



Testimony of Dale Ho
Assistant Counsel, Political Participation Group
NAACP Legal Defense and Educational Fund, Inc.

In Support of AB 420

California State Senate
Committee on Elections and Constitutional Amendments

Room 3191

June 21, 2011

1:30 pm

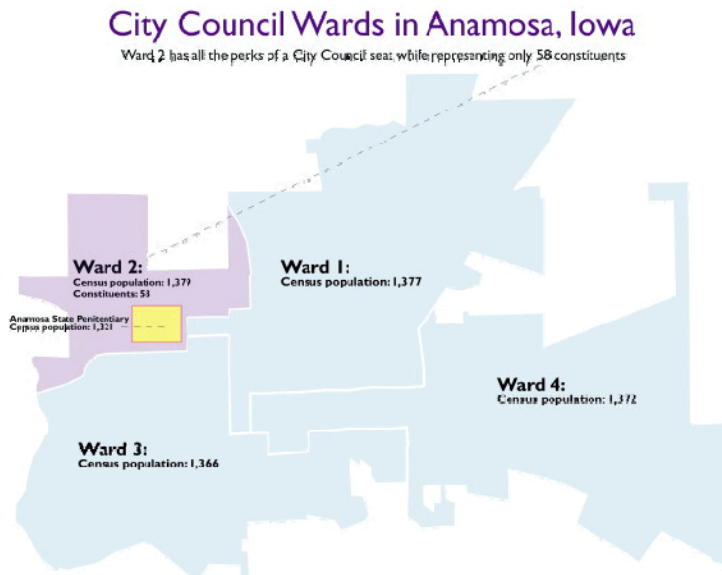
Introduction

Good afternoon. My name is Dale Ho, and I serve as Assistant Counsel with the NAACP Legal Defense and Educational Fund, Inc. (LDF). Founded under the direction of Thurgood Marshall, LDF is the nation's oldest civil rights law firm, most famous for litigating the landmark case *Brown v. Board of Education*.¹ The quest for the unfettered participation in civic and political life of all Americans has been and remains an integral component of LDF's mission.

I am honored to appear at today's hearing held by the Committee on Elections and Redistricting, in support of Assembly Bill 420. This important legislation will enable California to end the practice known as "prison-based gerrymandering," which is the drawing of election district lines while counting incarcerated individuals where they are confined, rather than at their home addresses. By bringing an end to prison-based gerrymandering, AB 420 will make California a leader in an important area of electoral reform, and align the State's redistricting process with basic principles of fairness and equality.

What Is Prison-Based Gerrymandering?

The easiest way to understand how prison-based gerrymandering distorts our democratic process is to look at a simple example from another state. During the 2002 election cycle, the town of Anamosa, Iowa was divided into four City Council wards of about 1370 people each. Ward 2, however, contained a state penitentiary that housed over 1320 prisoners. Thus Ward 2's actual population was comprised of fewer than sixty non-incarcerated residents:



Anamosa's districting plan (pictured above) therefore granted the approximately sixty true

¹ 347 U.S. 483 (1954).

constituents of Ward 2 the same level of political representation accorded to over 1300 people living in each of the other wards. Remarkably, a man was elected to Anamosa's City Council from Ward 2 on the strength of two write-in votes.²

Prison-Based Gerrymandering and the One Person, One Vote Principle

Unfortunately, prison-based gerrymandering is replicated here in California on both the county and statewide level, and it artificially inflates population numbers—and thus, political influence—in the districts where prisons are located, at the expense of all other voters, contravening state law concerning legal residence, and basic principles of equality in the democratic process.

With respect to state law, prisoners are not legal residents of the communities where they are held. California Election Code § 2025 provides that a person does not gain or lose legal residence by virtue of being incarcerated.³ Federal and state courts in California have similarly held that an incarcerated person's legal domicile remains at the person's pre-incarceration address.⁴

This legal rule comports with common sense: incarcerated individuals do not choose the districts in which they are held, and can be moved at any time at the discretion of the Department of Corrections. They do not interact with or develop enduring ties to the surrounding communities. And, of course, they cannot vote as residents of those communities. They are not “constituents” of those districts in any credible sense of the word.

Not only does prison-based gerrymandering contravene basic legal principles on residence, it also makes a mockery of the “one person, one vote” principle. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that electoral representation—other than to the United States Senate—“be apportioned on a population basis.”⁵

² See Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. Times, Oct. 23, 2008, at A12.

