



Testimony of
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Demos: A Network for Ideas & Action

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I. Introduction

Thank you, Members of the Minnesota Judicial Special Redistricting Panel, for providing the opportunity to submit written testimony. Demos is a national, non-profit, non-partisan research and policy organization. The Demos Democracy Program works to ensure high levels of voting and civic engagement, and supports reforms to achieve a more inclusive and representative democracy.

I am an attorney with over twenty years of experience in redistricting, voting rights, and election reform. I am also a member of the Board of Advisors for the Prison Policy Initiative, a non-partisan, non-profit center which, for the last decade, has been the leading organization studying how the U.S. Census counts people in prison; and works to quantify the policy and legal implications flowing from those technical decisions. And although I am very interested in the broad range of issues affecting fairness in representation for Minnesota communities, I focus my testimony here on the specific issue of incarcerated populations this state, and the manner in which they are counted for purposes of redistricting.

II. Redistricting and “Residence”: Constitutional Standards

It is well settled that the Fourteenth Amendment to the United States Constitution requires state legislative districts to satisfy requirements of population equality under the “one-person, one-vote” doctrine. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964). Nonetheless, the U.S. Supreme Court has held that states are not required to rely upon federal Census data in redistricting. *See Mahan v. Howell*, 410 U.S. 315, 330-332 (1973) (rejecting City of Virginia’s argument that it was compelled to use Census data regarding “residences” of military personnel in its state legislative redistricting). Indeed, in *Burns v. Richardson*, the Supreme Court stated that:

“[n]either in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include . . . 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 been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, *cf., e.g., Carrington v. Rash*, 380 U.S. 89 (1965), the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.”

384 U.S. at 92 (emphasis added).

Similarly, the Third Circuit has observed that, although states are entitled to the number of representatives in the House of Representatives as determined by the federal census, states are not required to use such census figures as a basis for apportioning their own legislatures. *See Borough of Bethel Park v. Stans*, 449 F.2d 575, 583 n.4 (3d Cir. 1971).

- Minnesota

Each decade, Minnesota redraws its legislative districts on the basis of population, to ensure that each of Minnesota’s 201 legislative and eight U.S. House districts have substantially equal populations. In this regard, Minnesota seeks to ensure that its citizens all receive the same access to representation and government, consistent with the U.S. Supreme Court’s mandate of “one person, one vote.” Yet, this mandate is not fully realized because of Minnesota’s treatment of incarcerated populations. Minnesota treats incarcerated persons as residents of the prison in which they are temporarily located, rather than as residents of their home communities, for purposes of state legislative redistricting, using U.S. Census Bureau data files that make this allocation. As a result, Minnesota not only falls victim to this form of prison-based gerrymandering – which results in significant distortions in fair representation – but it also violates its *own state constitution*, which states that “For the purpose of voting[,] no person loses residence solely by reason of confine[ment] in any public prison.” Minnesota Constitution, Article VII, § 2.

Minnesota state statutes and case law also make clear that for voting purposes, incarcerated prisoners should be counted as part of the population of their home residential districts, rather than as part of the district in which their prison is located. For example, Minnesota State Statute § 200.031, entitled “Elections; Determination of residence,” sets forth a number of examples of when a person acquires or loses residence. These examples all consistently demonstrate Minnesota’s legislative policy regarding residence for voting purposes, namely, that an individual does not lose his or her residence, or acquire a new residence, “if the individual is living [in a new state or precinct] only temporarily, without the intention of making that precinct home.” Minn. Stat. § 200.031(c) (2009). *See also Bell v. Gannaway*, 227 N.W.2d 797, 801 (Minn. Sup. Ct. 1975) (citing Minn. Stat. § 201.26, noting that the “guidelines established by this statute base residence upon considerations of physical presence and intent”). This policy definition is also consistent with statutory and case law definitions of the term “resident” in other contexts. *See, e.g., Minn. Const. art. VII, § 2* (holding that residence is not lost by reason of employment in the U.S. military, confinement in an almshouse, prison or asylum); *Mason v Comm’r of Revenue*, No. 3612, 1983 WL 1915, at *5 (Jun. 23, 1983) (noting that once a “domicile” is established, it continues until another domicile is established elsewhere, superseding the former domicile) (internal citations omitted). Given Minnesota’s legislative and judicially fashioned definitions of the term “residence” as

including both a physical presence in a location and an intention to make such location one's home, it is plain that persons incarcerated in prisons in Minnesota should not be counted as residents of the district of the prison; rather, such persons should be counted as residents of their home communities.

