



Karen Humes, Chief
Population Division
U.S. Census Bureau
Room 5H174
Washington, DC 20233

July 20, 2015

Comment: Residence Rule and Residence Situations , 80 FR 28950 (May 20, 2015)

Dear Ms. Humes:

Dēmos appreciates the opportunity to submit this comment in response to the Census Bureau's federal register notice regarding the Residence Rule and Residence Situations, 80 FR 28950 (May 20, 2015).

Dēmos is a national public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Dēmos has been working with state and national groups, redistricting experts, and other stakeholders for nearly a decade to support reform of the Bureau's "usual residence" rule as it applies to incarcerated persons. Dēmos also has served as counsel or co-counsel in many of the legal actions described in this comment.

The Bureau's existing residence rule, as it applies to incarcerated persons, results in serious distortions in how our nation's population is reflected and tabulated for redistricting purposes, and fails to reflect accurately the demographics of numerous communities throughout our country. Because of this outdated rule, some 2 million incarcerated people are being counted in the wrong place for purposes of redistricting, undermining the equal representation principle of the 14th Amendment to the U.S. Constitution. In particular, using this flawed data to draw local and state districts grants the people who happen to live near large prisons extra representation in government, at the expense of voters everywhere else in the jurisdiction.

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To end these distortions and inaccuracies – commonly referred to as “prison gerrymandering” – Dēmos urges the Bureau to revise its Residence Rule to tabulate incarcerated people at their home address, rather than at the particular facility where they happen to be present on Census day.

Dēmos has reviewed and fully endorses the factual background on this issue that is explained in the comment filed by the Prison Policy Initiative, with which we work closely on the issue of prison gerrymandering. To avoid duplication, we will not repeat that background here. Dēmos instead will use this comment letter primarily to discuss some of the insights revealed by past and recent litigation over the issue of prison gerrymandering, and how such litigation reinforces the wisdom of a change in the Census Bureau’s approach to tabulating incarcerated persons.

As background for this discussion, it is useful to refer to the U.S. Supreme Court’s 1992 decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). In *Franklin*, the Supreme Court upheld the Census Bureau’s authority and decision to change its method of determining the residence of overseas military personnel. In that case, the Census Bureau advocated for a flexible interpretation of the usual residence rule, arguing that: “[i]t is far too late in the Nation’s history to suggest that enumeration of the population of the States must be based on a rigid rule of physical presence on the census date.”¹

In its *Franklin* ruling, the Supreme Court upheld the Census Bureau’s change in the residence rule so as to count military personnel at their “home of record”. The Court distinguished “usual residence” from mere physical presence, noting that the former “has been used broadly enough to include some element of allegiance or enduring tie to a place.” 505 U.S. at 804. *Franklin* supports the Census Bureau’s authority to change the manner in which it applies its residence rule to particular populations in response to changes in social and demographic factors affecting the rule’s application. In recent years, the Bureau’s current rules on tabulation of incarcerated persons have also proven to be outdated and to require change.

¹ Brief for the Appellants at 17, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502), cited in Kirsten D. Levingston & Christopher Muller, Brennan Center for Justice at NYU School of Law, “Home” in 2010: A Report on the Feasibility of Enumerating People in Prison at Their Home Addresses in the Next Census 9 (Feb. 15, 2006), <https://www.brennancenter.org/publication/home-2010>.

Reform laws in New York and Maryland

The inadequacies of the Bureau's current counting rules with respect to incarcerated persons are reflected in the decision of four states, thus far, to reject the Bureau's population data on incarcerated persons, and to require instead that incarcerated persons be tabulated as residents of their pre-prison home addresses. New York, Maryland, California, and Delaware have all enacted legislation requiring this change.² New York and Maryland implemented this change with respect to their states' redistricting after the 2010 Census, while California and Delaware will implement this new approach in response to the 2020 Census. The experiences of Maryland and New York in implementing their reform laws for the 2010 round of have been reviewed and analyzed in a report prepared for Demos by Erika L. Wood, Professor of Law at New York Law School.³

