



Montana Districting and Apportionment Commission

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'TO: Districting and Apportionment Commission

FROM: K. Virginia Aldrich, Staff Attorney

RE: Representation of the Districting and Apportionment Commission

DATE: July 30, 2021

This memorandum was prepared at the direction of the Districting and Apportionment Commission (Commission) as background information, and it does not represent any opinion or action on the part of the Commission.

I. Montana Law Likely Does Not Prohibit the Commission from Reallocating Prisoners

A. Introduction

For the decennial census, the Census Bureau counts incarcerated individuals as residents of their prison location.¹ The Census Bureau's reasoning for this position was explained by the New York Supreme Court in a case concerning whether a New York statute violated the New York Constitution by requiring that inmates be counted for reapportionment purposes in their last known residence prior to imprisonment rather than in the location of their assigned correctional facility. In that case, the court discussed a 2006 Census report pertaining to this method of counting prisoners:

the Census Bureau found that, at that time, it would be highly difficult to determine precise numbers of persons in each state "for apportionment purposes" unless prisoners were counted in their place of incarceration. Despite the inherent difficulty in ascertaining consistent prisoner data, the Census Bureau recognized that Congress had required that prisoners be counted at their "permanent home of record," a term which was not clearly defined. The 2006 Census Bureau report concluded that counting inmates in the manner recommended by Congress would likely increase census-related costs and would burden correctional facilities that would be required to collect such data.²

A three-judge federal district court panel in Maryland similarly explained, "The conclusion that States may adjust census data during the redistricting process is . . . consistent with the practices of the Census

¹ 83 Fed. Reg. 5525 (Feb. 2, 2018).

² [Little v. N.Y. St. Task Force on Demographic Research and Reapportionment, No. 2310-2011, slip op. \(N.Y. Sup Ct. Dec. 1, 2011\)](#). See also, "[Tabulating Prisoners at Their 'Permanent Home of Record' Address](#)", U.S. Census Bureau. Feb. 21, 2006.

Bureau itself. According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones."³

Despite the difficulties noted by the Census in the 2006 report, some states have assumed the responsibility for adjusting the location of prisoners within their statewide population for redistricting purposes and have successfully survived legal challenges related to these adjustments. Specifically, Maryland adjusted its 2010 Census data for congressional districts by reallocating prisoners from their place of incarceration to their last-known residence before incarceration.⁴ A three-judge federal district court panel rejected the plaintiff's claim that adjustments made under Maryland's law to correct for the "distortional effects of the Census Bureau's practice of counting prisoners as residents of their place of incarceration" resulted in malapportionment in violation of Article I, section 2, of the United States Constitution.⁵ The decision was affirmed without comment by the United States Supreme Court.⁶ States have also adjusted state legislative district data by reallocating prisoners. In the last cycle, both New York⁷ and Maryland adjusted their legislative data to reallocate prisoners. In addition, several additional states have passed laws to reallocate prisoners during the 2020 cycle.⁸

B. The Montana Constitution

The Montana Constitution provides the basis for the Districting and Apportionment Commission's power and authority, and it prescribes the process for districting and apportionment. Article V, section 14, provides:

Section 14. Districting and apportionment. (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

(2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative districts and a plan for redistricting the state into congressional districts . . .

(3) Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.

(4) The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to

³ *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 895 (D. Md. 2011), 893, aff'd, 133 S. Ct. 29 (2012).

⁴ *Id.*

⁵ *Id.* The Maryland Act required that state and federal prison inmates in Maryland were to be counted as residents of their last known residence before incarceration. Prisoners who were not Maryland residents prior to incarceration were excluded from the population count, and prisoners whose last known address could not be determined were counted as residents of the district where their facility was located. *Fletcher*, 831 F. Supp. 2d at 893.

⁶ *Fletcher*, 831 F. Supp. 2d 887 (D. Md. 2011), 893, aff'd, 133 S. Ct. 29 (2012).

⁷ The New York law withstood a legal challenge brought under the New York Constitution. *Little v. N.Y. St. Task Force on Demographic Research and Reapportionment*, No. 2310-2011, slip op. (N.Y. Sup Ct. Dec. 1, 2011).

⁸ "Reallocating Incarcerated Persons for Redistricting," National Conference of State Legislatures, <https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx>.

the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.

(5) Upon filing both plans, the commission is then dissolved.

