

the proposed articles of incorporation of Douglass Mutual Aid Society until the same have been changed to conform with law.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

3069.

CONGRESSIONAL REPRESENTATION—NUMBER OF REPRESENTATIVES TO BE ELECTED FROM OHIO—HOW APPORTIONED—FUTURE LEGISLATION MAY ALTER.

SYLLABUS:

1. *Inasmuch as Congress has heretofore seen fit to provide by specific acts that Representatives in Congress from the several states be elected by districts under apportionments made following the sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth censuses, each of which acts of Congress was complete in itself and entirely superseded the act applying to the apportionment under the last preceding census thereto and did not make similar provision for the election of Representatives under the fifteenth census, it follows that the several states are free to provide for the election of members in the national House of Representatives, in such manner as the legislature of the state may determine, until such time as federal regulation of the matter may become effective.*

2. *The question of how representatives in Congress are to be elected, whether by districts, or at large, is purely legislative, and in the absence of Federal regulation of the matter, provision may be made therefor by the Legislature of Ohio, in any manner it sees fit.*

3. *Unless further legislation is had, either Federal or state, prior to the general election to be held in November, 1932, the State of Ohio will be represented in the Seventy-third Congress by twenty-two Representatives elected by districts, and two Representatives elected at large.*

COLUMBUS, OHIO, March 20, 1931.

HON. JOSEPH N. ACKERMAN, *Chairman, Committee on Elections, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a request for my opinion with reference to the manner of electing members of Congress at the election to be held in November, 1932. This request emanated from the Chairman of a Subcommittee and, specifically, is as follows:

“Whether the amendment adopted by Congress on June 18, 1929, requires a re-districting of Congressional Districts on the basis of twenty-four congressmen, and whether Section 4 of the act of August 8, 1911, applied only to elections at large under that act.”

The Constitution of the United States in Section 2 of Article I thereof, provides in part, as follows:

“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, * *

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct. * * ”

Section 4 of Article I of the said Constitution of the United States provides in part as follows:

“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 choosing Senators.”

By force of the foregoing provision of the Constitution, it has been held that Congress is empowered to provide by law the manner of choosing representatives to Congress. This power was not exercised however, until 1842. From the time of the adoption of the Constitution until 1842 many of the states elected their representatives to Congress by districts. Many others, however, elected them at large. See *Watson on Constitutions*, page 274, *Ex parte Liebold*, 100 U. S., 371 at page 384, *Ex parte Yarbough*, 110 U. S., 651 at page 660; *United States v. Gridnehl*, 243 U. S., 476 at page 482.

In 1842, Congress passed an act entitled:

“An Act for the apportionment of representatives among the several states according to the sixth census.” 5 Statutes at Large, 491.

By the terms of Section 2 of this act, it was provided that in every case where a State is entitled to more than one representative, the number to which each state is entitled, under an apportionment provided for therein, should be elected by districts composed of contiguous territory equal in number to the number of representatives to which said state was entitled, no one district to elect more than one representative.

Similar provisions to this were contained in succeeding acts of Congress passed in 1850, 1852 and 1862.

In 1872 there was enacted by Congress an act entitled:

“An Act for the apportionment of representatives to Congress among the several states according to the ninth census.”

Section 1 of this act provided that after the third day of March, 1873, the House of Representatives should be composed of 283 members to be apportioned among the several states in accordance with the provisions of the act. Section 2 of said act read in part as follows:

“That in each state entitled under this law to more than one representative, the number to which said states may be entitled in the forty-third,

and each subsequent Congress, shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of representatives to which said states may be entitled in Congress, no one district electing more than one representative."

Section 1, of the above act was codified as Revised Statutes 20 and 21. Section 2, thereof, was codified as Section 23 of the Revised Statutes.

I do not find that Section 2 of the act of 1872, quoted above, has ever been specifically repealed. It has been superseded, however, by similar provisions in the acts of Congress with reference to the apportionment of representatives passed after, or about the time of subsequent censuses in 1882, 1891, 1901 and 1911. The last comprehensive act with reference to this subject was enacted by Congress on August 8, 1911, 37 Statutes at Large, page 13. Said act of 1911 appears as Sections 2, 3, 4, and 5 of Title 2 of the United States Code of Laws, being an act of Congress to consolidate, codify and set forth the general and permanent laws of the United States in force December 7, 1925 and published as Volume 44, Part 1, of the United States Statutes at Large. Said Sections 2, 3, 4 and 5 read in part, as follows:

"Section 2. The House of Representatives shall be composed of four hundred and thirty-five Members, to be apportioned among the several States as follows:

Alabama, ten.

