Prison Policy Initiative

Dēmos

June 11, 2009

Commissioner Susan A. Gendron
Maine Department of Education
23 State House Station
Augusta, ME 04333-0023

Dear Commissioner Gendron,

We are writing as representatives of two voting rights organizations to urge you to declare the apportionment of Regional School Unit 13 in violation of the principles of one person one vote and to order a new apportionment. We are writing to share our relevant experience and to urge you to declare, under your own authority granted by 20A § 1255 (1)(C), the apportionment in violation of the principles of one person one vote.

We understand that this issue has been brought to your attention before by school board member Josiah Wilson, and by the board as a whole. We believe that your department's conclusion that the prison populations did not cause impermissible vote dilution was based on an incorrect method of calculating vote dilution. We urge you to revisit this issue.

As you know, the Regional School Unit 13 apportionment is a system of weighted votes, where each town is given a number of votes in proportion to its population. However, the apportionment was conducted with Census data that did not reflect the actual population. The Regional School Unit based its apportionment on Census Bureau estimates for 2006 that credited the town of Thomaston with the population of the Maine State Prison that had closed 4 years prior.[1]

As argued in *Phantom Constituents in Maine's Regional School Unit 13: How the Census Bureau's Outdated Method of Counting Prisoners Harms Democracy*,[2] basing the weighted voting system on Census counts of prisoners at the now-closed Maine State Prison in Thomaston gives the actual residents of Thomaston an enhanced say over school board affairs.

---

[1] Further, even if the prison was still located in Thomaston, Maine state law prohibits considering incarcerated people as residents of the prison town: "a person does not gain or lose a residence solely because of the person's presence or absence … while kept in any institution at public expense." 21-A M.R.S. § 112 (2008).

[2] Peter Wagner, *Phantom Constituents in Maine's Regional School Unit 13: How the Census Bureau's Outdated Method of Counting Prisoners Harms Democracy*, Prison Policy Initiative, January 15, 2009, available at http://www.prisonersofthecensus.org/maine/

By padding Thomaston's actual resident population with the non-resident prison population, the current weighted voting system gives every group of 10 residents of Thomaston the same power over school district decisions as each group of 11 residents in the other towns.

Under *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny, districts must be apportioned on the basis of population with only a small permissible deviation to protect other legitimate state interests. The rule that has emerged from subsequent Supreme Court decisions on allowable population deviations for state or local legislative districts is that total deviations of over 10% (resulting when individual districts in a plan are more than 5% above or below ideal population size) create a *prima facie* case of unconstitutionality and cannot withstand judicial scrutiny absent unusual justifications. *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983). To fit within this rule, each district should be no more than 5% above or 5% below ideal population, because the deviations of the largest and smallest district are added to determine the maximum or total deviation of the plan. Barring a showing of an improper motive, individual district deviations of up to 5% from exact equality are presumed to be constitutional. *White* v. *Regester*, 412 U. S. 755 (1973). But in some cases, even deviations below that level have led to invalidation of the legislative plan. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (striking down legislative plan with less than 10% total population deviation), *aff'd mem*., 542 U.S. 947 (2004).

The principle that no individual district should be more than 5% above or below ideal population size is echoed in 20-A MRSA Section 1472(2)(C):

> A plan may not permit the voting power of any director to exceed by more than 5% the percentage of voting power the director would have if all 1,000 votes were apportioned equally among the directors.

As you know, the RSU 13 government structure consists of a multimember weighted voting system as shown in this table:

Town	Directors	Votes per director from that town
Cushing	1	67
Owls Head	1	88
Rockland	5	80
South Thomaston	1	81
St. George	2	72
Thomaston	3	73

The following table analyzes the distribution of voting power in the current apportionment and compares it against the distribution of population from the 2007 Census Estimates. (The Census Bureau noticed its previous error and did not include the Maine State Prison in Thomaston in the 2007 estimates.) We found that crediting the prison population to Thomaston reduces the weight of a vote in every other town by 1.69% to 3.24%, and enhances the weight of a vote in Thomaston

by 8.96% over its ideal weight. Combined, this vote enhancement and vote dilution exceeds constitutional limits:

	2007 Census Bureau estimates (prison was not counted in 2007)	Percentage of RSU 13 in each town, 2007	Number of Members (per plan submitted Aug 20, 2008)	Votes per member (per plan submitted Aug 20, 2008)	Total Votes per town (per plan submitted Aug 20, 2008)	% of total votes allocated to town by August 20, 2008 plan	Deviation from exactly equal distribution of votes
Cushing	1,253	6.86%	1	67	67	6.71%	-2.23%
Owls Head	1,637	8.96%	1	88	88	8.81%	-1.69%
Rockland	7,480	40.95%	5	80	400	40.04%	-2.22%
St. George	2,692	14.74%	2	72	144	14.41%	-2.21%
S. Thomaston	1,531	8.38%	1	81	81	8.11%	-3.24%
Thomaston	3,675	20.12%	3	73	219	21.92%	8.96%
Total	18,268				999		

The almost 9% deviation in Thomaston is significantly more than the 5% deviation allowed by Supreme Court decisions for a single district, and the combined deviation of 12.2% between Thomaston and South Thomaston is also larger than the maximum deviation allowed by controlling precedents.