Although the Constitution specifies that "[a]ll districts shall be as nearly equal in population as is practicable," the Constitution does not discuss whether or not federal census data can be corrected for perceived flaws. While interpreting this section in a case concerning the allocation of holdover senators, the Montana Supreme Court noted that "Article V, Section 14's mandate that the Commission effect redistricting is self-executing" ⁹ In other words, it can be given effect without the aid of other instruments or intervening action. If the section is self-executing, it follows that the Commission likely has the authority to provide for details of the plan, such as whether adjustments to federal census data are necessary in order to create districts using the "best" available census data.

C. Statutory Law

The Commission establishes legislative and congressional districts. Its work does not affect funding formulas or other legislative provisions that fall outside the scope of the Commission's authority. For instance, a "resort community" allowed to impose a resort area tax is defined as, among other requirements, a population of an incorporated municipality of "less than 5,500 according to the most recent federal census." ¹⁰ Likewise, the composition of an interlocal cooperation commission must be made up by certain members from the principal city of a county as determined by the city "having the largest population in the county . . . according to the latest federal decennial census." ¹¹ Certain library funds are distributed on a per capita basis using a funding formula that multiplies "the total number of residents of the state as determined by the most recent decennial census of the population produced by the U.S. bureau of the census." ¹² These statutes demonstrate instances in which the Legislature has explicitly stated how census numbers are to be used. However, none of these provisions implicate the creation of legislative or congressional districts, and none of these provisions would be impacted by prisoner reallocations for the purpose of establishing those districts.

The only statute that implicates the federal decennial census with respect to the creation of legislative districts is 5-1-115, MCA, which provides, in part, "[t]he districts must be as equal as practicable, meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census" Although that portion of the statute has been declared void by a district court, ¹³ the wording does not prohibit adjustment of census data. Further, it does not specify that the equality of districts must be calculated from unaltered census block population data.

In any event, statutory prohibitions concerning the sphere of the Commission's work in formulating the plan raise potential constitutional questions about whether the Legislature can dictate details of the

⁹ *Wheat v. Brown*, 2004 MT 33, ¶35. Likewise, in *Wheat*, the Court also cited an Attorney General's opinion that stated that the Commission had the "'inherent authority' to resolve 'details'" (e.g., allocating holdover senators).

¹⁰ Section 7-6-1501, MCA.

¹¹ Section 7-11-203, MCA.

¹² Section 22-1-327, MCA.

¹³ For a discussion of this statute, please see pp. 11-14 of the May 31, 2020, legal memorandum.

plan.¹⁴ Nevertheless, in deliberating its policy options, the Commission should be aware of statutes that reflect the will of the Legislature.

Although the Legislature does not set policy for the federal census or determine the residence of individuals for the purposes of the federal census, for general purposes of Montana law, the Legislature has provided a statute relating to the residence of each individual:

1-1-215. Residence — rules for determining. Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:

(1) It is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

(2) There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.

(3) A residence cannot be lost until another is gained.

(4) The residence of an unmarried minor is:

(a) the residence of the minor's parents;

(b) if one of the parents is deceased or the parents do not share the same residence, the residence of the parent having legal custody;

(c) if neither parent has legal custody, the residence of the legal guardian or custodian appointed by a court of competent jurisdiction; or

(d) if the conditions in 20-5-502 are met, the residence of the caretaker relative.

(5) In the case of a controversy, the district court has jurisdiction over which residence is the residence of an unmarried minor.

(6) Except as provided in Title 20, chapter 5, part 5, and this section, the residence of an unmarried minor who has a parent living cannot be changed by either the minor's own act or an act of the minor's guardian.

(7) The residence can be changed only by the union of act and intent.

Unfortunately, this statute does not deal directly with the residence of incarcerated individuals. However, it does specify that it "is the place where a person remains when not called elsewhere for . . . special or temporary purpose." Likewise, it notes that a residence "can be changed only by the union of act and intent." It could be argued that incarceration is a special or temporary purpose, and an incarcerated individual likely would not claim that their habitation at a facility was the result of their intent to change their residence to the location of the facility.

Although this general residence statute is useful, there is an election-related statute that deals with the residence of incarcerated individuals. As delegated by the Constitution in Article IV, section 3, the Legislature has provided the residency requirements for elections including registration, absentee voting, and the administration of elections:

13-1-112. Rules for determining residence. For registration, voting, or seeking election to the legislature, the residence of an individual must be determined by the following rules as far as they are applicable:

¹⁴ For a discussion of these issues, please see pp. 11-14 of the May 31, 2020, legal memorandum.

(1) The residence of an individual is where the individual's habitation is fixed and to which, whenever the individual is absent, the individual has the intention of returning.