* * * *

Ohio, twenty-two.

* * * *

"Sec. 3. In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed."

"Sec. 5. Candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State."

The above act of 1911 is published in the "Compiled Statutes" of 1913, issued by West Publishing Company as Sections 15, 16, 17, 18, and 19. In a footnote

appended to Section 15, which section corresponds to Section 3 of Article II of U. S. C., *supra*, it is said:

“The apportionment of Representatives in Congress among the several States which was incorporated in R. S. sec. 20, was made originally, under the Ninth Census, by Act Feb. 2, 1872, c. 11, 17 Sta. 28. Thereafter, apportionments were made under the successive Censuses, as follows:

Under the Tenth Census, by Act Feb. 25, 1882, c. 20, 22 Stat. 5.

Under the Eleventh Census, by Act Feb. 7, 1891, c. 116, 26 Stat. 735.

Under the Twelfth Census, by Act. Jan. 16, 1901, c. 93, 31 Stat. 733.

Under the Thirteenth Census, by Act Aug. 8, 1911, c. 5, 37 Stat. 13.

Each apportionment, in turn, superseded that which preceded it. In like manner, R. S. § 21, relating to Representatives of new States, and R. S. § 23, providing for election of Representatives by districts, were superseded by provisions to the same effect in Act Feb. 25, 1882, which were repeated in substance in each of the subsequent apportionment acts, and are now contained in Act Aug. 8, 1911, c. 5, §§ 2-4, post, §§ 16-18. Hence, the provisions of the acts of 1882, 1891, and 1901, as well as those of R. S. §§ 20, 21, 23, are omitted, and the act of 1911 is included as the only law in force on the subjects covered by it.”

By Act of Congress, entitled “An Act to provide for the fifteenth and subsequent decennial census, and to provide for the apportionment of Representatives in Congress” approved June 18, 1929, it was provided for the apportionment of Representatives in Congress under the fifteenth census. Section 22 of the said Act codified as Section 2a of Title 2, of U. S. C., reads as follows:

“(a) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions, no State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

(b) If the Congress to which the statement required by subdivision

(a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a re-apportionment under this section or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 26 of this title, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a)."

Upon examination of the foregoing Section 2a, it will be observed that it makes no provision whatever with reference to the manner of electing representatives to Congress. It deals entirely with the question of determining the number of members of the House of Representatives to which each state is entitled. Without reviewing the action taken by authority of said Section 2a, it is sufficient, for the purposes of this opinion, to say that by force of the said action of Congress it was determined that the State of Ohio is entitled, in the Seventy-third Congress and the next succeeding five Congresses, to twenty-four members.

Under the Congressional District Apportionment Act now in force, Section 4828-1, General Code (103 O. L. 568) the State of Ohio is divided into twenty-two Congressional Districts. The question therefore arises whether or not there may be elected in the State of Ohio, if no other legislation with reference to the matter is had, twenty-two Representatives by districts and two Representatives at large or whether in order to take advantage of the right to have twenty-four members in the House of Representatives from Ohio, further legislation is necessary, and if so, whether it may be lawfully provided by such legislature that twenty-two members be elected from the districts as now provided for, and two members at large, or whether it is necessary to redistrict the State into twenty-four districts.

I am of the opinion that the act of 1911, referred to above, in so far as it provided for the election of representatives in Congress by districts and additional representatives at large until such time as provision is made for their election by districts (Sections 3 and 4 U. S. C., *supra*), applied to the apportionment of representatives to the several states made by Congress in accordance with the Thirteenth census and has no force so far as the apportionment following the Fifteenth census is concerned. I am further of the opinion that there is now no controlling federal law governing the election of representatives to Congress from the several states under the current apportionment. By the specific terms of these two sections, (Sections 3 and 4—Title 2 U. S. C. *supra*) the provisions are limited to "this apportionment" which clearly is the apportionment made by the act; as the title of the act states "this apportionment" is the apportionment made in accordance with the Thirteenth census.

Under existing law, (Section 4828-1, General Code), provision is made for the election of twenty-two representatives to Congress from the State of Ohio

by districts. No specific provision is made for the election of congressmen at large. As the state is entitled, under the present apportionment, to twenty-four representatives, there necessarily must be two representatives elected by some method other than by districts, if the state is to have full representation, unless further legislation is had on the subject.

