

MEETING MINUTES
2021 PA LEGISLATIVE REAPPORTIONMENT COMMISSION

Date and time of meeting: August 24, 2021, 10:30 a.m. – 12:46 p.m.

Location: Room 8E-B, East Wing of the Capitol

AGENDA

1. Call to Order and Opening Remarks
2. Approval of Minutes
3. Consideration of Proposed Resolution Regarding Prisoner Data Reallocation
4. Report of the Release and Processing of Census Data
5. New Business / Discussion
6. Adjournment

Chair Mark Nordenberg called the meeting to order at 10:30 a.m.

He welcomed members of the public in attendance, either in person or through the Commission's livestream, and recognized the other members of the Commission in attendance:

- House Majority Leader Kerry Benninghoff
- Senate Democratic Leader Jay Costa
- House Democratic Leader Joanna McClinton
- Senate Majority Leader Kim Ward

Chair Nordenberg then stated that all meetings and hearings of the Legislative Reapportionment Commission are livestreamed and that the videos typically are posted on the Commission's website one day following the meeting or hearing. He also commented that the Commission's website continues to accept comments from citizens with respect to the reapportionment process and noted that there were over 100 postings as of this date.

Chair Nordenberg stated the first item of business would be the approval of three sets of meeting minutes for meetings held on the following dates: May 26, 2021, June 25, 2021, and July 13, 2021. He noted that the minutes for June 25, 2021, also contained an errata sheet which corrected his mistake in reading a number 6,475 which should have been 6,615. Chair Nordenberg called for a motion to approval all three sets of minutes:

- Motion by Commissioner Ward to approve the minutes
- Second by Commissioner Costa
- All five commissioners voted Aye

Chair Nordenberg then called for consideration of the principal item of business on the agenda, which was a proposed resolution regarding prisoner data reallocation that had been previously discussed at the Commission's meeting held on May 26, 2021. Commissioner McClinton moved that the Commission take up the matter of Resolution 4A, the reallocation of state prisoner census data from the location of current incarceration back to each prisoner's home location, excluding prisoners serving life sentences. A copy of the exact wording of

Resolution 4A is attached to these minutes. Commissioner Costa seconded the motion.

Before opening the floor for discussion, Chair Nordenberg asked Robert Byer, the Commission's Chief Legal Counsel to give an overview of the legal issues regarding Resolution 4A. Mr. Byer thanked the legal counsel of all four caucuses for their informative briefings on both sides of this issue. Mr. Byer said both he and the Chair have spent a considerable amount of time studying the legal aspects of reallocating prisoner census data. Mr. Byer then presented his conclusions:

1. Neither the United States Constitution nor the Pennsylvania Constitution would be violated either by maintaining the current practice of counting prisoners at their place of incarceration or by changing this practice to using pre-incarceration home locations.
2. The provisions of the Commonwealth's Election Code and Voter Registration Act concerning residents and prisoners for purposes of registration and voting do not control where prisoners are counted for purposes of redistricting, but those statutes do express a public policy that the Commission may consider.
3. The 1968 amendments to the Pennsylvania Constitution adopting Article II, Section 17, in its current form and rescinding former Article II, Section 18, were intended to remove the General Assembly from any role with respect to legislative redistricting and instead place that role in this independent Commission. Legislation is not required for this Commission to make the changes proposed in Resolution 4A.
4. Therefore, this Commission has the authority to adopt the proposed resolution if the Commission concludes that the proposed change is required in the exercise of its judgment based upon considerations of fairness and public policy.

Mr. Byer then went into further detail covering all of these key points. He noted that there is a statistically significant effect showing a difference in districts where there is a state correctional institution and in counties or districts where such an institution is not located in terms of the number of votes requires to elect a representative. He concluded that the current state of the law does not prohibit the current practice of counting prisoners as residents of their places of

imprisonment based upon the Federal census, but the law also does not prohibit this Commission from changing that practice if the Commission, in exercising its exclusive and plenary authority over legislative redistricting, determines that such a change is required in the interest of fairness and sound public policy.

