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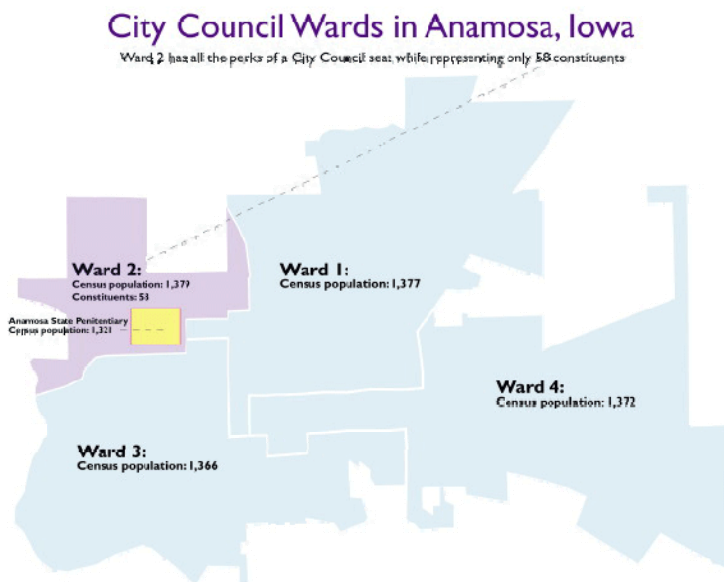
Introduction

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 which initiated the desegregation of our nation's public schools. 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 Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs, to discuss 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. As I'll explain, prison-based gerrymandering contravenes basic principles of fairness and equality in the democratic process.

What Is Prison-Based Gerrymandering?

The easiest way to understand how prison-based gerrymandering distorts our democratic process is to look at a simple, but striking example. 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 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

¹ 347 U.S. 483 (1954).

² See Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y.

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

Unfortunately, prison-based gerrymandering also happens here in Kentucky. For instance, after the 2000 Census, Clay County was counted as having approximately 24,000 residents, and was divided into 6 districts of about 4,000 people each.³ But one district in Clay County – District 2 – was home to over 1,800 prisoners. In other words, over 40% of District 2’s purported “constituents” were actually behind bars. The result: approximately 2,500 people in District 2 were granted the same representation and political power as around 4,000 people in the neighboring districts.

There are other examples. In Oldham County, two separate districts (Districts 2 and 3) were about 30% comprised of incarcerated “constituents.” In Lyon County, two districts (Districts A and C) were around 25% incarcerated. Moreover, with two large prison facilities built in Elliot and McCreary Counties in the last few years, democracy distortion caused by prisons has likely grown only worse.⁴

This problem is also replicated in the state legislature. There are 6 House districts where, of the reported “constituents,” more than 3.5% are behind bars.⁵ The most egregious examples are House Districts 59 and 77, where, respectively, 8.1% and 5.6% of the reported “constituents” are actually prisoners. To be clear, in mentioning these districts, I do not mean to single out the legislators representing these districts—rather, I only intend to note that the lines of these districts can and should be adjusted slightly in order to more accurately reflect the distribution of population through the state. I also note that these districts are represented by Democrats and Republicans alike, illustrating that this is and should be understood as a non-partisan issue.

With respect to state law, prisoners are not legal residents of the communities where they are held. Kentucky Annotated Revised Statute §116.035(2) states that

A voter shall not lose his or her residence by absence for temporary purposes merely; nor shall he or she obtain a residence by being in a county or precinct for such temporary purposes, without the intention of making that county or precinct his or her home.

Thus, state and federal courts in Kentucky have held that “[a] person’s domicile is not changed by his involuntary confinement in a penitentiary or other prison.”⁶ This legal rule comports with common sense: incarcerated individuals do not choose the districts in which they are held, and

Times, Oct. 23, 2008, at A12.

³ See Prison Policy Initiative, Fixing prison-based gerrymandering after the 2010 Census: Kentucky (March 2010), available at <http://www.prisonersofthecensus.org/50states/KY.html>

⁴ See *id.*

⁵ See *id.* These are districts 6, 59, 77, 71, 90, 100. I note that, at present, three of these districts are represented by a Republican, and three by a Democrat, demonstrating the non-partisan nature of this issue.

⁶ See, e.g., *Ferguson v. Ferguson*, 255 Ky. 230, 73 S.W.2d 31 (Ky. App. 1934); *Shaffer v. Tepper*, 127 F.Supp. 892 (D. Ky. 1955).

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.

To be clear, I am not saying that prisoners do not have an effect on the districts where they are held, for instance, with respect to certain needs like roads and utilities. Prisoners are counted, and should continue to be counted for such purposes.

