

DRAFT #2 5/30/95

M E M O R A N D U M

TO: Legal Team

DATE: 5/30/95

FROM: Bernard Zimmerman

SUBJECT: Reapportionment Bases.

In Burns v. Richardson, 384 U.S. 73; 16 L.Ed.2 376; 86 S.Ct. 1286 (1966), the Supreme Court approved an interim plan to reapportion the Hawaii Legislature based on registered voters, not general population. Reynold v. Sims, the Court noted, required only that the legislature be apportioned substantially on the basis of population.

We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured . . . Neither in Reynolds v. Sims nor in any other decision has this court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have shown no constitutionally founded

reason to interfere. Unless the choice is one the Constitution forbids . . . , the resulting apportionment base offends no constitutional bar. 86 S.Ct. 1286-87, 16 L.Ed.2 390-91.

The Supreme Court approved the use of registered voters as an apportionment basis because it recognized, in part, that Hawaii had special population problems, which could skew reapportionment based on population, these include a large military presence and a large number of tourists which are a part of Hawaii's census population and whose tourist presence on Oahu was disproportionate to the outer islands.

The Court also noted that the use of registered voters or actual voters presents additional problems, such as "barriers" to becoming a registered voter and fluctuations in the number of registered voters from election to election, which might make their use unpermissible. Nonetheless, the Court held that Hawaii had safeguarded against those problems and noted that its apportionment was "not substantially different" than that which would have resulted from the use of a total population base. It concluded:

We are not to be understood as deciding that the validity of the registered voter basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere. 86 S.Ct. at 1299.

After remand, Hawaii held a constitutional convention which,

in part, reapportioned the Legislature. This plan, also based on registered voters, was approved by a three-judge district court in Burns v. Gill, 318 F.Supp. 1285 (D.H. 1970).

Burns v. Richardson has played to mixed reviews. Though I have not read all of its progeny, a number of courts have cited Burns for the proposition that a reapportionment plan may be based on data other than population. See e.g., Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. 1981) (voting age population); and Brown v. United States, 486 F.2d 658 (8th Cir. 1973) (qualified voters).

In California, Burns has been read more restrictively. In Calderon v. City of Los Angeles, 481 P.2d 489 (1971), the California Supreme Court held unconstitutional a plan to redistrict the Los Angeles City Council based on registered voters which produced districts with roughly equivalent number of voters but with substantial deviations in total population. In Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), the Ninth Circuit disapproved a reapportionment plan devised by the trial court based on voter registration because of evidence that it discriminated against minorities and because the governing California statute required that any redistricting be based on total population. 918 F.2d at 774-75.

Read together, the cases suggest that redistricting based on data other than total population is permissible so long as there is a good (and arguably compelling) reason for doing so and so long as the results are not substantially different than what they would have been had total population been used.

The alternate date bases for which there is support are registered voters (Burns v. Richardson, supra), state citizens (Burns v. Richardson), and voting age population (Wyche, supra). If the Third Constitutional Convention wishes to reapportion the Legislature on a basis other than total population, it would first have to amend Article II, § 4(a) of the CNMI Constitution, which requires redistricting on the basis of total population. The Convention would then have to make a record, similar to that made by Hawaii in its convention,* of the strong reasons based on CNMI circumstances which suggest that reapportionment on some basis other than total population would produce a more equal result.

Both of these cases read Burns restrictively, focusing on the fact that use of registered voters produced districts similar to those populations could have produced. These cases also focus on the fact that people who did not vote still are entitled to access to their elected officials to obtain benefits and services, redress grievances and the like. They see the goal of reapportionment as "equality of representation" which may not be achieved even if equality of voting is, since the number of people with access to the same representative could vary substantially.**

*The Hawaii convention formed a Legislative Apportionment Committee which held lengthy hearings took testimony from over 50 people, including political scientists and statisticians, and considered 39 alternate redistricting plans. Burns v. Gill, 316 F.Supp. at 1289.

**In Calderon, the issue was framed thereby: "is the constitutional imperative fulfilled by a standard of 'one voter, one vote; rather than 'one person, one vote.'" 481 P.2 at 490.