To be sure, the rule emerging from cases such as *Regester* and *Brown* only concerns how large a deviation must be from strict population equality before it is *presumed* to be unconstitutional. Districts can be held unconstitutional if the district deviations are smaller than 5% if there is other evidence that discriminatory effect was intended. *See Larios v. Cox, supra.* And the Supreme Court has approved districts with combined deviations larger than 10%, but only upon a showing that legitimate state interests required such a large deviation. For example, the Supreme Court upheld a presumptively unconstitutional 16.4% combined deviation in *Mahan v. Howell*, 410 U.S. 315 (1973), but only because of Virginia's settled practice of not splitting counties or cities between districts.[3]

By contrast, the RSU 13 governance structure is a weighted voting system that is considerably more flexible than the districting system that produced one too-small district and one-too large district in Virginia 30 years ago. The vote totals could simply be adjusted to eliminate the extremely large and unwarranted enhancement that it is being given to just one RSU 13 town.

To restate, the general rule is that a district plan with a combined deviation under 10% is presumed to be constitutional, but the 12.2% deviation in the RSU 13 apportionment is outside of those limits.

---

[3] Further, the drawing of districts in Virginia are complicated by the presence of the Delmarva Peninsula which contains two counties but is separated by the Chesapeake Bay from the rest of the state.

Previous reviews have relied on an incorrect method of calculation

As recently as June 4, Suzan Beaudoin in your department wrote to the RSU 13 board that reapportionment was not required because a change from the 2006 to 2007 Census would result only in a change of 1.9% in the voting power assigned to Thomaston. She wrote that reapportionment was not required because she found a change of less than 5%. We believe this calculation and conclusion to be in error.

We think it would be helpful to explain why our calculations and conclusions differ from those of Ms. Beaudoin. Ms. Beaudoin calculated the population of each town as a percentage of the school unit for both the 2006 Census (with the prison) and the 2007 Census (without the prison). She found that by either data source, Thomaston was about 20% or 22% of the total population of the Regional School Unit. Because the absolute difference between the two Census years reflected a change of less than 2% of the total population in the school unit, she argued that the reapportionment was not required.

We believe that Ms. Beaudoin erred by comparing the two population figures instead of looking, as we do above, at whether "the vote of any citizen is approximately equal in weight to that of any other citizen," Reynolds v. Sims, 377 U.S. at 579, in order to provide "fair and effective representation for all citizens," id. at 565-566. Determining if a voting system complies with the requirements of one person one vote requires a comparison of the *actual* voting power of individual residents to the voting power that they should *ideally* have if the apportionment was fairly done.

The correct calculation is the one we used in the table above, where we first calculated the excess voting power held by Thomaston, (21.92% - 20.12% = 1.8%) and then divided this figure by the voting power it should exercise (1.8% / 20.12% = 8.95%).[4]

Ms. Beaudoin is correct that the removal of the Maine State Prison — and other small updates caused by moving from the 2006 Census to the 2007 Census — appear to be small changes. But *Reynolds v. Sims* requires voting systems to be reviewed from the perspective of the voting power due individual residents. And from that perspective, these apparently small differences are larger than those allowed by the principles of one person one vote.

---

[4] Note the Supreme Court's focus on comparing actual districts to the ideal district in *White v. Regester*, 712 U.S. at 758 (1973):

> "The reapportionment plan for the Texas House of Representatives provides for 150 representatives..... [Because the total state population is 11,196,750, the] ideal district is 74,645 persons. The districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between the largest and smallest district is thus 9.9%."

Remedy

The appropriate remedy would be for the RSU 13 board to reapportion itself based on data that does not include the Maine State Prison, for example, based on the 2007 Census Bureau estimates which correctly do not include the prison:

Town	Population	Directors	Votes per director	Director votes per town	Deviation from ideal distribution
Cushing	1,253	1	69	69	0.38%
Owls Head	1,637	1	90	90	0.25%
Rockland	7,480	5	82	410	-0.08%
St. George	2,692	2	74	148	0.21%
South Thomaston	1,531	1	84	84	0.04%
Thomaston	3,675	3	67	201	-0.30%
TOTALS/AVG	18,268	13	1,002		

But this effort could not proceed without you first declaring the current districts in violation of the one person one vote principle. Maine statute 20A § 1255 describes the three ways that an apportionment may be declared to be in violation of the one person one vote principle:

> 1. Duties of the commissioner. The commissioner shall determine if a district is apportioned in accordance with the principles of one man, one vote, if:
>
> > A. The commissioner receives a request by the board of directors;
> >
> > B. The commissioner receives a petition signed by district voters equal to at least 10% of the voters who voted in the last gubernatorial election in the district; or
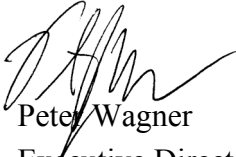> >
> > C. The commissioner determines a district is not apportioned according to the principles of one man, one vote.

We therefore urge you to declare the apportionment of Regional School Unit 13 in violation of the principles of one person one vote, on your own authority as provided by 20A § 1255 (1)(C).

We thank you for your time reading this letter and would be happy to answer any questions you may have.

Sincerely,

s/n   s/n
Aleks Kajstura   Peter Wagner   Brenda Wright
President,   Executive Director,   Director, Democracy Program,
Prison Policy Initiative Prison Policy Initiative Dēmos: A Network for Ideas & Action
PO Box 127   (413) 527-0845   (617) 232-5885 ext. 13
Northampton MA 01061   PO Box 127   358 Chestnut Hill Avenue, Suite 303
                                   Northampton MA 01061 Brighton, Massachusetts 02135