

**Written Testimony of
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**Before the
Indiana Advisory Committee to the U.S. Commission on Civil Rights**

Voting Rights in Indiana: Redistricting

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Chair Clements-Boyd and distinguished Members of the Advisory Committee, thank you for the invitation to offer this testimony. I am sorry that I was not able to join you in person for the hearings in February and March, but I thank you for the ability to participate nevertheless, even from a distance and at some remove.

My name is Justin Levitt. I am a Professor of Law and the Associate Dean for Research at Loyola Law School, in Los Angeles.¹ I teach constitutional law and criminal procedure, and I focus particularly on the law of democracy — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the law of democracy is not merely theoretical. I have returned to Loyola from serving as a Deputy Assistant Attorney General helping to lead the Civil Rights Division of the U.S. Department of Justice. There, I had the privilege to support the Division's work on voting rights, among other issues. Before joining the Civil Rights Division, I had the chance to practice election law in other contexts as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution. And of particular relevance to the topic below, I maintain a website attempting to explain and track the redistricting process and the

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

course of related litigation for statewide districts (both state and federal) across the country; that website is available at <http://redistricting.ils.edu>.

I have previously had the privilege to address committees of the Indiana state legislature on redistricting matters, and the privilege to address both the Commission on Civil Rights and state Advisory Committees to the Commission on elections issues of various kinds. It is a distinct pleasure to offer additional assistance to this esteemed advisory body.

It is my understanding that you have already heard from various experts and other witnesses with respect to several issues that may confront Hoosiers in the election process, including witnesses presenting various concerns with voters' ability to cast ballots that may be counted. Several such controversies have confronted Indiana recently, with associated concerns about the degree to which burdens may fall unevenly on communities already underserved. Those controversies include disputes over the particular means by which individuals are asked to identify themselves at the polls, the particular means by which voter registration rolls are maintained, the establishment of sufficient sites for in-person absentee voting (also known as "early voting"), and the extent of the "chute" for purposes of closing time and access to pollwatchers, among others. There are also aspects of the current structure which may present barriers just as meaningful, or more meaningful, without generating the same degree of public controversy, including equitable access to the ballot by citizens formerly disenfranchised by conviction, citizens with language difficulties, younger voters and elderly voters, or citizens with disabilities. And, naturally, I expect that the committee will have heard about affirmative opportunities to assist individuals in exercising the right to vote by building bridges, and not merely by tearing barriers down.

To avoid duplication of those other witnesses' efforts, I also understand that you would prefer that I focus my particular remarks on a different portion of the electoral system: specifically, on the redistricting process that speaks to the representation that Hoosiers receive apart from the mechanics of casting and counting ballots. By focusing on redistricting, I do not mean to offer a judgment about its relative priority in Indiana. Similarly, by foregoing for the time being discussion of these other topics relevant to election administration, I hope that I do not communicate in any way that I believe these topics to be less important.

With respect to redistricting, I'll offer one additional caveat: unfortunately, I have not had recent opportunity to extensively research the redistricting of county or municipal offices in Indiana, and the extent to which that redistricting has or has not complied with federal voting rights law. It may well be that particular controversies or challenges have been revealed in contests over local redistricting in the state, in litigation and beyond, and their absence in this testimony is more a product of my recent schedule than any assessment of the merit of those challenges.

In statewide redistricting — redistricting for state legislative and congressional office — Indiana has something of a distinction. Along with Delaware, Iowa, Nebraska, and Utah, I believe that Indiana is one of only five states free from litigation related to statewide redistricting in both the 2000 and 2010 redistricting cycles. That is both notable and commendable.

That said, I do not believe that the absence of litigation over the redistricting process necessarily proves that all is well, or that Indiana has thoroughly insulated itself from future concerns with respect to ensuring equitable representation. I would like to use this opportunity to highlight three redistricting issues in particular, and to recommend that the Advisory Committee consider them in its report.