³ “A person does not gain or lose a domicile solely by reason of his presence or absence from a place ... while kept in an almshouse, asylum or prison.” California Elections Code § 2025. See also Office of the Attorney General, State of California, Opinion No. 91-601, 74 Ops. Cal. Atty. Gen. 162, 1991 WL 495473 at *2 (Cal.A.G. Aug. 23, 1991) (“[T]he Legislature has provided that both state prisoners and Youth Authority wards are to be treated as not attaining a new and different voting ‘residency’ by virtue of their placements in prisons and state institutions.”).

⁴ See, e.g., *Cohen v. United States*, 297 F.2d 760, 764 (9th Cir. 1962) (holding that, for tax notification purposes, “[o]ne does not change his residence to the prison by virtue of being incarcerated there.”); *Gonzalez v. Rubin*, 2000 U.S. App. LEXIS 12762, at *3 (9th Cir. May 22, 2000) (citing *Cohen*, 297 F.2d at 774) (same, when determining domicile for purposes of federal diversity jurisdictions); *Hillman v. Stults*, 263 Cal. App. 2d 848, 872 (1968) (holding that, for purpose of determining domicile in conservatorship proceedings, “[p]risoners do not gain or lose residence as a result of being removed to the prison system.”).

⁵ See *Reynolds v. Sims*, 377 US 533, 567 (1964) (“Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a

Accordingly, election districts must hold roughly the same number of constituents so that everyone is represented equally in the political process and that each constituent has the same level of access to an elected official.

“One person, one vote” is a bedrock principle of political equality: everyone’s vote should count equally, regardless of where you live. But, thanks to prison-based gerrymandering, your vote counts less if you happen not to live near a prison.

The democracy-distorting effect of prison-based gerrymandering in California is substantial given the skyrocketing growth of the prison population over the previous 50 years. While California’s prison population was approximately 20,000 people in 1960, that figure grew 8-fold to approximately 160,000 by the 2000s.⁶ The location at which those populations are counted therefore has a tremendous effect on the shape of our democracy.

I note, however, that it would be inaccurate to say that the current system of prison-based gerrymandering benefits the generally rural counties that host prisons. To the contrary, the democracy-distorting effects of prison-based gerrymandering are felt most keenly at the local level, where total population numbers are smaller and the presence of large prison facilities can have a greater skewing effect. For instance, in Solano County, 11.3% of the purported residents in County Commission District Number 4 are actually prisoners, who are not actual residents of the County.⁷ Everyone else in Solano County has suffered from a dilution in their voting power.

Thus, in an official legal opinion, former-Attorney General Dan Lundgren explained that counting incarcerated individuals as residents of the local community “might well create an imbalance in voting strength and a dilution of voting power among district voters.... A vote in the district containing the state prison will necessarily count more; in comparison, the voting power of persons in the other districts will be diluted.”⁸ Moreover, because districts that have prisons contain fewer true constituents than do other districts, the prison districts enjoy “greater access to [their elected officials], than the non-prisoner populations in the other ... districts,”⁹ compounding the inequality present here.

representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”).

⁶ California Legislative Analyst’s Office, *Cal Facts 2004*, available at http://www.lao.ca.gov/2004/cal_facts/2004_calfacts_trends.htm.

⁷ Similarly, 8% of the purported “population” in one county district in Marin County is incarcerated. See Aleks Kajstura and Peter Wagner, *Importing Constituents: Prisoners and Political Clout in California* (March 2010), available at <http://www.prisonersofthecensus.org/ca/report.html>.

⁸ Office of the Attorney General, State of California, Opinion No. 91-601, 74 Ops. Cal. Atty. Gen. 162, 1991 WL 495473 at *3 (Cal.A.G. Aug. 23, 1991).

⁹ *Id.* at *3.

Not surprisingly, 10 California counties with large prison populations, such as Kern and Kings County, already reject the notion that prisoners should be counted as part of the local community for redistricting purposes.¹⁰ That solution, which has been approved by the Attorney General's Office¹¹ and works at the local level, will work equally well for the state as a whole.

Prison-Based Gerrymandering and Minority Voting Rights

Prison-based gerrymandering also raises particular concerns with respect to minority voting rights. Ensuring adequate representation for minority voters is one of the overarching imperatives during the redistricting process. For instance, Section 2 of the federal Voting Rights Act prohibits any "voting ... standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."¹² Federal law prohibits not only those voting practices that deny the right to vote entirely, but also those practices that have a dilutive "effect" on minority vote power.¹³ California's own Voting Rights Act recognizes similar concerns.¹⁴

It is indisputable that prison-based gerrymandering dilutes the voice of minority communities in California. Two points establish this fact: (1) the composition of the prison population; and (2) the demographics of incarcerated individuals' home communities.