Chair Nordenberg then opened the floor for discussion. Commissioner Ward asked about possible discrepancies and nonuniformity by affecting only State prisoners and not Federal prisoners and thus there would be different census data used to established both State House and Senate districts than what would be used to establish Federal congressional districts. Mr. Byer stated that would be correct since the state legislature would have to adopt a change with respect to congressional districts in Pennsylvania and the legislature would have to do the same for municipal redistricting covered by the current Municipal Reapportionment Act. Commissioner Ward then asked how college students are counted and Mr. Byer replied that they are counted in their place of residence on campus. Mr. Byer pointed out that it is up to the Commission to decide on how to count individuals who are in "group quarters" e.g., prisons, college dormitories, senior citizen institutions. He stated that college students are in their resident locations by choice while prisoners have no choice as to where they are located.

Commissioner McClinton asked about the findings of Dr. Jonathan Cervas regarding statistically significant evidence regarding voting. Mr. Byer said that there are statistical calculations that show that fewer votes are required to elect a state representative in a district where a State correctional institution is located as compared with a district that does not have a correctional institution.

Commissioner Benninghoff commented that Resolution 4A is not similar to legislation that has been previously introduced in the House Committee. The bill has been revised multiple times in committee and what is being considered by the Commission is a major policy change. He asked about fairness and Mr. Byer replied that fairness is a determination that the Commission would have to make. Mr. Byer stated that the resolution being considered is not a legal question but rather a policy question.

Commissioner Benninghoff then asked about prisoners who have a sentence of longer than ten years. Mr. Byer responded that would be a policy choice to be made by the Commission.

Commissioner McClinton then presented six points to support the resolution.

1. The Pennsylvania Constitution leaves no doubt that this Commission has the authority to reallocate incarcerated individuals to their home communities.
2. Given the constitutional grant of authority to the Commission, there is no need for legislation to reallocate prisoners.
3. There is public policy of this Commonwealth that incarcerated persons are treated as residents of their home communities for purposes of elections.
4. Reallocating incarcerated persons to their home communities will not result in unwarranted disparities between prisoners and college students.
5. Counting incarcerated persons at the place where they are incarcerated invites constitutional challenges.
6. The Commission has the means to accurately reallocate incarcerated persons to their home communities via data analysis from the Penn State Data Center and the Pennsylvania Legislative Data Processing Center.

Commissioner McClinton provided detailed supporting comments on each of the six points. Those statements can be found in the official transcript of the meeting. She concluded her comments by stating that nothing prohibits the Commission from reallocating prisoners to their home addresses and urged all of the Commissioners to vote in favor of Resolution 4A.

Commissioner Benninghoff stated he feels very strongly about his participation in the reapportionment process. He stressed that early on the Commission made a commitment to be as open, fair and transparent as possible. He expressed his concerns about the matter of prisoner reallocation being considered by the Commission. Being that the Federal census counts prisoners where they eat, sleep and live, that is where they should be considered as residents. He stated that the action being proposed is outside the scope of the authority of the Legislative Reapportionment Commission, which is a short-term, temporary Commission. He stressed that this fundamental and significant policy change should be done through a deliberative legislative process and that all 203 House

members and 50 Senators should have a voice on this matter. Commissioner Benninghoff also noted that the resolution should apply to all individuals living in group quarters noting that it does not apply to military bases, long-term care facilities, colleges and universities. He urged the Commission to reject the resolution.

Commissioner Costa thanked Commissioner McClinton for introducing Resolution 4A and said that he has submitted written remarks on this matter. (His written remarks are attached to these minutes.) He acknowledged and stated his agreement with the analysis provide by Chief Counsel Byer that this proposal did not require legislative action, and that the Commission has the authority to enact Resolution 4A. He agreed with Commissioner McClinton that by not doing prisoner reallocation, it ultimately results in unfairness between voters that have prisons in their districts and those who do not. He acknowledged and supported the six key points stated by Commissioner McClinton and urged the Commission to approve the proposed resolution.