First, Indiana is likely to be buffeted by the same winds buffeting other jurisdictions around the country reflecting the controversy over the Census. On March 26, 2018, the Secretary of Commerce indicated his intent to place a question on the decennial Census asking each and every individual about their citizenship, ostensibly to improve the enforcement of minority voting rights (albeit in the fact of strong opposition from civic groups actually engaged in the enforcement of minority voting rights). In a profound and profoundly disturbing departure from prior Census practice, Secretary Ross made this determination without first testing its likely impact. And in the present political climate, based on increasing levels of concern with collecting citizenship information even on less salient and far lengthier surveys, many advocates for minority representation fear that elevating the prominence of a citizenship question on the decennial Census will substantially depress Census response. Indeed, the concern is that response will be depressed not only among noncitizens (including those lawfully present), but among communities with heightened levels of distrust of the federal government, including many minority citizens.

Depressed response to the decennial Census risks damage to the Census Bureau's only constitutional mandate: the responsibility — the very first express responsibility articulated of any federal administrative body in the federal Constitution — to count each individual in the country. But depressed response to the decennial Census also risks damage to the representation of Hoosiers. Within the state, inaccurate Census data will distort the equality of representation also guaranteed by the Constitution. And among the states, inaccurate Census data will reward states with ample outreach to their more marginalized populations at the expense of those who forego such outreach. Indiana currently has nine congressional districts, and if the Census accurately records relative growth patterns across the country, it is expected to retain nine congressional districts in 2020. If, however, Census participation in Indiana is disproportionately depressed by the addition of a citizenship question and the lack of compensatory state outreach, under extreme conditions, Indiana could lose its ninth congressional seat. And if such an outcome did not accurately reflect Indiana's population, Hoosiers statewide would suffer.

I would therefore encourage the Advisory Committee to recommend that the Census Bureau forego the additional citizenship question, at least in the absence of the normal degree of rigorous testing to determine the impact of such a change to the conduct of the decennial Census. And, in the event that the Census Bureau does not change course, I would also encourage the Advisory Committee to recommend that Indiana engage representatives of underserved populations to undertake compensatory outreach to those communities, to foster full participation in the Census despite community fears.

Second, Indiana is a state in which legislators are offered the opportunity to draw the districts in which they compete for re-election, and thus far, they have pursued this process

without any meaningful guidance in either state statute or the state constitution. This is an unstable state of affairs. The process of drawing legislative lines affects the interests of individual legislators, the interests of political parties, and the interests of represented communities — or, put differently, the public good. When legislators personally are able to set the lines by which they are elected, there arises a natural temptation to conflate the three, even when those officials act with the purest of motives. That is, even conscientious elected representatives might be tempted to draw electoral lines that insulate their districts from effective challenge and promote their party's fortunes — because they believe themselves and their party best able to serve their constituents.

Such temptations — whether fueled by self-interest or zealous advocacy — weaken the democratic process and blunt the voice of the electorate. By drawing district lines to promote individual and party security, legislators with a hand in the districting process become enmeshed in the task of building districts based on favored constituents and disfavored ones. That is, representatives become involved in the business of choosing their constituents, rather than the other way around.

Just as important is the way that this process looks to the public. Even if some individuals choose to forgo self-interested temptation, a system that encourages legislators to design their own districts with a free hand fosters the public perception that improper self-dealing is at work, which can further erode trust in civic institutions. This may be part of the reason that Todd Rokita, when serving as Secretary of State, made redistricting reform one of his signature issues.

The fact that Indiana legislators are in charge of the process lends extra suspicion to recent electoral maps — suspicion that might not be warranted were the maps produced by different means. In 2001, for example, the redistricting process was subject to split partisan control; Democrats controlled the state House and gubernatorial mansion, and Republicans controlled the state Senate. The resulting maps reflected rough overall partisan balance, but in a way consistent with a stark bipartisan, incumbent-protective gerrymander. Of 100 districts in the resulting state House map, 50 were drawn so that they leaned toward one major party or the other by an average of 30 percentage points, and so it is perhaps unsurprising that those 50 seats were wholly uncontested by one or the other of the major political parties.