III. The Impact of Prison-Based Gerrymandering in Minnesota

The rules that the Census Bureau uses for determining "residence" were adopted long before prison populations in the U.S. became large enough to have a significant effect on representation. The U.S. now has some 1.6 million persons in state and federal prisons. In Minnesota, there are currently ten Minnesota House districts which contain state and federal prisons. And because Minnesota relied on Census data allocating incarcerated persons to the prison during its last redistricting cycle, all of its prison populations were counted as residents of those prison districts. This is a problem, because this form of prison-based gerrymandering significantly enhances the weight of a vote cast in those districts – and, consequently, the political clout of persons who live in those districts. This comes at the expense of representation for anyone in Minnesota who lives in districts without large prison populations. Disturbingly, this practice particularly distorts fair representation for communities of color, which are often disproportionately affected by high rates of incarceration.

| Post 2000 District | Census 2000 Population | Prison population | Percent deviation between actual resident population and ideal district size |
|---------------------------|-------------------------------|--------------------------|---|
| 56A | 36,812 | 1,746 | -4.48% |
| 20A | 36,641 | 1,324 | -3.80% |
| 52A | 36,767 | 1,124 | -2.91% |
| 26B | 36,496 | 1,097 | -3.58% |
| 26A | 36,780 | 943 | -2.38% |
| 08A | 36,721 | 861 | -2.32% |
| 08B | 36,998 | 847 | -1.53% |
| 30A | 36,890 | 839 | -1.80% |
| 15B | 36,573 | 800 | -2.56% |
| 06B | 36,697 | 599 | -1.67% |

Because of an increase in the prison populations over the last decade, the Census Bureau's prison miscount, if uncorrected, will have an even larger negative impact on democracy in Minnesota.

V. Proposals to Remedy Inequities Caused By Prison-Based Gerrymandering

- States That Have Ended Prison-Based Gerrymandering

State and local governments need not wait for the Census Bureau to change where it counts incarcerated people in order to end prison-based gerrymandering. Indeed, the following four states demonstrate, by example, that states are empowered to take action on their own. We encourage Minnesota to follow their example.

1. Maryland

When its “No Representation without Population” Act passed as H.B. 496 and S.B. 400, Maryland became the first state to bring an end to prison-based gerrymandering within its borders on April 13, 2010. Pursuant to the Act, Maryland is the first state to pledge to collect the home addresses of incarcerated people.

The Act will help Maryland correct past distortions in representation, such as the following:

- 18% of the population currently credited to House of Delegates District 2B (near Hagerstown) was actually incarcerated people from other parts of the state. In effect, by using uncorrected Census data to draw legislative districts, the legislature granted every group of 82 residents in this district as much political influence as 100 residents of every other district.
- In Somerset County, a large prison was 64% of the 1st County Commission District, giving each resident in that district 2.7 times as much influence as residents in other districts. Even more troubling is that by including the prison population as “residents” in county districts, the county had been unable to draw an effective majority-African American district and has had no African-American elected to county government, despite settlement of a vote dilution lawsuit in the 1980s.

The legislation applies to redistricting only, and would not affect federal funding distributions.

2. New York

New York also passed a bill to end prison-based gerrymandering, attached as “Part XX” of the revenue budget, which was signed into law on August 12, 2010. This new law requires New York to collect home addresses of incarcerated individuals, and requires the state and local governments to draw legislative districts based on allocating incarcerated persons to their home addresses rather than as residents of the prison.

The Act will help New York correct past distortions in representation, such as the following:

- Seven of the previous New York State Senate districts met minimum population requirements only by claiming incarcerated people as residents.
- Although each Senate district in New York should have had 306,072 residents, district 45, which claims the populations of thirteen large prisons, had only 286,614 actual residents.

Because the bill does not change the core Census data, no federal funding based on Census data would be affected.

3. Delaware

Delaware passed a bill to end prison-based gerrymandering, HB 384, on August 31, 2010. The act requires that an individual who was a resident of the State of Delaware prior to incarceration be counted at his or her last known residence prior to incarceration, as opposed to at the address of the correctional facility. This would apply in determining the reapportionment and redistricting for the state. The bill was amended in May 2011 to postpone implementation until the 2020 redistricting process.

The legislation applies only to redistricting, and will not affect federal or state funding distributions.

4. California

California passed a bill to end prison-based gerrymandering, AB 420, on October 7, 2011. The new law directs the Department of Corrections and Rehabilitation to report the last known addresses of incarcerated people to California's Citizens' Redistricting Commission. The data may then be used to count incarcerated individuals as members of their home communities, rather than as residents of the prison location for redistricting purposes.

The new law will go into effect in the 2020 redistricting cycle.