Commissioner Ward stated that the resolution is flawed in several ways. She noted that prisoners are utilizing facilities and resources in the districts where they reside, and that they are using and benefiting from representational bandwidth. She stated that elected representatives do care about those prisoners who are located within their districts. She also noted the proposed resolution would create differences between how prisoners are counted for congressional districts versus municipal districts. She feels that is going to become a matter that will end up in the courts.

She also feels that there will be significant discrepancies in the data information between the data from the Department of Corrections and the data from the Federal Census Bureau. She urged that the matter regarding any possible differences in the data be resolved before the resolution be considered. Finally, she stated that the Commission is already under a condensed timeframe and the approval of the resolution would cause additional problems. She urged the Commission to vote against the resolution so that the General Assembly could consider it in a deliberative process.

Chair Nordenberg thanked everyone for their comments. He stated that he has spent a considerable amount of time reviewing all legal aspects of the proposed resolution. He also stated that the Commission was intentionally created by the Constitution to be an independent Commission and not part of the legislature, nor is it part of the judiciary or an administrative agency. He stated that the Legislative Reapportionment Commission is a one-of-a-kind entity with an important charge, being in existence only every ten years for the purpose of reapportioning the Commonwealth. He reminded the members of the Commission that the matter of prisoner reallocation was first brought up at the meeting of the Commission on May 26, 2021. At that time Commissioner McClinton wanted to introduce a resolution on prisoner reallocation but it was decided to delay that process until each Commissioner could have enough time to thoroughly consider the matter and thus, we all have been engaged in a very deliberative process since then.

Chair Nordenberg then cited from his perspective the four key points of his consideration:

1. Since the Commission is created by the State Constitution, nothing in the U.S. Constitution or the Pennsylvania Constitution precludes the Commission from reallocating prisoner locations.
2. There is not any statutory limitation on the Commission's proposed action.
3. He agrees with Chief Counsel Byer's conclusion that neither the provisions of Section 703 of the Election Code nor Section 1302 of the Voter Registration Act are binding because of language limiting their application to registration and voting.
4. The Commission has responsibility to do what is prudent with respect to the controlling framework of constitutional law, both to faithfully advance our mission within governing standards and to do our best to ensure that our plan will be upheld when it is ultimately reviewed.

Commissioner Benninghoff then made several additional comments. He stated that he has visited with prisoners many times and found that, contrary to common belief, most prisoners, as they complete their rehabilitative programs, do not return to the same environment where they reside before incarceration. He also noted that transferring prisoner locations from their place of

incarceration back to their home locations will cause a change in the statistics of both districts. He also expressed concern that the unknown effect of getting the data processed correctly could be an issue.

At this time in the meeting, Commissioner Ward introduced two resolutions. One resolution would call for the PA Legislative Data Center to produce two sets of census data: one set being the original census data and the second set being the revised census data with the state prisoners, excluding those being held longer than 10 years, reallocated to their home locations.

Before further discussion on the two resolutions introduced by Commissioner Ward, Chair Nordenberg called for the vote on Resolution 4A. Before the vote was taken, Commissioner Costa raised several additional points. He urged that the Commission reach out to the Department of Corrections to make certain that there will not be any issues by excluding prisoners serving life sentences in Resolution 4A. He also raised concern as to the possibility of issues arising from the Commission using one set of data to establish House and Senate districts while the legislature would be using another set of data to establish the state's congressional seats. He said he hoped that the legislature would accept and use the same census data that the Commission was going to use. Finally, Commissioner Costa raised the matter of how much deviation the Commission was going to allow in establishing districts. He cited testimony that a deviation range of 2 percent to 10 percent would be allowable. There was no further discussion on the matter of deviation. However, Commissioner McClinton did endorse Commissioner Costa's suggestion of reaching out to the Department of Corrections as soon as possible.

