

JANUARY 26, 1951.

THE HONORABLE ALFRED E. DRISCOLL,  
*Governor of New Jersey,*  
Trenton, New Jersey.

## FORMAL OPINION—1951. No. 4

DEAR GOVERNOR:

Some weeks ago, anticipating that the One Hundred and Seventy-fifth Legislature (to which we shall refer as the 1951 Legislature) would have the duty to apportion the members of the General Assembly among the several counties, you directed us to examine into the problem from the standpoint of the method that would effectuate the command of the Constitution of 1947 that the apportionment be made "as nearly as may be according to the number of inhabitants, but each county shall at all times be entitled to one member and the whole number of members shall never exceed sixty." However, in view of the fact that the federal census of 1950, showing county population totals, had not been promulgated when the 1951 legislative year began, the immediate question is whether the 1951 Legislature has the power to make the apportionment.

We have given this question thorough consideration. Our conclusion, which we now express as our opinion, is that the power to apportion the members of the General Assembly inheres in the Legislature in session during the legislative year next succeeding the promulgation of a federal census; and that, inasmuch as the federal census of 1950 showing county totals had not been promulgated when the 1951 legislative year began, the 1951 Legislature has no power to make the apportionment.

Article IV, Section III, Paragraph 1, of the Constitution of 1947 commands that . . . Apportionment of the members of the General Assembly shall be made by the Legislature at the first session after the next and every subsequent census . . .

This is essentially the same language contained in the Constitution of 1844, *viz.*:

. . . an apportionment of members of the General Assembly shall be made by the Legislature at its first session after the next and every subsequent enumeration or census . . . (Art. IV, Sec. III, Par. 1.)

In *Botti vs. McGovern*, 97 N. J. L. 353 (Sup. Ct. 1922), which was heard by Mr. Chief Justice Gummere and Justices Trenchard, Bergen, Minturn and Katzenbach (a majority of the court), the Chief Justice said:

By article 4, the legislative power is vested in two separate bodies, the Senate and General Assembly. The members of each of these bodies are to be selected, not from the people of the State at large, but from the inhabitants of the several counties into which the State is divided and are to be elected by the legal voters of the county; each county is entitled to one senator, without regard to the number of inhabitants thereof; but membership in the General Assembly is variable, the representation of each county therein being dependent upon the number of the inhabitants thereof as nearly as may be. The framers of the constitution realized that in the growth of the population of the State there would naturally be a change from time to time in the proportion of the number of inhabitants of the various counties

inter sese, and, in order that the governmental scheme, based upon representation in the lower house in proportion to population, might be made effective in the future, provided that there should be an apportionment of membership among the various counties at stated times, *the period fixed being the year succeeding the promulgation of the federal census*, the apportionment to be made without regard to whether or not, by it, any change in the number of representatives should occur in any county. (Italics ours.)

In the above-recited portion of the court's deliverance the significant language is: ". . . the period fixed being the year succeeding the promulgation of the federal census . . ." And, as will presently be borne out by a further excerpt from the same opinion, there can be no doubt that the court had in mind, not the succeeding *calendar* year but the succeeding *legislative* year as interpretive of the clause of the Constitution of 1844 reading: "first session after the . . . census."

When does the session of the Legislature begin? In the Constitution of 1947 the answer is to be found in Article IV, Section I, Paragraph 3:

The Senate and General Assembly shall meet and organize separately at noon on the second Tuesday in January of each year, at which time the legislative year shall commence.

And this provision is essentially the same as that contained in Article IV, Section 1, Paragraph 3, of the Constitution of 1844:

Members of the Senate and General Assembly shall be elected yearly and every year, on the first Tuesday after the first Monday in November; and *the two Houses shall meet separately on the second Tuesday in January next after the said day of election, at which time of meeting, the legislative year shall commence*; but the time of holding such election may be altered by the Legislature. (Italics ours.)

Thus, if the federal census showing the population of the several counties (the promulgation of a State total obviously does not subserve the constitutional requirements of New Jersey) had been promulgated by the federal authorities before noon of the second Tuesday in January 1951 (the ninth day of that month), the power to apportion the members of the General Assembly would have been conferred—and the constitutional duty to make such appointment would have been consequently imposed—upon the Legislature directed by the Constitution to meet at that hour, such being the time fixed for the beginning of the legislative year. Only in such circumstances would the legislative year beginning at noon of the second Tuesday in January 1951 be "the year succeeding the promulgation of the federal census."