- *Proposals for Minnesota*

Although it is too late for Minnesota to collect the information necessary to count incarcerated people at their residential addresses, the state need not wait another decade to take action to lessen the harm of prison-based gerrymandering. Arizona¹ and Massachusetts,² for example, are already currently working on interim solutions for the current redistricting cycle to avoid exacerbating the major distorting effects of prison populations in redistricting.

There are three ways that the Panel can greatly reduce the impact of prison-based gerrymandering in Minnesota during this redistricting cycle. The first option would be to simply remove any prison populations from the redistricting data, thus eliminating large concentrations of phantom constituents from districts with large prisons. The second option would be to deliberately overpopulate any district that contains a correctional facility by approximately the population size of the correctional facility, and slightly under-populate the home districts of incarcerated individuals. Third, the Panel could identify prison populations in any redistricting tables it uses or publishes so that the inclusion of such populations would be transparent to all, and use that information to take prison populations into account when drawing majority-minority districts.

¹ See the Prison Policy Initiative's summary of the September 8, 2011 hearing, and link to the video record at <http://www.prisonersofthecensus.org/news/2011/09/14/airc/>

² See the final paragraphs of Yawu Miller, Redistricting Committee Supports Minority Districts, *Bay State Banner*, October 13, 2011, available at <http://www.baystatebanner.com/local15-2011-10-13>

First Option

The Panel can use the Census Bureau's Advance Group Quarters Summary File³ to remove the correctional facilities from the Census counts used in redistricting. Mathematically, counting incarcerated people at the prison location has a larger vote dilutive effect than simply failing to count them at the correct home address. Below is a subset of this file in tabular form showing the 22 census blocks that contain state prisons, federal prisons, private prisons and halfway houses in Minnesota along with the populations counted within those facilities by the Census Bureau. The Prison Policy Initiative has also made point shapefiles of this Minnesota data in both ESRI and Maptitude formats.⁴ The shapefiles include direct links to Census data on the race and ethnicity of the incarcerated population within each block. (For more technical information on these files or using the Census Bureau's group quarters summary file, you may contact Peter Wagner or Aleks Kajstura at the Prison Policy Initiative at (413) 527-0845.)

| County | Tract | Block | Correctional Population | Facility Name(s) | Facility Type(s) |
|-------------------|--------|-------|-------------------------|--|------------------|
| Anoka County | 050229 | 1020 | 1,305 | Minnesota Correctional Facility-Lino Lakes | State |
| Carlton County | 070500 | 5021 | 1,128 | MCF Willow River/Moose Lake | State |
| Chisago County | 110200 | 1049 | 980 | MCF Rush City | State |
| Hennepin County | 008400 | 1000 | 25 | Volunteers of America | Private |
| Hennepin County | 021602 | 1014 | 16 | Damascus Way | Private |
| Hennepin County | 105600 | 3000 | 21 | 180 Degrees | Halfway House |
| Olmsted County | 002300 | 5012 | 954 | Federal Medical Center, Rochester | Federal |
| Pine County | 950400 | 2132 | 1,315 | FCI Sandstone | Federal |
| Polk County | 020700 | 1013 | 8 | Red River Valley Juvenile Center | Halfway House |
| Polk County | 020700 | 1031 | 139 | Tri-County Community Corrections | Halfway House |
| Ramsey County | 033200 | 1015 | 12 | RS Eden (Women's) | Halfway House |
| Ramsey County | 035500 | 2007 | 34 | RS Eden (Men's) | Halfway House |
| Ramsey County | 041602 | 2008 | 46 | Volunteers of America- Female | Private |
| Rice County | 070700 | 3013 | 2,058 | MCF-Faribault | State |
| Scott County | 080500 | 2009 | 588 | MCF Shakopee | State |
| Sherburne County | 031500 | 4008 | 1,000 | MCF St. Cloud | State |
| St. Louis County | 000300 | 1043 | 772 | Federal Prison Camp Duluth | Federal |
| St. Louis County | 002000 | 2004 | 45 | Bethel Work Release Program | Halfway House |
| St. Louis County | 011100 | 2003 | 150 | Northeast Regional Correction Center | Private |
| Waseca County | 790500 | 2104 | 1,067 | FCI Waseca | Federal |
| Washington County | 070801 | 1001 | 1,587 | MCF Stillwater | State |
| Washington County | 070802 | 1001 | 448 | MCF Oak Park Heights | State |

³ See Census Bureau's Advance Group Quarters Summary File available at http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html; and Demos and Prison Policy Initiative press release "Advocates Hail Census Bureau's Release of Data to Assist in Correcting Prison-Based Gerrymandering," April 20, 2011, available at <http://www.prisonersofthecensus.org/news/2011/04/20/groupquartersreleased/>

⁴ Available at http://www.prisonersofthecensus.org/data/2010/MN_PRISON_BLOCKS_shapefile.zip and http://www.prisonersofthecensus.org/data/MN_Prison_blocks_mapt.zip

Second Option

The second option is to deliberately overpopulate any district that contains a correctional facility by approximately the population size of the correctional facility. This will necessitate a legislative district plan with a higher maximum population deviation than is traditionally practiced in Minnesota. We urge the Court to conclude that a higher population deviation is warranted by the fact that the deviation results from a flaw in the Census that counts incarcerated people in the wrong place. Giving the actual residents of each district equal access to the legislature is more important than the appearance of equality based on flawed Census data.