In the absence of federal regulation of the election of representatives in Congress, the state law governs. If the state, however, did not provide for the election of representatives by districts, they necessarily would all be elected by the electors of the entire state as is done in states having but one representative, and was the method of election of all representatives in many of the states prior to 1842.

Representatives in Congress represent the entire state, even when elected by districts. *McPherson v. Blaker*, 146 U. S. 1, and in my opinion, are properly elected by the people of an entire state, unless otherwise provided by law, without any specific legislation providing for such election other than general provisions for the election of officers to represent the entire state in any capacity, commonly called state officers, provision for the election of which is made by the general law relating to public elections. Section 4785-1, et seq. of the General Code, of Ohio.

Formerly specific provision was made for the nomination of congressmen at large by Section 4952, General Code, wherein it was provided:

"Candidates for state offices, United States senator and congressman-at-large shall be nominated by direct vote of the people in the manner following: * *"

Said Section 4952, General Code, was repealed upon the adoption of the Election Code of 1929. Similar provision for the nomination of congressmen at large is made by the terms of said Election Code in Section 4785-70, General Code, although this provision is not specific as to the nomination of congressmen at large. It is there provided inter alia, with reference to declaration of candidates to be voted for at a primary election, as follows:

"In the case of candidates for state offices, United States senator and other candidates to be nominated in the state-at-large, such declaration shall be filed with the Secretary of State. In the case of candidates for district offices where such districts include more than one county, which shall include all candidates for members of the house of representatives in the congress of the United States other than congressmen-at-large, such declaration shall be filed with the board of the most populous county in the district, which board shall forthwith certify all such nominations to the boards of each county in such district, who shall enter the names so certified on the proper ballots to be used at the primary. * *"

By authority of the provisions of law quoted above, nominations of persons seeking the position of Congressmen-at-large may be made, and when made, their names should be placed upon the official ballot to be voted for at the next election. See Section 4785-98, General Code.

In view of the fact that Congress saw fit to provide by specific acts that Representatives in Congress be elected by districts in the several states under apportionments made following the sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth censuses, each of which acts of Congress was complete in itself and entirely superseded the last preceding act applying to the apportion-

ment under the last preceding census thereto, and did not make similar provisions for the election of representatives under the fifteenth census, I am of the opinion that the several states are now free to provide for the election of Representatives in the national House of Representatives in such manner as the legislature of the state may determine, until such time as federal regulations of the matter may become effective.

The manner of electing Representatives in Congress is peculiarly within the domain of legislative power. It is purely a matter for legislation. At present, in Ohio, provision is made by Section 4828-1, General Code, for the election of twenty-two Representatives in Congress by districts. Before any more or less number than twenty-two may be elected by districts, the state must be redistricted.

In my opinion the Legislature of Ohio may, in its discretion, redistrict the State so as to provide for the election of twenty-four members of the national House of Representatives by districts and if that is not done and no further legislation enacted on the subject, the State of Ohio will be represented in the Seventy-third Congress and in the next succeeding five Congresses, by twenty-two Representatives elected by districts, in compliance with Section 4828-1, General Code, and two Representatives at large.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3070.

DISAPPROVAL, LEASE FOR RIGHT TO USE FOR RAILWAY AND POLE
LINE RIGHT OF WAY PURPOSES, MIAMI AND ERIE CANAL LAND
IN MONTGOMERY AND WARREN COUNTIES—CINCINNATI AND
LAKE ERIE RAILROAD COMPANY.

COLUMBUS, OHIO, March 20, 1931.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain canal land lease, in triplicate, by which the State of Ohio, through you as Superintendent of Public Works, and as Director of said Department, has leased and demised to the Cincinnati and Lake Erie Railroad Company, an electric traction company, the right to occupy and use for electric railway and pole line right of way purposes a certain abandoned portion of Miami and Erie Canal Lands abandoned by an act of the 86th General Assembly, passed March 25, 1925, and which went into effect on the fourteenth day of July, 1925 (111 O. L. 208). That portion of abandoned Miami and Erie Canal Lands covered by said lease and thereby leased and demised to the Cincinnati and Lake Erie Railroad Company is particularly described in said lease as follows:

“That portion of the abandoned Miami and Erie Canal property, in Montgomery and Warren Counties, Ohio, commencing at the southerly corporation line of the Village of Miamisburg, Montgomery County, Ohio, being at or near Station 10036 plus 92 of H. C. Baldwin’s survey of said canal South of Dayton, Ohio, and extending thence southerly over