In both New York and Maryland, the reform laws withstood legal challenges. New York's reform law was challenged on state constitutional grounds and was upheld in 2011.⁴ Demos served as co-counsel for individuals and organizations who intervened in the lawsuit to defend the reform. In Maryland, the reform law that counted incarcerated people at their home address in the post-2010 redistricting process came under a federal constitutional challenge. Dēmos, along with the ACLU of Maryland, the Maryland and Somerset County NAACP, the Howard University Civil Rights Clinic, and the NAACP Legal Defense Fund, joined in filing an amicus brief to defend the constitutionality of Maryland's reform law. The three-judge district court agreed that Maryland's law requiring reallocation of incarcerated persons to their home address was fully consistent with the U.S. Constitution. On appeal of that ruling, the U.S. Supreme Court affirmed.⁵

Grappling with prison population in court-ordered plan in Kansas

A three-judge federal district court in Kansas also had to grapple with the distortions caused by application of the usual residence rule to incarcerated persons in 2012, when the Kansas legislature failed to agree on a state legislative redistricting plan. The unique concentration of state, federal and private prisons in the Leavenworth area in Kansas posed a problem for map-

² Cal. Elec. Code § 21003; 29 Del. Code § 804A; Md. Code Ann., Election Law § 8-704; Md. Code Ann., State Gov't, § 2-2A-01; N.Y. Legis. Law § 83-m(13)(b).

³ Erika L. Wood, *Implementing Reform: How Maryland and New York Ended Prison Gerrymandering*, August 15, 2014. The report is submitted as an attachment to this Comment, and is available at <http://www.demos.org/sites/default/files/publications/implementingreform.pdf>.

⁴ *Little v. LATFOR*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011).

⁵ *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge court), *aff'd*, 133 S.Ct. 29 (2012).

drawers, because combining that population in one district would have meant that a substantial portion of that district would be made up of phantom constituents -- people who are from other parts of the state (or country) and who are not allowed to vote or interact with the community in any other way. The plan proposed by the Kansas House would have done precisely that, resulting in a district with 5,622 incarcerated persons and a population deviation of over 20%. This would have given every four residents of that district the political influence of 5 residents in any other district.⁶

The plan ultimately adopted by the federal district court ameliorated this problem by splitting the Leavenworth facilities among three different House districts instead of concentrating them into one.⁷ Nonetheless, this was still only a partial solution to the problem, because the federal court had no data on the actual home addresses of the persons incarcerated at the Leavenworth facilities, and thus could not assign them to their true residences.

Prison gerrymandering in Cranston, Rhode Island – a constitutional challenge

In 2014, a group of residents of Cranston, Rhode Island, along with the Rhode Island ACLU, filed a federal court challenge to an extreme instance of prison gerrymandering of the City Council and School Committee districts in Cranston, Rhode Island.⁸ Dēmos, the ACLU, and the Prison Policy Initiative are representing the plaintiffs in this case.

Following the 2010 Census, the City of Cranston redrew the districts used to elect City Council and School Committee members. Cranston houses Rhode Island’s only state prison complex, the Adult Correctional Institutions (“ACI”). The ACI contains an incarcerated population of 3,433.⁹

During the public discussions leading up to Cranston’s 2012 redistricting, the members of the City Council were confronted with the question of how and whether to count the incarcerated population of the ACI. At a public hearing on the proposed districting plan, the Council heard

⁶ Peter Wagner and Brenda Wright, “One Last Chance to Avoid Prison Gerrymandering in Kansas,” May 28, 2012, http://www.prisonersofthecensus.org/kansas/one_last_chance.pdf.

⁷ *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kansas 2012) (three-judge court); see also Peter Wagner, “Federal Judges save Kansas from ‘worst prison gerrymander’ award,” June 8, 2012, <http://www.prisonersofthecensus.org/news/2012/06/08/ks-court-maps/>

⁸ See *Davidson v. City of Cranston*, 42 F.Supp.3d 325 (D. R.I. 2014).