But it seems clear that prisoners should not be treated as residents of the communities where they are held for purposes of allocating political representation. Doing so 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.”⁷ 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 voice should count equally, regardless of where you live. But, thanks to prison-based gerrymandering, your voice counts less if you happen not to live near a prison.

The democracy-distorting effect of prison-based gerrymandering in Kentucky is significant given the substantial growth of the prison population over the previous decade. While Kentucky’s prison population was approximately only 15,000 in 2000, that number grew by approximately one-third over the last decade, to reach 20,000 individuals.⁸ Notwithstanding recent bipartisan efforts to reduce the size of the prison population, it remains relatively large, such that the location at which those populations are counted continues to have a tremendous effect on the shape of democracy in Kentucky.

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.”⁹

⁷ 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 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.”).

⁸ See The Pew Center on the States, *Kentucky: A Data-Driven Effort to Protect Public Safety and Control Corrections Spending*, Oct. 19, 2010, available at http://www.pewcenteronthestates.org/report_detail.aspx?id=61357.

⁹ 42 U.S.C. § 1973(a) (2006).

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.¹⁰

It is indisputable that prison-based gerrymandering dilutes the voice of minority communities in Kentucky. There are substantial racial disparities in incarceration in here, where African Americans comprise about 7% of the state’s population,¹¹ but are over 30% of the state’s prisoners.¹² Overall, African Americans are incarcerated at nearly 5 times the rate of whites.¹³ Regardless of the cause of that disparity, one thing is clear: while prison-based gerrymandering harms democracy for everyone, its effects are felt most acutely by Kentucky’s African-American community, whose voting strength is sapped when so many of their members are counted so as to inflate population numbers elsewhere.

Prison-based gerrymandering also results in an inaccurate demographic picture of many counties in Kentucky. To take one example, the 2000 Census reported that Morgan County had a total population of 13,948 people. 1,664 of those people—or 12%—were actually incarcerated. Looking more closely reveals that the Census Bureau counted 611 African Americans as residents of Moore County. But 593 of those individuals—or 96%—were actually behind bars. All told, Moore County had only 18 true African-American residents.¹⁴ Under these circumstances, it hardly makes sense to regard Moore County as having a community of several hundred African-American residents. Reallocating incarcerated individuals to their home addresses will not only equalize the number of true constituents in election districts throughout the state, it will help resolve the distortions in our demographic data caused by 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.¹⁵ Indeed, Boyle County already refuses to treat prisoners as

¹⁰ See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1241 (2009).

¹¹ See U.S. Census Bureau, *State and County QuickFacts: Kentucky*, available at <http://quickfacts.census.gov/qfd/states/21000.html>.

¹² See Kentucky Department of Corrections, *Sourcebook of Criminal Justice Statistics in the Commonwealth* 86 (2008), available at <http://www.corrections.ky.gov/NR/rdonlyres/E5CF00CD-BB63-4F19-B080-0056605E3B0B/0/KYSourcebook2008FINAL.pdf>.

¹³ See Sentencing Project, *Kentucky*, available at <http://www.sentencingproject.org/map/statedata.cfm?abbrev=KY&mapdata=true> (noting that the white incarceration rate is 561 per 100,000 people, while the Black incarceration rate is 2,793 per 100,000).

¹⁴ See Prison Policy Initiative, *Too Big Too Ignore: Morgan County, Kentucky*, available at <http://www.prisonersofthecensus.org/toobig/countydetail/05000US21175/>.

¹⁵ 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.”).

members of the local community for redistricting purposes, a solution that can work equally well for the state as a whole.

Last year, Delaware, Maryland and New York each enacted legislation ending prison-based gerrymandering in their states.¹⁶ Those states are demonstrating that a solution is within the grasp of the Kentucky legislature. All that remains necessary is the political will to implement this practical, straightforward solution.

This is no trivial matter. The 2000 Census counted the number of incarcerated persons in the United States at approximately 1.99 million;¹⁷ more recent statistics place the number at about 2.3 million.¹⁸ 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.¹⁹ If the incarcerated population could form its own state, it would have qualified for five votes in the Electoral College after the 2000 reapportionment.²⁰ Simply put, where incarcerated individuals are counted has tremendous implications on the shape of our democracy.

¹⁶ 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.”).

¹⁷ See Kimball Jonas, U.S. Census Bureau, *Census 2000 Evaluation E.5, Revision 1: Group Quarters Enumeration* 55 (Aug. 6, 2003).

¹⁸ 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).

¹⁹ 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).

²⁰ See Hamsher, *supra* note 19, at 299 (citing Burt Constable, *Some Arresting Facts About Our Fastest-Growing, Fourth-Largest City*, *Chi. Daily Herald*, June 30, 2001, § 1, at 11).