional authority was not in dispute in this litigation. Rather, the Court noted in passing that the current statutory scheme governing apportionment of the House of Representatives was enacted in 1929 pursuant to congressional authority under the "Times, Places and Manner" provision of the Constitution. Consequently, it seems likely that Congress has broad authority, within specified constitutional parameters, to establish how members' districts will be established, including the creation of at-large districts.

It might be suggested that creating an at-large congressional district in a state could violate the "one person, one vote" standard established by the Supreme Court in *Wesberry v. Sanders*.[12] In *Wesberry*, the Supreme Court first applied the one person, one vote standard in the context of evaluating the constitutionality of a Georgia congressional redistricting statute that created a district with two to three times as many residents as the state's other nine districts. In striking down the statute, the Court held that Article I, section 2, clause 1, providing that Representatives be chosen "by the People of the several States" and be "apportioned among the several States ... according to their respective Numbers," requires that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[13]

While it is not beyond dispute, it does not appear that the creation of an at-large district under the circumstances outlined in H.R. 157 would be interpreted to create a conflict with the "one person, one vote" standard. Under H.R. 157, each Utah voter would have the opportunity to vote both for a candidate to represent his or her congressional district *as well as* for a candidate to represent the state at-large. Each person's vote for an at-large candidate would be of equal worth. Further, each person's vote for an at-large candidate would not affect the value of his or her vote for a candidate representing a congressional district. Accordingly, all Utah residents' votes would have equal value, thereby arguably comporting with the one person, one vote principle.

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[10] 538 U.S. 254 (2003).

[11] 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 (1967) (2 U.S.C. § 2c), prohibiting at-large elections. In 1941 and 1967, Congress enacted modifications to the apportionment statute at 2 U.S.C. §§ 2a(c) and 2c, respectively. The *Branch* Court reconciled the inherent tension between the two provisions by holding that the provision requiring at-large elections under § 2a(c) was subject to the requirement under § 2c that single-member districts must be drawn whenever possible. *Id.* at 266-71. For further discussion, *see* CRS Report RS21585, *Congressional Redistricting: Is At-Large Representation Permitted in the House of Representatives?*, by (name redacted) and (name redacted).

[12] 376 U.S. 1 (1964).

[13] *Id.* at 7-8. Therefore, the Court held that, due to such substantial population deviations among the congressional districts, the statute "grossly" discriminated against certain voters by contracting the value of some votes and expanding that of others. *Id.* at 7. While it may be impossible to draw congressional district lines with precise mathematical equality, the Court determined that a maximum variance of 30.26% is unconstitutional. Under Article I, section 2, the Court announced, congressional districts must be "equal in population as nearly as practicable." *Id.* at 18.

Based on the authority granted to Congress under the Constitution to regulate congressional elections and relevant Supreme Court precedent, it appears that a federal law establishing a temporary at-large congressional district would likely be upheld as constitutional.

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