

Prison-based Gerrymandering in Virginia

by Karen Kimball, member of the League of Women Voters of Arlington, Virginia

Some legislative districts in Virginia are skewed by prison-based gerrymandering. And, under current Virginia law, that is perfectly legal.

Prison-based gerrymandering is the practice of counting prisoner populations in the district where they are incarcerated rather than as residents of their home districts. Incarcerated persons of course cannot vote. The result is the artificial inflation and overrepresentation of the population in all districts containing significant prison populations and, conversely, the underrepresentation of populations in all other districts, including prisoner home districts. At issue is whether all voters have the right to fair and equal representation.

Virginia's Constitution provides that every electoral district for members of the Senate and of the House of Delegates in the General Assembly “shall be so constituted as to give, as nearly as practicable, representation in proportion to the population of the district.” Va. CONST. art. II, § 6.

Under Virginia law, the General Assembly must “reapportion the Commonwealth into electoral districts . . . in the year 2011 and every ten years thereafter.” Va. CONST. art. II, § 6. Thus, Virginia redistricting won't take place again until 2021.

The Census Bureau published prison population data in time for redistricting in 2011 so that states and local governments could identify prison population numbers in their districts. However, states and local governments must still take the initiative to ensure that prisoners are identified with their home districts rather than in the place of their incarceration. The state of Virginia, along with eighteen counties and one Virginia City, has not done that. As a result, incarcerated populations in those areas are treated as if they are part of the residential population.

Prior to 2002, Virginia law actually required local governments to redistrict based upon identical numbers from the census data which count incarcerated people as if they were residents of the prison location. In 2002, Virginia amended VA. CODE § 24.2-304.1 (C.) to permit any governing body to exclude prison populations when redistricting only if such populations exceeded 12 percent of the total population of any county, city, or town. However, this was not a directive to do so; individual counties could if they chose to.

On March 20, 2013, the Virginia legislature amended VA. CODE § 24.2-304.1.(C.), removing any reference to an inmate population percentage as a threshold requirement for excluding prison population at the place of incarceration. Under VA. CODE § 24.2-304.1.(C.), for purposes of decennial reapportionment and redistricting, any county, city, or town governing body *may elect* to exclude the incarcerated population figures of any federal, state, or regional adult correctional facility in the locality of that facility. But, again, the option to exclude prisoner counts is still permissive only. See attached VA. CODE § 24.2-304.1.

The greatest impact of prison-based gerrymandering is on county and municipal elections in locations where prisons are located. Presently, 18 Virginia counties and one city engage in prison-based gerrymandering. Those 18 counties are Augusta, Bland, Buchanan, Buckingham, Culpeper, Fluvanna, Goochland, Lunenburg, Mecklenburg, New Kent, Nottoway, Powhatan, Prince Edward, Pulaski, Scott, Southampton, Tazewell, and Wise, and Suffolk City.

Below is a table showing the result in these counties and municipalities which continue to use data that count incarcerated people as if they were residents of the prison location for purposes of reapportionment and redistricting. The impact in those districts varies widely and significantly. Districts in seven counties have incarcerated prisoners that represent 25 percent or more of their respective populations. Prisoners in one district in Southampton County account for 51 percent of that district's population and the prisoner population in one of Lunenburg County's districts is a whopping 67 percent of its population count.

County or City	Total Population as reported by the 2010 Census	Incarcerated Population as reported by the 2010 Census	Prison population makes up this percentage of a city or county district (e.g. Board of Supervisors district)
Augusta County	73,750	2,138	12%
Bland County	6,824	637	36%
Buchanan County	24,098	839	13%
Buckingham County	17,146	2,173	45%
Culpeper County	46,689	1,263	18%
Fluvanna County	25,691	1,218	23%
Goochland County	21,717	1,276	30%
Lunenburg County	12,914	1,173	67%
Mecklenburg County	32,727	1,310	23%
New Kent County	18,429	447	12%
Nottoway County	15,853	1,371	42%
Powhatan County	28,046	2,021	22%
Prince Edward County	23,368	725	25%
Pulaski County	34,872	691	10%
Scott County	23,177	450	11%
Southampton County	18,570	1,464	51%
Tazewell County	45,078	1,023	11%
Wise County	41,452	2,017	11%
Suffolk city	84,585	762	6%

Source: Analysis by Prison Policy Initiative for League of Women Voters of Virginia

California, Delaware, Maryland and New York have all passed legislation ending prison-based gerrymandering. The Maryland and New York laws have been challenged in court and been upheld. In Maryland, the “No Representation without Population Act” of 2010 was upheld by a three-judge panel in the United States District Court in Maryland and affirmed by memorandum opinion at the United States Supreme Court. Fletcher, et al. v. Lamone, et al., 831 F. Supp.2d

887 (D. Md. 2011), *aff'd mem.*, 567 U.S. ____, 133 S.Ct. 29, 183 L.Ed.2d ____, 2012 WL 1030482 (June 25, 2012). The full Maryland court opinion is attached.

Maryland law now requires the state to determine the home addresses of incarcerated prisoners and assign them to their home addresses prior to redistricting. Inmates in state or federal legislative districts are counted as residents of their last known residence before incarceration. Those who are not Maryland residents prior to incarceration are excluded from the population count; prisoners whose last known address cannot be determined are counted as residents of the district where their facility is located. See attached Maryland's No Representation without Population Act, 2010 Md. Laws, ch. 67, codified at Md. Code Ann., Art. 24 § 1-111, Election Law § 8-701. Missing from the Maryland law is any indication of which specific agency would be responsible for obtaining data about the legal residence of prisoners from the Department of Corrections and adjusting the census data to assign those prisoners to their home districts instead of counting them in districts where they are incarcerated.

Under United States Supreme Court case law, as nearly as practicable, one man's vote is to be worth as much as another's. The "as nearly as practicable" standard requires states to make a good-faith effort to achieve precise mathematical equality." Fletcher v. Lamone, 831 F. Supp. 2d, 887, 894 (2011), citing Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

A key consideration is whether a population in a given legislative district has a substantial connection to, and effect on, the communities where people reside. Fletcher at 896. An incarcerated population, though residing in an area, does not have that connection and effect on those communities and, thus, does not have shared interests with it.

As the Fletcher decision concludes, states are to use the census data as a starting point; they may modify that data to correct perceived flaws. However, "it may not do so in a haphazard, inconsistent, or conjectural manner," citing Karcher v. Daggett, 462 U.S. 725, 732 n. 4 (1983).

What could be more haphazard, inconsistent, or conjectural than counting the incarcerated population who are not legal residents of districts where they are imprisoned. Additionally, the numbers of incarcerated vary from district to district, with some having a greater impact in some areas on representation than others. Counting the incarcerated as if they have a connection with or shared interests with community concerns effectively gives legislative weight to a population that is not eligible to vote and undermines the Constitutional right to fair and equal representation.

After the decision in Fletcher, legislators now can confidently enact a law similar to Maryland's, counting prison inmates at their pre-incarceration addresses instead of where they are incarcerated. Isn't it time Virginia does that also?