First, there are substantial racial disparities in incarceration in California. Together, African Americans and Latinos comprise 43.3% of the state's population,¹⁵ but are 68.3% of the state's prisoners.¹⁶ Overall, Latinos are incarcerated at nearly 2 times the rate of whites, and African Americans at approximately 6 times the rate of whites.¹⁷

¹⁰ The following 10 California counties reject prison-based gerrymandering when drawing local district lines: Amador, Del Norte, Imperial, Kern, Kings, Lassen, Madera, Monterey, San Luis Obispo, and Tuolumne Counties. See Prison Policy Initiative, *10 Calif. Counties Reject Prison-Based Gerrymandering*, available at http://www.prisonersofthecensus.org/factsheets/ca/ca_counties.pdf.

¹¹ See Office of the Attorney General, State of California, Opinion No. 91-601, 74 Ops. Cal. Atty. Gen. 162, 1991 WL 495473 at *1 (Cal.A.G. Aug. 23, 1991) ("We conclude that the prisoners and wards may be excluded" from the local population for redistricting purposes.).

¹² 42 U.S.C. § 1973(a) (2006).

¹³ See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1241 (2009).

¹⁴ See California Elections Code §§ 14025-14032

¹⁵ U.S. Census Bureau, *California QuickFacts*, available at <http://quickfacts.census.gov/qfd/states/06000.html>.

¹⁶ California Dep't of Corrections, *California Prisoners & Parolees 2009* at 19, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2009.pdf.

¹⁷ See Sentencing Project, *California*, available at <http://www.sentencingproject.org/map/statedata.cfm?abbrev=CA&mapdata=true> (noting the white

Second, California’s prison population comes disproportionately from its cities and metropolitan areas, which are in turn home to California’s communities of color. For example, a large percentage of California’s total population (28%) and its incarcerated population (34%) come from Los Angeles County—which itself is comprised largely of communities of color (LA County is 48% Latino, 13% Asian-American, and 9% African-American).¹⁸ But only 3% of the state’s prison cells are located in Los Angeles.¹⁹ Thus, while prison-based gerrymandering harms democracy for everyone, its effects are felt most acutely by California’s communities of color, whose voting strength is sapped when so many of their members are counted so as to inflate population numbers elsewhere.

Again, former-Attorney General Lundgren’s official opinion is instructive, explaining that counting incarcerated persons as members of the local community during redistricting “would not serve the expressed goals of the Voting Rights Act as set forth in the language itself and in the cases interpreting its requirements.... Claims of minority vote dilution will be especially significant if the prisoner and ward populations are not reflective of the racial and language minority populations of the county as a whole.”²⁰

In sum, prison-based gerrymandering dilutes the political power of minority voters in California and undermines principles of fair representation. By reallocating incarcerated individuals to their home addresses, corrective legislation will equalize the number of true constituents in election districts throughout the state, and thus resolve the long-standing discriminatory effects of prison-based gerrymandering.

The Solution

As courts have recognized, States have the freedom to allocate incarcerated individuals during the redistricting process back to their home communities, and are not required by federal law to use any particular data set.²¹ As I mentioned previously, 10 counties in California already exclude prisoners from the local population base when drawing county commission districts, and

incarceration rate of 460 per 100,000 people, as compared to 2,992 incarcerated African-American persons per 100,000, and 783 incarcerated Latinos per 100,000).

¹⁸ U.S. Census Bureau, *Los Angeles County QuickFacts*, available at <http://quickfacts.census.gov/qfd/states/06/06037.html>.

¹⁹ Prison Policy Initiative, *California 2010 Census Guide*, available at <http://www.prisonersofthecensus.org/50states/CA.html>.

²⁰ Office of the Attorney General, State of California, Opinion No. 91-601, 74 Ops. Cal. Atty. Gen. 162, 1991 WL 495473 at *3 (Cal.A.G. Aug. 23, 1991).