⁹ Declaration of William Cooper, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, April 30, 2015, ¶ 23.

testimony as to the severe distortions that would be created by counting all of the inmates of the ACI in a single ward.¹⁰ In spite of this, the Cranston City Council approved a districting plan that includes the prison population in its base population count and counts the entire population of the only state correctional facility in Rhode Island in a single ward—Ward 6.

Without the incarcerated population, Ward 6 includes only 10,227 residents, compared with 13,000-14,000 persons making up each of the other five city wards. Thus, persons involuntarily incarcerated in the ACI—who are in no sense true “residents” of Ward 6—constitute almost a quarter of the population counted toward Ward 6’s population total. This results in an actual maximum population deviation among all Cranston wards of approximately 28%.¹¹

Put differently, because Ward 6 has significantly fewer actual residents than any of the other five wards, three Ward 6 constituents enjoy more representation and political power in City government than four similar people across the district line.

In response to the filing of plaintiffs’ one person, one vote challenge to the City of Cranston’s districting plan, the City filed a motion to dismiss the complaint, arguing that because the City relied upon U.S. Census Data, the inclusion of the incarcerated population is not subject to constitutional challenge. The District Court disagreed, and explained its reasoning as follows:

[T]he case now before this Court presents an alleged set of circumstances that appears to be justified by neither the principle of electoral equality nor of representational equality. Clearly, the inclusion of the ACI prison population is not advancing the principle of electoral equality because the majority of prisoners, pursuant to the State’s Constitution, cannot vote, and those who can vote are required by State law to vote by absentee ballot from their pre-incarceration address. Consequently, according to Plaintiffs, a full 25% of the population of Ward Six cannot vote in the Ward. . . .

Furthermore, if Plaintiffs’ allegations are true, the prisoners’ inclusion in Ward Six does nothing to advance the principle of representational equality. Nonvoting residents generally have a right to petition elected officials, even if they were not able to vote for them; and they may generally be presumed to have a great interest in the management

¹⁰ Deposition of Steven Brown, Davidson v. City of Cranston, Civil Action No. 1:14-cv-00091-L-LDA, February 25, 2015, 8:4-8:20.

¹¹ Supplemental Declaration of William Cooper, Davidson v. City of Cranston, Civil Action No. 1:14-cv-00091-L-LDA, June 15, 2015, Exh. A-1, Figure 5.

of their municipalities. This is true of minors, noncitizens, college students, and military and naval personnel. . . .

Based on Plaintiffs' allegations, it appears to the Court that the ACI population does not participate in any aspect of the City's civic life. According to Plaintiffs, they cannot send their children to school in Cranston; they cannot visit the City's parks; they do not pay taxes to the City; they do not drive on the City's roads. It is not clear from the information available to the Court at this juncture of the litigation that the prisoners at the ACI's inclusion in Ward Six furthers the Constitutional goals of either representational or electoral equality.¹²

The Court therefore denied the City's motion to dismiss and allowed the plaintiffs to proceed with discovery to flesh out the facts concerning the ACI population and its interaction, or lack thereof, with the community and City officials.

Subsequent discovery in *Davidson v. City of Cranston* has confirmed that the ACI population does not partake in the civic life of the community and is not represented by elected officials in Cranston in any meaningful sense. The overwhelming majority of persons incarcerated in the ACI are not domiciled residents in Ward 6, but remain residents of the communities where they lived prior to their incarceration.¹³ The median length of stay for individuals at the ACI is only 99 days.¹⁴ Incarcerated persons at the ACI did not choose where they would be incarcerated.¹⁵ They cannot voluntarily visit or patronize public or private establishments and cannot participate in the life of the Ward 6 community. Their children are not even permitted to attend Cranston public schools by claiming residence of the parent at the ACI.¹⁶ A significant proportion of ACI inmates are not eligible to vote in City or School Committee elections because they have been convicted of a felony.¹⁷ Those who can still vote typically cannot claim the ACI

¹² *Davidson v. City of Cranston*, 42 F.Supp.3d 325, 331-332(D. R.I. 2014).

