

COMMISSION AUTHORITY AS TO PRISON INMATE REALLOCATION

At the hearing of November 8, 2021, Senator Walter S. Felag Jr. questioned whether the Reapportionment Commission has the legal authority to reallocate prison inmates in the reapportionment plan it will submit to the General Assembly. The answer is no. Proposing a reapportionment plan to the General Assembly that relies on data that does not come from the U.S. Census would be contrary to the Reapportionment Commission's enabling statutory authority.

In its enabling statute, "the purpose and responsibility" of the Reapportionment Commission is to "draft and to report to the general assembly an act to reapportion the districts of the general assembly and the state's United States congressional districts ... subject to the final 2020 census data provided by the United States Census Bureau."¹ It does not say to draft reapportionment legislation subject to the final 2020 census data provided by the United States Census Bureau and the Department of Corrections. It does not say to draft reapportionment legislation subject to the final 2020 census data provided by the United States Census Bureau, which may be adjusted, or modified by the Reapportionment Commission.

In order for the Reapportionment Commission to reallocate prison inmates, it needs data from some other entity than the United States Census Bureau. Not only is the data regarding the pre-incarceration address of prison inmates unreliable,² its use is not permitted by the enabling statute. While admitting that "the Census Bureau itself counted prisoners at their housed correctional facility," the ACLU and its allies cite a statement from the U.S. Census stating it recognizes that some states reallocate prison inmates, students, and military personnel in redistricting.³ This is not significant. In order to reallocate prison inmates, the Reapportionment Commission needs data the U.S. Census Bureau does not have, and would depart from data the U.S. Census does have.

Also, the enabling statute requires congressional and state legislative districts to only vary in population by a certain percentage "as determined by the population reported in the federal census in 2020."⁴ It does not say districts can vary in population as determined by the population reported in the federal census in 2020, subject to adjustment by the Reapportionment Commission. In 2012, Massachusetts did not reallocate prison inmates because the Massachusetts State Constitution requires that the federal census "be the basis" for districts.⁵ Similarly, the enabling statute of the Reapportionment Commission specifies that the population of districts are "determined by the population reported in the federal census in 2020." Therefore, any reapportionment plan the Reapportionment Commission submits to General Assembly must be based only on the "final 2020 census data provided by the United States Census Bureau" and the population of the districts must

¹ 2021 P.L. c. 176, and 177, Section 1(b).

² In the past, when Kimball Brace has sought the last known address of prison inmates in Cranston, the Department of Corrections provided the information but stated: "There is no confirmation data to show if that is in fact a legal address, a relative or friend's address, a part time address or simply a mailing address." Declaration of Kimball W. Brace, para. 34 (quoting the R.I. Department of Corrections), Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).

³ ACLU, Prison Policy Initiative and Common Cause RI Comments (11/10/21).

⁴ 2021 P.L. c. 176, and 177, Section 2(c) (1) and (2).

⁵ See Massachusetts State Constitution, Article CI.

be “determined by the population reported in the federal census in 2020,” otherwise the Reapportionment Commission has exceeded its statutory authority.⁶

The ACLU and its allies also argue that the Reapportionment Commission can give recommendations to the General Assembly on prison inmate reallocation because its enabling statute refers to “its findings and recommendations.” This is inaccurate. The word “recommendations” in Section 3(c) and Section 4 should be read consistently with “the purpose and responsibility” of the Reapportionment Commission provided in Section 1(b) of the statute. The recommendations the General Assembly has sought from the Reapportionment Commission is recommended reapportionment legislation for state legislative and congressional districts. The General Assembly did not request recommendations from the Reapportionment Commission pertaining to any or all issues which affect or are affected by reapportionment such as the reallocation of prison inmates and college students or the voter cap for precincts.⁷ When the General Assembly creates a study commission to making recommendations related to elections, it can be rather specific as to the recommendations it is seeking.⁸ Nowhere in the its enabling authority does the General Assembly state it wants the Reapportionment Commission’s advice on the prison inmate reallocation.