(2) An individual may not gain or lose a residence while kept involuntarily at any public institution, not necessarily at public expense; as a result of being confined in any prison; or solely as a result of residing on a military reservation.

(3) (a) An individual in the armed forces of the United States may not become a resident solely as a result of being stationed at a military facility in the state.

(b) An individual may not acquire a residence solely as a result of being employed or stationed at a training or other transient camp maintained by the United States within the state.

(c) A member of a reserve component of the United States armed forces who is stationed outside of the state but who has no intent of changing residency retains resident status.

(4) An individual does not lose residence if the individual goes into another state or other district of this state for temporary purposes with the intention of returning, unless the individual exercises the election franchise in the other state or district.

(5) An individual may not gain a residence in a county if the individual comes in for temporary purposes without the intention of making that county the individual's home.

(6) If an individual moves to another state with the intention of making it the individual's residence, the individual loses residence in this state.

(7) The place where an individual's family resides is presumed to be that individual's place of residence. However, an individual who takes up or continues a residence at a place other than where the individual's family resides with the intention of remaining is a resident of the place where the individual resides.

(8) A change of residence may be made only by the act of removal joined with intent to remain in another place.

As noted under subsection (2), the Legislature has specified that for purposes of registration, voting, or seeking election to the Legislature, "[a]n individual may not gain or lose a residence . . . as a result of being confined in any prison . . ." To the extent that the Commission decides to undertake the reallocation of prisoners to their home location prior to incarceration rather than their prison location for the purpose of drawing legislative and congressional districts, such a policy decision is consistent with the Legislature's determination that for voting and registration purposes, a person's residence is not lost during incarceration.

Nevertheless, while helpful in understanding the Legislature's view of residency, these statutes do not dictate that the Commission must reallocate prisoners. Incarcerated felons are prohibited from voting,¹⁵ and thus, although residency for voting may be considered a similar purpose to that of where a person is located for the purpose of drawing congressional and legislative districts, it is not the *same*, but it may be instructive. Thus, while the Commission is likely not compelled to reallocate prisoners, the decision to reallocate prisoners is likely also not inconsistent with other relevant state law.

¹⁵ Mont. Const. art. IV, §2.

D. Conclusion

Although Montana law likely does not forbid the Commission from adjusting census data for this purpose, a number of considerations remain, including whether or not to proceed if accurate and complete residence data exists for only a relatively small proportion of incarcerated individuals. As noted in my previous memo, if the Commission implements any adjustments to the census data, it must use accurate and reliable data in a systematic approach using clear guidelines.¹⁶ Although this is still a developing area of law, the United States Supreme Court has been clear that systematic, consistent policies must govern any attempt to correct census data.¹⁷ It has noted that "[i]f a State does attempt to . . . 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner."¹⁸ In analyzing Maryland's prisoner adjustments, the three-judge federal district court panel noted that the Maryland Department of Planning "undertook and documented a multistep process by which it attempted to identify the last known address of all individuals in Maryland's prisons. The MDP and its redistricting contractor, Caliper Corporation, then used this information to make the relevant adjustments to the data it had received from the Census Bureau."¹⁹ Here in Montana, the Commission must consider the completeness of the data files it is able to compile concerning prisoners and whether or not there has been or can be any attempt to locate missing or incomplete information with respect to the prior residence of prisoners. To the extent that the data the Commission uses partial or haphazard information concerning the residence of incarcerated individuals to reallocate prisoners or reallocates in an inconsistent manner, the Commission dramatically increases its potential legal liability. Thus, the Commission must consider whether it can adjust the data in the required systematic manner during this cycle.

If the Commission does proceed with reallocation, it has a number of policy decisions it must make, such as how to allocate prisoners with missing information, how to treat prisoners whose prior residence was out-of-state, etc.

On the other hand, if the Commission chooses not to proceed with reallocation this cycle because of the quality, consistency, or completeness of relevant data, the Commission can lay the foundation for successfully implementing prisoner reallocation during the next cycle by recommending that the Legislature statutorily require the collection and retention of accurate information relating to each incarcerated individual's prior residence and that the information be accessible by future commissions, should they choose to undertake prisoner reallocations.

¹⁶ See pp. 22-24 of the May 31, 2020, legal memorandum.

¹⁷ *Karcher v. Daggett*, 462 U.S. 725, 732, n. 4 (1983), and *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-535 (1969).

¹⁸ *Karcher*, 462 U.S. at 732, n. 4 (citing *Kirkpatrick*, 394 U.S. at 534-535).

¹⁹ *Fletcher*, 831 F. Supp. 2d at 896.