In the most recent redistricting, Republicans had control of each legislative house and also the gubernatorial mansion. And the resulting maps reflect a stark pro-Republican bias — more skewed than between 88 and 96 percent (depending on slight variations in the particular measure deployed) of a set of plans analyzed nationwide over several decades. And though a partisan gerrymander usually produces more seats marginally more competitive than an incumbent-protective gerrymander, of 100 seats up for election in 2012, 32 were wholly uncontested by one of the major political parties.

These political outcomes might not breed quite as much concern about self-dealing if legislators were not drawing the lines of their own districts. In many cases, constituents are undoubtedly pleased with the representation they receive, and return incumbents to office by healthy margins. And in order to represent particular distinctive communities, it will often be

necessary to link like-minded voters together, which will result in districts that are less competitive. Moreover, individual legislators have shown that it is certainly possible to win an election in districts slanted toward the opposing party. Still, when legislators are in charge of the redistricting process, it is difficult to explain the electoral patterns exclusively in terms that put the public interest foremost.

The pressures and incentives of incumbency also raise serious concerns with respect to minority communities. In this past redistricting cycle, incumbents in several states sought to gain or preserve partisan advantage through redistricting plans or other electoral changes targeting voters based on their race or ethnicity. The fact that race or ethnicity may serve as a ready shorthand for perceived partisan preference does not make the targeting of such voters any less pernicious.

Nor is partisan gain the only reason to be concerned about incumbents' potential manipulation of minority representation in the redistricting process. Almost thirty years ago, a case from my adopted hometown made the point in vivid fashion:

When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors

But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. Incumbency carries with it many other subtle and not-so-subtle advantages, and incumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act. Today's case barely opens the door to our understanding of the potential relationship between the preservation of incumbency and invidious discrimination, but it surely gives weight to the Seventh Circuit's observation that “many devices employed to preserve incumbencies are necessarily racially discriminatory.”

Garza v. County of Los Angeles, 918 F.2d 763, 778–79 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (internal citations omitted).

Even if these particular tensions have not been prominent points of contestation in Indiana's recent statewide redistricting maps, Indiana is not immune from the “more general

proposition” reflected not only in the *Garza* case, but in redistricting battles across the country. I would therefore encourage the Advisory Committee to recommend that Indiana revisit its redistricting process, to place the redistricting authority primarily beyond the temptation of individual self-regard. There is room to ensure that redistricting is undertaken by a body reflecting the diversity of the state and with meaningful independence from the legislature, without taking either politics or politicians entirely out of the process. And there is room to ensure that redistricting is undertaken with this meaningful independence without squeezing all discretion from the body with the pen, to account for communities — including minority communities — that may not conform neatly to preconceived arithmetic expectations. Several other states already offer different reasonable approaches to the problem, and further innovations are constantly afoot. Indiana need not merely rely on forbearance by those with the largest inherent conflict of interest.

Finally, I would like to raise the issue of the interaction of imprisoned populations with the redistricting process. I have earlier mentioned concerns about a substantial coming inaccuracy in the Census count, reflecting populations that may refuse to answer the Census call. The issue I raise now is distinct, and has to do with an existing inaccuracy likely to be replicated once again in 2020: not about *who* will be counted, but about *where*.

The vast majority of persons counted by the Census will be counted at a “usual residence” they consider “home”: the address that they would also consider their permanent legal, electoral, and social residence. A few have a “usual residence” that is different from “home,” but where they are generally intertwined with the community where they lay their heads when the Census comes calling. But the 2.2 million individuals who are incarcerated in the United States were counted by the Census Bureau in 2010 at locations where they had involuntarily been placed. Unlike all other sojourners who are away from “home” on Census Day, incarcerated individuals do not meaningfully interact — indeed, are not permitted to meaningfully interact — with the communities to which they were assigned by the Census Bureau. Individuals incarcerated in Village Township do not eat at the restaurants of Village Township, shop in Village Township stores, attend Village Township movie theaters, or use Village Township roads, sidewalks, or public transportation. While incarcerated, they are not affected by Village Township county or municipal codes and cannot attend Village Township public meetings. They may be confined in a location physically adjacent to Village Township residents, but most Village Township residents will not likely consider them “neighbors.”