²¹ See, e.g., *Bethel Park v. Stans*, 449 F.2d 575, 583 (3rd Cir. 1971) (“Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature.”).

the Office of the Attorney General has confirmed that doing so “embodies a legitimate state interest of maintaining voting strength among the voters of the various districts.”²²

Moreover, although the California Constitution delegates control of the statewide redistricting process to the independent Citizens Redistricting Commission, AB 420 will not infringe on the Commission’s authority in any way. California Government Code § 8253(b) directs the Legislature to ensure that accurate data is available for redistricting.²³ Consistent with that mandate, AB 420 requires the Department of Corrections to provide the Redistricting Commission with the home address information of California prisoners, and simply requests that the Commission utilize that information in the redistricting process. Because the Commission has no legal authority to compel the Department of Corrections to produce that information, legislation along these lines is the only way to ensure that the Commission has access to this data. In other words, by providing the Commission with information that it would not otherwise have, AB 420 actually increases the discretion of the Commission so that it has the tools necessary to end prison-based gerrymandering in California.

Last year, Delaware, Maryland and New York each enacted legislation ending prison-based gerrymandering in their states.²⁴ Those states are demonstrating that a solution is within the grasp of the California legislature. This is not an expensive measure, with one estimate that it would cost approximately \$25,000 to \$45,000.²⁵ All that remains necessary is the political will to implement this practical, straightforward solution.

Enacting corrective legislation will also give California an opportunity to lead the way in correcting this manifest injustice across the country. Shortly after each Census, the Census Bureau typically conducts a reevaluation of its methods, in order to begin preparations for the next Census. The Bureau has indicated that it is willing to reevaluate its current method of enumerating incarcerated individuals, and has even released special data during this redistricting

²² Office of the Attorney General, State of California, Opinion No. 91-601, 74 Ops. Cal. Atty. Gen. 162, 1991 WL 495473 at *3 (Cal.A.G. Aug. 23, 1991).

²³ See California Government Code § 8253(b) (“The Legislature shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting.”).

²⁴ Delaware HB 384 (“The Act provides that the General Assembly may not count as part of the population in a given district boundary any incarcerated individual who was not a resident of the State prior to the individual’s incarceration. In addition, the Act requires that an individual who was a resident of the State of Delaware prior to incarceration be counted at the individual’s last known residence prior to incarceration, as opposed to at the address of the correctional facility.”); New York part XX of the revenue budget A9710-D (“...For such purposes, no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, as defined in subdivision eight of section two of this chapter, by reason of being subject to the jurisdiction of the department of correctional services and present in a state correctional facility pursuant to such jurisdiction.”); Maryland HB 496 “No Representation Without Population Act of 2010” (“The population count... shall count individuals incarcerated in the state or federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the state.”).

²⁵ See Exhibit A, Letter from Peter Wagner, dated June 14, 2011.

cycle to assist states and localities that seek to end prison-based gerrymandering.²⁶ Legislation along these lines from our largest and arguably most important state would not only serve as a model for other states, it would send a strong signal to the Census Bureau that States are unsatisfied with the Bureau's current methodology of enumerating incarcerated individuals, which, in turn, could lead to nationwide change.

This is no trivial matter. The 2000 Census counted the number of incarcerated persons in the United States at approximately 1.99 million;²⁷ more recent statistics place the number at about 2.3 million.²⁸ These numbers represent an explosion from just a few decades ago. Today, the total incarcerated population of the United States is roughly equal to our fourth-largest city (Houston); it is larger than that of fifteen individual states, and larger than the three smallest states combined.²⁹ If the incarcerated population could form its own state, it would have qualified for five votes in the Electoral College after the 2000 reapportionment.³⁰ Simply put, where incarcerated individuals are counted has tremendous implications on the shape of our democracy. California has a unique opportunity to help lead the way to ending prison-based gerrymandering, and bringing the redistricting process in line with basic principles of fairness and equality. We urge you to enact AB 420.

²⁶ See U.S. Census Bureau, 2010 *Census Advance Group Quarters Summary File*, available at http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html; Robert Groves, Director, U.S. Census Bureau, *So, How Do You Handle Prisons?*, 2010 *Census: The Director's Blog* (March 12, 2010), available at <http://blogs.census.gov/2010census/2010/03/so-how-do-you-handle-prisons.html>; Sam Roberts, *New Option for the States on Inmates in the Census*, *N.Y. Times*, Feb. 11, 2010, at A18, available at <http://www.nytimes.com/2010/02/11/us/politics/11census.html>.

²⁷ See Kimball Jonas, U.S. Census Bureau, *Census 2000 Evaluation E.5, Revision 1: Group Quarters Enumeration* 55 (Aug. 6, 2003).

