



OLR RESEARCH REPORT

March 26, 2013

2013-R-0179

FEDERAL COURT DECISION ON PRISONERS AND THE CENSUS

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You asked for a summary of *Fletcher v. Lamone*, 831 F.Supp.2d (2011), dealing with how prisoners are counted for purposes of redistricting. The U.S. Supreme Court summarily affirmed (i.e., without further briefs or oral argument) this decision in June 2012.

SUMMARY

This case arose in response to Maryland's plan to redistrict congressional districts after the 2010 census. Pursuant to state law, as part of redistricting, state residents confined in correctional institutions were allocated to where they previously lived and out-of-state prisoners were excluded from population counts in determining districts.

The plaintiffs, nine African-American state residents, alleged that the first practice resulted in malapportionment, in violation of Article I, § 2, of the U.S. Constitution, which includes the "one person, one vote" principle, and the second resulted in racial discrimination, in violation of the U.S. Constitution's Fourteenth Amendment. They moved for an injunction to block the state's redistricting plan, while the state's election officials moved for summary judgment.

The court rejected the plaintiffs' motion and granted summary judgment. It held that states may adjust census data during the redistricting process if they do so systematically. It found no support for the plaintiffs' argument that the state law's exclusion of incarcerated non-Maryland residents from the population base constitutes intentional discrimination on the basis of race, in violation of the Fourteenth Amendment.

FACTS

After the 2010 census, Maryland enacted a new redistricting plan for its eight congressional districts. Like the redistricting plan passed after the 2000 census, the enacted plan created two majority African-American congressional districts, one around Baltimore and the other centered on Prince Georges County. In adopting the plan, the state Senate rejected an amendment that would have created a third majority African-American district.

The plaintiffs in this case were African-American state residents who sued the state's administrator of elections and the State Board of Elections chairman. Among other things, they argued that population adjustments made under the state's 2010 "No Representation Without Population Act" resulted in (1) malapportionment, in violation of Article I, § 2, of the Constitution and (2) racial discrimination, in violation of the Fourteenth Amendment (the law is codified at Md.Code Ann., Art. 24 § 1-111, Election Law § 8-701).

According to the state, the 2010 law was intended to "correct for the distortional effects of the Census Bureau's practice of counting prisoners as residents of their place of incarceration." While most of the state's prisoners come from African-American areas, the state's prisons are located primarily in the majority white First and Sixth Districts. As a result, residents of districts with prisons were systematically "overrepresented" compared to other districts. In other words, residents of districts with prisons were able to elect the same number of representatives despite in reality having comparatively fewer voting-eligible members of their community.

To rectify this perceived imbalance, the act requires that for purposes of drawing local, state, and federal legislative districts, state and federal prison inmates must be counted as residents of their last known residence before incarceration. Prisoners who were not Maryland residents are excluded from the population count, and prisoners whose last known address cannot be determined are counted as residents of the district where their facility is located.

The Maryland Department of Planning (MDP) accomplished the adjustments by performing a multistep analysis of the records for prisoners housed in the Division of Correction. As a result of the reassignment, the Sixth District, which contains most of the prisons, lost 6,754 individuals. The Seventh District, which includes Baltimore, gained 4,832 individuals. In no case did the adjustments exceed 1% of a district's population.

MALAPPORTIONMENT

Argument

The plaintiffs contended that Maryland's adjustments to the census data resulted in malapportionment, violating the "one person, one vote" standard established in *Reynolds v. Sims*, 377 U.S. 533 (1964), under Article I, § 2, of the Constitution. As interpreted by the Supreme Court, this provision mandates that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" (*Wesberry v. Sanders*, 376 U.S. 1, at 7-8, (1964)). "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality" (*Kirkpatrick v. Preisler*, 394 U.S. 526 at 530-31 (1969)). "Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Id.* States do not have unlimited discretion in performing the calculations required to meet the standard. In *Kirkpatrick* and again in *Karcher v. Daggett*, 462 U.S. 725, (1983), the Court concluded that because the census count represents the "best population data available," it is the only basis for good-faith attempts to achieve population equality" (*Karcher*, 462 U.S. at 738 (internal citation omitted)).

Relying on these statements in *Karcher* and *Kirkpatrick*, the plaintiffs contended that "for determining congressional districts the only [population] number that can be used is the number generated by the U.S. census." They argued that Maryland's decision to adjust the census number was unconstitutional. The plaintiffs' argument rested heavily on *Travis v. King*, 552 F.Supp. 554 (D.Haw.1982), which they argued was the only case directly on point. In this case, the Hawaii legislature excluded from its population measure the entire military population, without attempting individual assignment, but used this population to help it get a second congressional seat. The court subsequently held that Hawaii's actions violated the "one person, one vote" principle.