We provide three examples based on data from Minnesota. The first is a general illustration, and the other two are specific problems we wish to address.

- By itself, the FCI Sandstone Facility (which contains 1,315 federal prisoners from throughout the nation) in Block 2132, Tract 950400, in Pine County would be 3.3% of a district. Instead of drawing that district with ideal district size of 39,582, it should be drawn to contain about 40,897. In this way, the actual resident population would more closely match the ideal district size.
- The MCF Stillwater and MCF Oak Park Heights facilities in Washington County are less than a mile apart. Taken together, the two facilities add up to 2,038 prisoners or 5.1% of a district. Here, the Court should consider putting the two blocks that contain these facilities in two separate districts. If this is not possible, the Court will need to explore the solutions we suggest for the MCF Fairbault facility, below.
- The MCF Fairbault facility in Rice County (Block 3013, Tract 070700) has 2,058 prisoners and could be 5.2% of a district. The Court may consider overpopulating the district by 5.2%. The Court can rely on *Mahan v. Howell* to argue that the apparent deviation in excess of the *White v. Regester* limits is not an actual deviation in resident population. Alternatively, the Court can overpopulate the district by 5%, and eliminate the vast majority of the harm caused by the Census Bureau crediting the prison populations to the wrong location.

Third Option

Third, the Panel should at the very least identify prison populations in any redistricting tables it uses or publishes so that the inclusion of such populations could be taken into account by anyone reviewing the maps. Disclosing which districts contain prison populations as part of the Panel's demographic analysis would be useful to the public. A healthy discussion about redistricting needs to include information about the number of people incarcerated in each district, so that actual constituent populations can be compared.

Critically, being aware of prison populations while drawing districts will also help the Panel minimize the vote dilutive effect of prison-based gerrymandering because it will make it less likely that several large prisons are concentrated in the same district, and it will lessen the odds that a large prison will be placed within a district that is already underpopulated.

The Panel should also take prison populations into account when drawing majority-minority districts. Arizona's Redistricting Commission, for example, is currently excluding prison populations when analyzing districts for Voting Rights Act purposes. The Arizona Redistricting Commission states that it will exclude prisons from its Voting Rights Act Section 5 analysis in order to avoid creating "artificial majority-minority districts" comprised largely of non-voting incarcerated populations. As the Commission's redistricting expert Bruce Adelson emphasized at a September 8, 2011 hearing: "The election analysis in determining what are effective majority-minority districts where minorities have the opportunity to elect, as we've talked about, cannot include felons who are incarcerated because they can't vote."⁵

Conclusion

The basic principle of our democracy is that representation is distributed on the basis of population. Crediting incarcerated prisoners to the wrong location has the unfortunate and undemocratic result of creating a system of "Representation Without Population." As demonstrated by the small variation between districts, as reported in the 2000 Census, Minnesota clearly values the principle of equal representation. Yet by continuing to rely upon Census Bureau data in redrawing its legislative districts, true equality cannot be achieved. Minnesota should use its best efforts to minimize the effects of this prison-based gerrymandering in the current redistricting cycle, and to adopt more permanent solutions going forward.

Thank you very much for this opportunity to submit written testimony.

Respectfully submitted,



Brenda Wright

More information is available:

- *Preventing Prison-Based Gerrymandering in Redistricting: What to Watch For* is a guide for advocates who want to minimize the effects of prison-based gerrymandering in their state or community: http://www.demos.org/pubs/Preventing_pbg.pdf
- *States are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do* is a fact sheet summarizing the discretion given under federal law to adjust the Census for redistricting purposes: <http://www.prisonersofthecensus.org/factsheets/adjusting.pdf>
- *Importing Constituents: Prisoners and Political Clout in Minnesota*, is a district-by-district analysis of prison-based gerrymandering in Connecticut state legislative districts:
<http://www.prisonersofthecensus.org/mn/report.html>

⁵ Video footage of the September 8, 2011 hearing is available on the Arizona Independent Redistricting Commission's website at: <http://www.azredistricting.org/Meeting-Info/default.asp>