In *Botti vs. McGovern* the relator (Botti) had sought the allowance of a *mandamus* to compel the respondents (McGovern, as Clerk of Hudson County, and the Hudson County Board of Election), in taking the statutory steps preliminary to the holding of the annual election in Hudson County of members of the Assembly to disregard the apportionment made by the 1922 Legislature and to observe that made by the 1911 Legislature. The court said:

The federal census is taken and promulgated every ten years, the last one being in the year 1920 . . . The last federal census having been promulgated in 1920, under the constitutional mandate, the duty rested upon the

Legislature of the year 1921 to make a new apportionment of members among the counties of the State . . .

This (apportionment of Assembly representation according to population) being the governmental scheme provided by the framers of the constitution and adopted by the people, the question presented for decision is whether *the Legislature sitting in the year next succeeding the promulgation of a federal census* can defeat that scheme, so far as it deals with the matter of the distribution of members of the General Assembly among the several counties of the State, by refusing or neglecting to make the apportionment required by article 4, section 3. In our opinion, the right of the inhabitants of the several counties of the State to be accorded the representation in the lower house, provided by the constitution, cannot be defeated by such non-action of the Legislature. It is true that the clause requiring *the Legislature sitting next after the promulgation of the federal census* to make the apportionment is mandatory; but disobedience of that mandate cannot produce the result claimed by the relator. The failure to perform the duty cannot cancel the legislative obligation. In other words, as was stated by Peckham, J., in the case of *People, ex rel. Carter vs. Rice*, 135 N. Y. 473, similar in its legal aspect to that now before us, the duty is a continuous one, and is cast in turn upon each Legislature succeeding that which has defaulted in the performance of the obligation, until the obligation is fulfilled. That is to say, if the apportionment is not made in the first session after the return of the enumeration, the duty to make it devolves upon the Legislature then next sitting, and upon each following Legislature until that duty is performed. To quote from the opinion just cited, "It cannot be tolerated that a Legislature, by mere omission to perform its constitutional duty at a particular session, can thereby prevent, for another ten years, the apportionment provided for by the constitution." (Italics ours.)

The portions we have italicized in the above excerpt from the court's opinion in *Botti vs. McGovern*, serve to confirm what we have already set forth as our understanding of what the court meant by saying ". . . the period fixed being the year succeeding the promulgation of the federal census . . ." By the expressions "the Legislature sitting in the year next succeeding the promulgation of a federal census" and "the Legislature sitting next after the promulgation of the federal census" the court made it crystal clear that the power to make the apportionment is *not* available to the Legislature which sits during the legislative year in which the federal census is promulgated. At the same time, the court made it equally clear that this power, once it inheres in the Legislature sitting in the year next succeeding the promulgation of the census, continues as a legislative power until exhausted by the making of the apportionment according to the constitutional prescription and purpose.

Now, from the standpoint that the various counties of the State are fundamentally entitled to representation in the General Assembly according to the number of their inhabitants as enumerated in decennial federal censuses, it can hardly be said that, in a given census, population counts which lack the stamp of finality are acceptable as the basis of apportionment. While the Bureau of the Census, United States Department of Commerce, promulgated during the year 1950 a *State* population total of 4,835,329 for New Jersey, there has been no promulgation of final *county*

population totals. All releases of county figures have been publicized as preliminary counts, subject to revision.

In reply to a telegram sent by us during the afternoon of January 9, 1951, to the Bureau of the Census, inquiring whether there had been "a promulgation of final 1950 census figures showing county totals in New Jersey," the Director of the Bureau stated (by letter dated January 10, 1951):

While the final 1950 population of each State has been reported as required by law, similar figures are not yet available for counties or other subdivisions. The returns for persons enumerated away from their usual residence are first reallocated on a State basis only in order to obtain the final State totals as quickly as possible and are not assigned to individual areas within States until later. The final 1950 population of New Jersey counties will be issued in a press release in the late spring or early summer . . .