Decision

The court held that the plaintiffs failed to read the *Karcher* and *Kirkpatrick* statements in their fuller context. Although the decisions require states to use census data as a starting point, they do not hold that states may not modify this data to correct perceived flaws. The Court recognized that “the census may systematically undercount population, and the rate of undercounting may vary from place to place.” *Karcher*, 462 U.S. at 738. It cautioned, however, that “[i]f a State does attempt to use a measure other than total population or to ‘correct’ the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner.” (*Id.* at 732 n. 4, (citing *Kirkpatrick*, 394 U.S. at 534-35)). Thus, the Court rejected the New Jersey redistricting plan at issue in *Karcher* not because the state used adjusted census data, but because it failed to perform its adjustments systematically. Taken together, these *Karcher* statements suggest that a state may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a non-arbitrary fashion and they otherwise do not violate the constitution.

Although the case law on this issue is sparse, the court found that most of the decisions on the issue had concluded that *Karcher* and *Kirkpatrick* do not bar the use of adjusted census data. It concluded that the Court in *Karcher* did not hold that the states must use census figures to reapportion congressional representation. Rather it reiterated a well-established rule of constitutional law: states must use the “best census data available” or “the best population data available” to achieve proportionate political representation. Nothing in the constitution or *Karcher* compels the states or Congress to use only the unadjusted census figures.

The court noted that *Travis*, which the plaintiffs relied on heavily, was decided before the *Karcher* decision, and the district court in *Travis* therefore did not have the benefit of *Karcher*’s elaboration on the requirements of Article I, § 2. Further, after the categorical exclusion of all military personnel, the congressional districts in Hawaii still varied by over 300 individuals, while the Maryland legislature in this case drew districts as equally as possible after adjusting the census figures.

According to the court, the conclusion that states may adjust census data during the redistricting process is also consistent with the Census Bureau’s own practices. According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones. It has explained that counting prisoners at their home addresses would require collecting information from each prisoner

and an extensive coordination with correctional facilities. Although the Census Bureau was not itself willing to count prisoners at their home addresses, it has supported state efforts to do so. For the 2010 census, it released its population data for prisoners and other inhabitants of “group quarters” early to enable states to count prisoners where the prisons are, delete them from redistricting formulas, or assign them to some other locations.

The court next addressed whether Maryland’s adjustments to census data were made systematically. It concluded that they were. The MDP undertook and documented a multistep process by which it attempted to identify the last known address of all individuals in Maryland’s prisons. It then used this information to make the relevant adjustments to the data it had received from the Census Bureau. This process substantially differed from the “haphazard, inconsistent, or conjectural” alterations the Supreme Court rejected in *Karcher*.

While the plaintiffs did not dispute the adjustment process they raised two objections to the result. First, they argued that if Maryland corrected for prisoner-related population distortions, it also must make similar adjustments to account for the distortionary effects of college students and members of the military. Second, they contended that most prisoners do not return to their last known residence after release.

According to the court, neither of these objections was probative of whether the adjustments were proper. While Maryland might produce more accurate data if it assigned college students or active duty military personnel to their permanent home addresses for redistricting, it was not constitutionally obligated to do so. Moreover, its failure to further improve its redistricting data by determining students’ and soldiers’ home addresses had little bearing on the merits of the plaintiffs’ Article 1, § 2 claim made with respect to prisoners.

The court also disagreed with the plaintiffs’ argument that college students, soldiers, and prisoners are similarly situated groups. It noted that college students and members of the military can vote, while incarcerated persons cannot. In addition, college students and military personnel can interact with members of the surrounding community and engage fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners.

The court also rejected the plaintiffs' argument that the adjustments were improper because most prisoners do not return to their last known addresses after release. It noted that at least some prisoners will do so and some correction is better than no correction. It concluded that the state's adjusted data would be more accurate than the information contained in the initial census reports, which does not account to prisoners' community ties at all.

As a result, the court concluded that the state did not violate Article I, § 2 by adjusting the raw census data as it did.

RACIAL DISCRIMINATION

The plaintiffs also contended that the act's exclusion of incarcerated non-Maryland residents from the population base constituted intentional discrimination on the basis of race, in violation of the Fourteenth Amendment, because more than 71% of the excluded prisoners were African-American.

The court found no support in the record for this contention. It noted that it is well-established that allegations of disparate impact alone are insufficient to state a claim under the Fourteenth Amendment. Instead, plaintiffs must prove purposeful discrimination. The court's review of the record revealed no evidence that intentional racial classification was the moving force behind the passage of the act. In fact, the evidence pointed to precisely the opposite conclusion. As the amicus brief of the Howard University School of Law Civil Rights Clinic and other civil rights organizations makes clear, the act was the product of years of work by groups dedicated to advancing the interests of minorities.

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