¹³ Declaration of William Cooper, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, April 30, 2015, ¶ 27; R.I. Gen. Laws § 17-1-3.1(a).

¹⁴ *Id.* ¶ 26.

¹⁵ Affidavit of Joseph A. Dinitto, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, ¶4.

¹⁶ See Defendant's Response to Plaintiffs' First Set of Interrogatories, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, Inter. No. 3.

¹⁷ Affidavit of Caitlin O'Connor, *Davidson v. City of Cranston*, Civil Action No. 1:14-cv-00091-L-LDA, ¶4.

as their domicile for voting purposes, but must instead vote by absentee ballot from their pre-incarceration domicile.¹⁸

Discovery in the case has now concluded, and no evidence has been produced that any elected official in Cranston has made campaign visits to the ACI to seek the electoral support of persons incarcerated there or to identify their needs and views about city governance. The City Councilor who represents Ward 6 acknowledged in his deposition that he is unable to identify any group of persons in Ward 6 that is more isolated from the rest of the community than the ACI population.¹⁹ The only correspondence prior to the lawsuit from anyone incarcerated at the ACI that the City could identify was a single letter in 2012, to which no one in city government apparently ever responded.²⁰

Cranston officials are by no means unique in this regard. One researcher conducted a survey of all of the members of the lower house of the Indiana state legislature, asking the following question:

Which inmate would you feel was more truly a part of your constituency?

- a) An inmate who is currently incarcerated in a prison located in your district, but has no other ties to your district.
- b) An inmate who is currently incarcerated in a prison in another district, but who lived in your district before being convicted and/or whose family still lives in your district.²¹

The results were uniform. “Every single one of the forty respondents who answered the question – regardless of their political party or the presence or absence of a prison in their district – chose answer (b).”²² *Id.* A similar survey of Maryland legislators also shows decisively

¹⁸ Deposition of Kimball Brace, Davidson v. City of Cranston, Civil Action No. 1:14-cv-00091-L-LDA, June 22, 2015, 87-90; R.I. Gen. Laws § 17-1-3.1(a).

¹⁹ Deposition of Michael Favicchio, Davidson v. City of Cranston, Civil Action No. 1:14-cv-00091-L-LDA, February 25, 2015, 41:16-41:20.

²⁰ Deposition of Allan Fung, Davidson v. City of Cranston, Civil Action No. 1:14-cv-00091-L-LDA, February 24, 2015, 51-52.

²¹ Taren Stinebrickner-Kauffman, Counting Matters: Prison Inmates, Population Bases, and “One Person, One Vote,” 11 Va. J. Soc. Pol’y & L. 229, 303 (2004).

²² *Id.*

that legislators view incarcerated persons as their constituents based on their home addresses, not based on the location of the prisons where they are incarcerated. The survey asked legislators who they would be more likely to consider a constituent: someone from their district who is incarcerated elsewhere, or someone who is from elsewhere but is incarcerated in their district. Again, virtually all legislators (92%) said they would be more likely to consider persons from their district who are incarcerated elsewhere to be their constituents.²³

As noted at the outset, the facts and legal rulings discussed in this Comment make up only a small part of the vast record of evidence that the Census Bureau's current residence rule, as applied to incarcerated persons, is outdated and no longer accurately reflects the population that it seeks to count. Dēmos urges the Census Bureau, in the 2020 Census, to tabulate incarcerated persons at their pre-prison home addresses.

Thank you very much for the opportunity to submit this Comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenda Wright". The signature is written in a cursive, flowing style.

Brenda Wright
Vice President for Policy and Legal Strategies

²³ Representative-Inmate Survey, Senate Education, Health, and Environmental Affairs Committee, Bill File: 2010 Md. S.B. 400 at 22-28. The Maryland researchers found similar results regardless of whether the legislator had a prison in his or her district. The survey also found that legislators are far more likely to receive communications from incarcerated persons whose home community is in their district than from persons who are incarcerated in a prison in the legislator's district.