Chair Nordenberg, then called for the vote on Resolution 4A.

- Commissioner Benninghoff - No
- Commissioner Costa – Aye
- Commissioner McClinton – Aye
- Commissioner Ward – No
- Chair Nordenberg – Aye

The resolution passed by the vote of 3-2.

Chair Nordenberg then called on Commissioner Ward to formally introduce her two resolutions. Senator Ward then introduced Resolution 4B:

-Resolved that the State Legislative Data Center submit to the Legislative Reapportionment Commission two final data sets, one with population adjusted on the basis of residence of individuals incarcerated in State correctional facilities and one without the population data adjusted on the basis of residence of individuals incarcerated in State correctional facilities.

Commissioner Benninghoff second the motion.

Commissioner McClinton asked that the vote be delayed so that she time to fully consider it. After reading the resolution, she agreed with moving forward on the motion. Senator Costa questioned why two sets of data would be needed and felt that this resolution could push the Commission further into January or February before getting a final plan approved. Commissioner Benninghoff expressed his support of Resolution 4B.

Chair Nordenberg then called for the vote on Resolution 4B:

-Commissioner Benninghoff – Aye
-Commissioner Costa – Aye
-Commissioner McClinton – Aye
-Commissioner Ward – Aye
-Chair Nordenberg – Aye

The resolution passed by the vote of 5-0.

Commissioner Ward then introduced her second resolution, Resolution 4C:

-Resolved that the population total used after the Federal Decennial Census of 2020 by the Legislative Reapportionment Commission for the purpose of legislative reapportionment for the General Assembly count an individual who is incarcerated in the State correctional facility, as determined by the Census, and who was a resident of this Commonwealth immediately prior to being sentenced to incarceration. Except as provided under paragraph (2). At the address as reported by the Department of Corrections where the individual was last domiciled in this Commonwealth immediately prior to being sentenced to incarceration. If the individual was homeless immediately prior to being sentenced to incarceration, at the location in

this Commonwealth, as reported by the Department, where the individual regularly stayed or regularly received services immediately prior to being sentenced to incarceration. Or, if there is no address under subparagraph (i) and no location under subparagraph (ii), at the facility where the individual is incarcerated. If the individual is subject to a sentence of 10 years or longer, at the facility where the individual is incarcerated. Representative Benninghoff second the motion.

Commissioner McClinton then stated that this resolution materially changes resolution 4A and asked for more time to review the resolution, and to get public comment and feedback. Commissioner Ward stated that Resolution 4C does not change Resolution 4A other than it excludes prisoners serving sentences longer than 10 years. Commissioner Costa asked if this resolution would require a third set of data.

Chair Nordenberg suggested that the Commission hold on taking any action on Resolution 4C to allow for time to determine if it is possible to get information from the Department of Corrections that would enable the exclusion, from the prisoner reallocation data, of those serving sentences longer than 10 years. All Commissioners agreed to table Resolution 4C at this time.

Chair Nordenberg then introduced Brent McClintock, Director of the PA Legislative Data Center, to provide an update on the status of receipt and processing of the Federal census data. Mr. McClintock presented the following key points of information:

1. On August 12, 2021, the Federal Census Data Center released the Public Law data to each state.
2. The Pa Legislative Data Center and its contractor partner, Penn State Data Center, immediately began the process of downloading and adjusting the data, as necessary. This included adjustments to election precincts that were altered by local municipalities after December 2019; creating split blocks required by recent precinct boundary changes and adjusting population if needed; and, correcting errors including block coding errors and voting district name and code errors.

Mr. McClintock stated that both data centers are ahead of schedule on the processing of the Federal data, and they are planning to present to the Commission data that could be certified by the end of September. However, he did state that the passage of Resolution 4A and 4B will have an impact on the timeframe for completion.

There being no further business, Chair Nordenberg adjourned the meeting at 12:46 p.m.