



The League of Women Voters of Virginia

501 East Franklin Street, Suite 624

Richmond, VA 23219

(804) 521-4171

www.LWV-VA.org

20 July 2016

Ms. Karen Humes
Chief, Population Division
U.S. Census Bureau, Room 6H174
Washington, DC 20233

Dear Ms. Humes,

Thank you for this opportunity to respond to the Census Bureau's Notice seeking comments on the Bureau's proposed 2020 Census Residence Rule and Residence Situations (81 FR 42577, June 30, 2016). The League of Women Voters of Virginia urges the Bureau to change the method it uses to count the prison population due to the impact it has on voter representation and on the League's mission to protect voting rights, ensure fair and equal representation, and promote accurate redistricting.

In 2015, in response to the Census Bureau's request for comments on its interpretation of its "usual residence" rule, the Bureau received 156 comments, asking the Bureau to change its interpretation of how the residence rule applies to prisoners and to count them at their home or pre-incarceration addresses. Six comments opposed changing the rule. It is difficult to understand why the great weight of those comments in favor of changing the rule did not persuade the Bureau to change its approach with respect to prisoner counts.

The Bureau created the "usual residence" rule through administrative interpretation of the Census Act of 1790. While a few changes have been made to those rules since that time in order to keep up with the changing demographics of America, the rule to count prisoners where they are incarcerated, not at their home residences, has remained unchanged over the last centuries.

Doubtless in 1790 when citizens were less mobile, these terms in the statute, "usual place of abode," "settled place of residence ...in any family," and "every person occasionally absent at the time of the enumeration, as belonging to that place in which he usually resides in the United States," meant one's home location. Back in 1790, this rule made sense because there were few prisoners and they were imprisoned and punished in their home locations. Since 1980, however, the prison population has quadrupled and, prisoners are now typically incarcerated in rural areas far from home. This change in circumstances and failure to change the residence rule in the context of today's imprisonment practices results in prison gerrymandering, granting greater representation to rural areas that contain prisons and, hence, unequal representation for residents in districts that contain no prisons (both urban and rural). It is time for the Census Bureau to update its interpretation of the people in prison on Census day.

In this proposed rule, when the Bureau does make a change in its interpretation of the "usual residence" rules, it appears to lean heavily on how long individuals are away from home. For

example, military now *deployed* overseas will be counted at their home addresses. Other military *stationed or assigned* overseas will be counted as previously in their “home of record” state for apportionment purposes only. Residents of juvenile group homes are counted at the group home location because they are there for long periods of time while juveniles in residential treatment centers will be counted at their home locations because the Census Bureau believes individual stays are relatively short.

A factual survey about prisoner time served at each prison nationwide might reveal that vast numbers of prisoners serve two years or less. In Virginia, the median time served in state prison for someone released in 2014 was 19.5 months. But even while they were in state custody they were likely to have been moved between different facilities, making the time spent at any given facility much shorter. We don’t have that data available for Virginia, but in New York, for example, the median length of stay in any given facility is about seven months and in Rhode Island it is under 100 days. Length of stay does not appear to support the Bureau’s reasoning for continuing to count prisoners at their prison locations where typical prisoner time served can be shorter than deployments overseas.

Also of concern in this proposed rule is that the Census Bureau leaves it up to the states individually to decide whether to include their own prisoner population counts when they redistrict. If states decide they want to exclude prisoner counts when they redistrict, states must either do the calculations themselves or submit a data file to the Census Bureau (indicating where each prisoner is incarcerated on Census Day and their pre-incarceration address) in a specified format. The Census Bureau will review the submitted file and then, if it includes the necessary data, provide a product that contains supplemental information the state can use to construct alternative, within-state tabulations for its own purposes. But even with this proposed solution states still cannot, as a practical matter, account for all of their residents who may be in other states’ prisons or in a federal facility. It is not clear why the Census Bureau does not use its statutory authority (to collect accurate census data) to ask states simply to do that.

Some localities in Virginia at town, city, and county levels have chosen to exclude their prisoner counts on occasion when making redistricting decisions. Six counties have adjusted their Census data and did not include prisoner counts when drawing their supervisors’ districts. Eighteen other counties in Virginia used Census data and included prison populations when drawing their supervisors’ districts. Such individual decision-making only adds to a lack of uniformity within states and among states, leading to inaccuracy in the way prisoners are treated for redistricting purposes.

This is a problem in rural communities that contain large prisons because it seriously distorts redistricting at the local level (county commissions, city councils, and school boards). The Constitutional principle of one person, one vote should not be a county by county or state by state issue. It is a federal issue about representational equality.

Already four states (Maryland, New York, California and Delaware) now count prisoners at their home locations for redistricting purposes; other states do not. Two recent court decisions in Rhode Island and Florida have held that counting prisoners at prisons in districts for local redistricting purposes as if those prisoners are eligible voters violates the Constitution’s one person, one vote principle. Here are links to the two decisions:

http://www.prisonersofthecensus.org/Calvin_v_Jefferson-Order.pdf;

<http://riaclu.org/images/uploads/Davidson.v.Cranston.decision.pdf>. Cranston is now on appeal.

These cases make it more likely that other challenges to using Census data will follow if the Bureau

does not change the way it counts incarcerated people. The Bureau's proposed rules lead to greater uncertainty as states redistrict in 2021.

Under its statutory authority to collect accurate census data, the Census Bureau can ask states and the federal Bureau of Prisons to submit a data file, indicating where each prisoner is incarcerated on Census Day and prisoner's pre-incarceration address. We ask the Census Bureau to exercise that authority in order to conduct an accurate Census.

Continuing to count prisoners at their places of incarceration makes it more likely than not that states will continue to count prisoners in districts where they should not be counted, resulting in impermissibly unequal representation in districts that do not contain prisons. Failing to interpret "usual residence" to reflect today's vastly changed circumstances promotes the likelihood that more federal courts will hold that the Bureau's failure to update its residence rules results in state redistricting plans that violate the Constitution.

Therefore, the League urges the Census Bureau to change the "usual residence" rules for the 2020 Census so that prisoners are counted at their pre-arrest home jurisdiction. Fairness in voting power will result and will prevent constitutional violations of the one person, one vote requirement.

Sincerely,

Lois Page
Co-President, League of Women Voters of Virginia
lpage.lwvva@cox.net

Dianne Blais
Co-President, League of Women Voters of Virginia
dblais.lwvva@gmail.com