²⁸ See U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2008*, at 8 (Dec. 2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763> (tabulating the total incarcerated population at 2,304,115).

²⁹ See U.S. Census Bureau, *Statistical Abstract of the United States: 2009*, at 17 tbl.12 (2009), available at <http://www.census.gov/prod/2008pubs/09statab/pop.pdf>; see also David Hamsher, Comment, *Counted Out Twice—Power, Representation, and the “Usual Residence Rule” in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 *J. Crim. L. & Criminology* 299 (2005).

³⁰ See Hamsher, *supra* note 29, at 299 (citing Burt Constable, *Some Arresting Facts About Our Fastest-Growing, Fourth-Largest City*, *Chi. Daily Herald*, June 30, 2001, § 1, at 11).

Exhibit A

Prison Policy Initiative

PO Box 127
Northampton MA 01061

pwagner@prisonpolicy.org
www.prisonpolicy.org

Phone: 413/527-0845

June 14, 2011

Advisory Board*

Andrew Beveridge,
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Queens College
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Criminology,
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Norway
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Attorney
Jon E. Yount, organizer
of *Mixon v. Commonwealth of Pennsylvania*

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identification purposes
only.

Dale Ho
Assistant Counsel
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson St. Suite 1600
New York NY 10013

Dear Dale,

You asked me what it would cost to prepare an adjusted dataset for California to use in redistricting that counted incarcerated people at home. I estimate it would cost \$25,000-\$45,000.

That large range reflects several unknowns, including:

- the number of incarcerated people in the state (I note that the state is under a court order to reduce its prison population)
- the quality of the addresses currently on file with the Department of Corrections and Rehabilitation, and how that quality will improve over the next decade
- the minimum level of "match rate" that the state considers acceptable and/or the minimum efforts that should be taken to increase the match rate. (For the later, I suggest the Maryland Department of Planning's regulations for implementation of their 'No Representation Without Population' Act as a best practice.)
- what demographic information, besides total population, the state wants reflected in the final dataset

As you know, I've been thinking about the technical aspects of reallocating incarcerated people for redistricting purposes for most of this last decade, ever since I wrote the first report about prison-based gerrymandering in New York State in 2002.¹

But you may not know that I have extensive experience with geocoding. The evidence I developed as a witness in *Whitaker v. Perdue* (Northern District of Georgia 4:06-cv-00140-CC) relied on extensive geocoding of addresses. My work in that case involved mapping many tens of thousands of school bus stops across urban, suburban and rural areas of the Georgia. I emphasize this

¹ "Importing Constituents: Prisoners and Political Clout in New York" available at: <http://www.prisonpolicy.org/importing/>

project because the address lists we started with were extremely poor. In most cases, the addresses were missing fields, and in many cases the “addresses” were landmarks like a particular donut shop or “by the mailboxes” at a particular trailer park. I share this anecdote because it illustrates the point that there are some real addresses that can be mapped, even if the software doesn’t recognize them on the first pass.

In my experience, geocoding projects are the least likely to succeed when they are predicated on an assumption that every address will be matched by the computer on the first pass; and geocoding projects tend to be the most successful when the design of the project is built around an appropriate amount of manual work.

In my view, the key to a cost-effective and timely re-allocation of incarcerated people for redistricting purposes is to split the task in to 4 distinct parts:

1. Determining the location, in latitude and longitude, of the alternative addresses of incarcerated people. This is the most labor intensive part of the process, but it can begin as soon as the addresses are provided. Negotiating the scope of the work early as discussed above can greatly keep the costs down.
2. Determining the Census blocks, tracts, etc. that each address is a part of. This should take just a few hours (or less) of computer processing time. This work can begin once the 2020 Census geographies are available, most likely in December 2020 or January 2011.
3. Determining the Census blocks, tracts, etc. that contain correctional facilities. The most cost effective way to do this is to wait until the Census Bureau publishes the Advance Group Quarters Summary File. In this round, it was published at the end of April 2011, and I expect the Bureau will roll this in to the PL94-171 data which is released even earlier. Once this data is available, there would be no more than 2 days work to identify exactly which blocks must be adjusted.
4. Preparing a modified version of the PL94-171 database for redistricting purposes is the final step. This is also a straight-forward process that should take 1 to 3 days of work to design, test and implement.

If the state wishes to proceed with this work, I'd be happy to talk in more detail to narrow down the estimate range. Call anytime: (413) 527-0845.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Wagner', written over the printed name below.

Peter Wagner
Executive Director