Moreover, individuals who are transferred to a correctional facility often have little in common with more usual “usual residents” of the area. Incarcerated individuals — disproportionately minorities — are often from a demographic and socioeconomic background quite distinct from those who live in the neighborhood. For example, a recent study found that there are at least seven Indiana counties where the proportion of African-Americans in the incarcerated population is more than ten times larger than the proportion of African-Americans in the surrounding county.

Under Indiana law, the simple fact of incarceration does not change a person’s electoral residence. But it will change the district to which they are assigned, distorting representation in several ways. For example, the Constitution requires that local, state, and federal districts be

drawn such that district populations are approximately equal. When the population tally counts incarcerated individuals where they are confined, districts are built on the backs of “ghost constituents,” with no meaningful ability in most states to influence their purported representatives, directly or indirectly. These individuals and the communities where they are truly from, accordingly, lose representation; in certain circumstances, the dilution may give rise to a claim under the Voting Rights Act.

On the other side of the coin, the non-incarcerated residents of districts with prisons garner unduly disproportionate influence. For example, in Lake County, Tennessee, after the most recent census, 87% of the population of one County Commissioner district was allotted to a local correctional facility. As a result, the 344 non-incarcerated residents of the district receive the same voice on county policy as the approximately 2500 or 2600 individuals in each of Lake’s two other districts.

Even when correctional facilities do not distort representation, they may well distort the candidate pool. Many jurisdictions allow voters throughout the jurisdiction to vote on candidates, but require the candidates to be from geographic districts of approximately equal size. If such districts are drawn to include large correctional facilities, there may be districts with no individuals eligible to run as candidates.

Sometimes, these factors align. In Anamosa, Iowa, after the 2000 Census, 1300 of the 1358 individuals allotted to City Council ward 2 were incarcerated there, giving the 58 other residents of that ward strikingly disproportionate political power. And after subtracting individuals ineligible to run for city council, that also left the ward strikingly few potential officeholders. In the 2005 municipal election, ward 2 had no candidates on the ballot, and only three voters, total. The winner, selected with two write-in votes, did not even vote for himself.

Though Anamosa’s situation is an extreme, the practice of counting incarcerated individuals where they are confined does democratic damage everywhere. This explains why more than 200 known counties, cities, and school boards in at least 30 states — including the City of Terre Haute and Vigo County — have attempted to correct or otherwise compensate for the 2010 Census tally, usually adjusting local population totals to account for populations in correctional facilities when drawing their own districts.

The solution that avoids representation distortion — in both state and local districts — is to tally incarcerated individuals in the communities to which they are most closely connected on Census Day. That location is not where they are involuntarily confined, but rather where they were from before the government intervened: where their relatives and friends and support systems are often located, where their children may live, where they are most likely to return when they are released from incarceration, and where their inclusion will illuminate and not distort the snapshot of the true local community. Indiana law already provides that a person’s electoral residence does not change when that individual is incarcerated; redistricting should reflect the same principle.

Four states, representing 65 million people, have already decided to adjust Census reports to tally incarcerated individuals for redistricting purposes at their last known address. I would

encourage the Advisory Committee to recommend that Indiana do the same, both for its own statewide districts and for local subdivisions, which may suffer from the democratic distortion to an even greater degree.

I hope that these short thoughts will serve the Advisory Committee as it continues its essential work. I would be happy to answer any additional questions that the Committee may have, and I certainly hope to be more available to speak with the Committee in the course of future deliberations. I thank the Committee once again for the opportunity to present this perspective, and wish you the best of luck in your endeavor to better protect the voting rights of all Hoosiers.