Federal laws providing for decennial censuses of population have never made any provision regarding the date when the results become effective or official in a given area, and we do not know of any federal court decision concerning the same. It is believed that this is a matter for State determination through legislation, as has been done in a few States; but if no such action has taken place, or if the matter has not been decided by the State courts, the question will usually require the attention of the Attorney General of the State. . .

The director then cites several cases decided in State courts, which, he suggests, "may be helpful." But the cases thus cited deal, not with a question so vital as the availability of tentative or preliminary census figures where (as in New Jersey) representation in a legislative body must be in proportion to the population of integral political subdivisions, but with the availability of such figures for other governmental purposes. In fact, the cases cited by the director generally involve the type of question which in New Jersey would now be governed by R. S. 52:4-1, as complemented by the definition of the word "census" in R. S. 1:1-2, fixing, "unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction," the effective date of a federal census for the purpose of the Revised Statutes and any other statute. But any such "determination through legislation" obviously cannot—and just as obviously was not intended—to govern the making of an apportionment of members of the General Assembly.

Be that as it may, in *Botti vs. McGovern* the court, in speaking of "the promulgation of the federal census," manifestly had in mind the federal census as officially and finally promulgated. Moreover, in the 1891 Supreme Court case of *In re Assessment for Passaic*, 54 N. J. L. 156, the decision was that Passaic did not become a second-class city until ninety days after April 17, 1891 (the date on which, according to the court, the official bulletin of the census of 1890 was issued), the act of April 2, 1891 (P. L. p. 306, supplementing the cities classification act) providing, in the words of the court, "that a census taken under national or State authority shall be applicable to the cities in question ninety days after the official promulgation thereof." Accordingly, this case has significance here insofar as it lays down the rule that a federal census is not officially promulgated unless it is complete. The court, after declaring that the supplementing act of April 2, 1891, "set at rest" the question, "At what period will 'population,' as used in the original Classification act, be fixed and determined?," said:

The contention is that, when the bureau or officers charged with the duty of enumerating state the result, the population of the district is estab-

lished and proven. But this is . . . inadmissible. Such statements may be varied and altered, *and manifestly the enumeration intended is not complete until it is officially promulgated.* (Italics ours.)

The federal census law (13 U. S. C. A. sec. 202), provides, as intimated by the Director of the Bureau of the Census in his letter, that "the tabulation of total population by States as required for the apportionment of representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States." Does not the reason that requires completed (final) figures for a congressional apportionment, in effectuation of the command of the federal Constitution ("Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . .") likewise require completed (final) figures for Assembly apportionment, in effectuation of the mandate of the New Jersey Constitution ("The members of the General Assembly shall be apportioned among the several counties . . . according to the number of their inhabitants . . .")? It must be manifest that final census figures are as essential to the integrity of the scheme of representation in the New Jersey General Assembly as they are to the integrity of the scheme of representation in the National House of Representatives.

In view of the opinion of the court in *Botti vs. McGovern*, it is unnecessary to ascertain whether any apportionment, either before or after that deliverance, was made on the basis of preliminary census counts. Nor would it serve any purpose to do so. As above indicated, the court stated, unequivocally: "The last federal census having been promulgated in 1920, under the constitutional mandate, the duty rested upon the Legislature of the year 1921 to make a new apportionment. . . ." And even if the court was in error as to the time of promulgation (of the final figures) of the 1920 census, its exposition of the sense and meaning of the constitutional language is so clear as to leave no room for doubt regarding the principle involved.

The construction thus placed by the court upon the pertinent provision of the Constitution of 1844 is applicable to the derivative provision of the Constitution of 1947. When a later instrument adopts a provision of an earlier one that has received a certain construction, the provision is deemed to be adopted as thus construed. *State vs. De Lorenzo*, 81 N. J. L. 613, 623 (E. & A. 1911).

We are not unmindful that under the Constitution of 1947 the terms of members of the General Assembly are fixed at two years (instead of one year as under the Constitution of 1844); that, because the members elected at the 1951 general election will have constitutional protection as to tenure accordingly, the next apportionment cannot effectuate county representation thereunder earlier than the legislative year beginning the second Tuesday of January 1952; and, therefore, that, even though the 1952 Legislature (provided the federal census will have been seasonably promulgated) performs its constitutional duty and makes the apportionment, the members then apportioned will not be elective until 1953. But that eventuality is rooted in the instrument of government adopted by the people.

Respectfully yours,

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