Even if the Reapportionment Commission had the authority to recommend a reapportionment plan that reallocated prison inmates, it should not do so. For years, the General Assembly has had the opportunity to enact legislation to reallocate prison inmates for redistricting. It has decided not to do adopt this policy.⁹ It would be rather illogical for a commission of legislative appointees to recommend a plan for the General Assembly’s adoption which incorporates a policy that the General Assembly refused to adopt just a few months earlier. The ACLU and its allies may be attempting to pressure the General Assembly to reallocate prison inmates by having the Reapportionment Commission take on the authority to recommend a plan which reallocates prison inmates. The ACLU and its allies may hope that due to the time constraints associated with creating a new reapportionment plan which actually follows the U.S. Census, the General Assembly will simply give in and change its policy on how prison inmates are counted for reapportionment. This is not the right way to change state policy. In nearly every state that has changed its policy and decided to reallocated prison inmates for redistricting, the decision was

⁶ Although how much a Rhode Island reapportionment plan can deviate from the U.S. Census under the state constitution has not been adjudicated, the U.S. First Circuit Court of Appeals opined on Rhode Island’s state constitutional reapportionment provisions in 2016. The Court stated: “As mandated by the [Cranston] city charter, which mirrors the total-population apportionment required by Rhode Island’s constitution, the [Cranston ward] Redistricting Plan is based on total population from the Census.” Davidson v. City of Cranston, 837 F.3d, 135, 144. (1st Cir. 2016). In other words, Cranston must count prison inmates in its ward redistricting plan. Id. Under the Cranston City Charter, wards must be “as nearly as possible an equal number of inhabitants as determined by the most recent federal decennial census.” Cranston City Charter Section 2.03(b). Under the Rhode Island State Constitution, “districts shall be as nearly equal in population ... after any new census taken by authority of the United States.” R.I. State Constitution Articles VII, and VIII.

⁷ In response to a letter from the Cranston Board of Canvassers, members of the Reapportionment Commission at the September 23, 2021 hearing indicated the Commission should not make a recommendation regarding increasing the voter cap per precinct.

⁸ See R.I.G.L. Section 27-29-3 related to rank choice voting.

⁹ For example, earlier this year, H5285 and S334 was introduced and held for further study by the House State Government & Elections Committee, and the Senate Judiciary Committee.

made by the state legislature, not an appointed commission.¹⁰ In Pennsylvania, the policy of reallocating prison inmates was made a commission. However, this does not appear to be going smoothly. According to a news report, the Pennsylvania state legislature may ignore the commission's decision and instead follow the U.S. Census.¹¹

It is truly unfortunate that advocates for reallocating prison inmates claim that by following the U.S. Census, Rhode Island is engaging in gerrymandering or a racist practice.¹² Facts should matter. Adherence to the U.S. Census approach for counting prison inmates over the past century was not done to favor a particular candidate or a political party. The U.S. First Circuit Court of Appeals would never have ruled that the inclusion of prison inmates in Cranston's ward redistricting plan was constitutional if in fact it was a racist practice. Although in some other states a form of malapportionment occurs when prison inmates make up about a majority of a district's population, this is not occurring in Rhode Island. In fact, the districts which include the prison population have more active registered voters than other districts in this state.¹³

Some of those alleging prison gerrymandering are only doing so for partisan advantage. It is noticeable that advocates for reallocating prison inmates seemingly never mention the Wyatt Detention Center in Central Falls. Furthermore, according to Kimball Brace, "the concept of shifting the population of the prisons back to their original home ... became popular among Democratic party officials ... the theory proposed was to bring more Democratic seats to Congress and the state legislature if the population could be shifted back to where the prisoners originally came from."¹⁴

If this Reapportionment Commission decides to exceed its statutory authority, and proposes a plan that reallocates prison inmates, which is ultimately approved by the General Assembly, you will see little impact on Democratic urban representation in the General Assembly. There are simply too few prison inmates to reallocate in Rhode Island to have much of an impact. However, you may see litigation, efforts to reallocate or exclude other groups from the reapportionment, and certainly acrimony between Cranston and other municipalities over who will pay the cost of providing local services for prison inmates living in Cranston.

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¹⁰ In New York, the reallocation of prison inmate is by statute. New York voters rejected a constitutional amendment to require prison reallocation by a margin of 56 to 44 percent this November 2021.

¹¹ "Pa. reformed 'prison gerrymandering,' but it likely won't matter in congressional maps" (WHYY 10/1/2021) <https://whyy.org/articles/pa-reformed-prison-gerrymandering-but-it-likely-wont-matter-in-congressional-maps/>

¹² See Rep. Felix's statement (10/25/21).

¹³ For example, House District 15 has 10,287 active registered voters and cast 8,285 votes for president in 2020, while House District 61 has 8,687 active registered voters and cast 5,769 votes for president in 2020.

¹⁴ Declaration of Kimball W. Brace, para. 11, Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).