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Addressing Prison-Based Gerrymandering in California

Written Testimony of Demos and Prison Policy Initiative
Before California Citizens Redistricting Commission
July 15, 2011

Dēmos and the Prison Policy Initiative submit this written testimony to discuss the issue of prison-based gerrymandering and to make recommendations on how the Citizens Redistricting Commission (CRC) can take steps to minimize the impact of prison-based gerrymandering in drawing state legislative districts for California.

Dēmos is a national, non-profit, non-partisan research and policy organization, established in 2000, with offices in Boston, New York, Washington, D.C., and Austin, Texas. The Dēmos Democracy Program works to ensure high levels of voting and civic engagement, and supports reforms to reduce barriers to participation by historically disfranchised communities and to achieve a more inclusive and representative democracy.

The Prison Policy Initiative is a Massachusetts-based non-partisan, non-profit center which for the last decade has been the leading organization studying how the U.S. Census counts people in prison and working to quantify the policy and legal implications flowing from those technical decisions.

I. Introduction to Prison-based Gerrymandering in California

Prison-based gerrymandering is the practice of counting incarcerated persons as "residents" of a prison when drawing legislative districts in order to give extra influence to the districts that contain prisons. The U.S. Constitution requires that election districts be roughly equal in size, so that everyone is represented equally in the political process. But prison-based gerrymandering distorts our democracy by artificially inflating the population numbers – and thus, the political clout – of districts with prisons, while diluting the political power of all other voters.

This problem is largely a byproduct of two factors: (1) an outdated Census Bureau methodology that counts people in prison as residents of the correctional facilities, rather than as residents of their home communities which remains their domicile under law; and (2) the skyrocketing rates of incarceration. This second factor is especially problematic for California where the number of incarcerated persons exploded during the last three decades, from 23,000 to over 173,000.[1] Although the Census Bureau has always counted incarcerated persons as residents of the prison location, it is only recently that the prison population has grown large enough to affect legislative redistricting.

In past redistricting cycles, California chose to prioritize population equality so highly that it drew all legislative districts exactly the same size, rather than permitting a small population deviation among legislative districts as most states do.[2] Ironically, without a fix to prison-based gerrymandering, California's devotion to population equality in redistricting was futile. This problem is illustrated by a cluster of districts drawn after the 2000 Census in the Central Valley: 8.6% of the 30th Assembly district was incarcerated in state prisons, 5.7% of the 20th Congressional district was incarcerated in state prisons, and 4.3% of the 16th Senate district was incarcerated in state prisons.[3] In each of these districts, every group of 91 to 94 people were given as much influence in Sacramento as 100 people from any other district that was not itself padded with large prison populations.

The Census Bureau practice of assigning incarcerated persons as residents of the prison directly conflicts with California law, which clearly states that a prison is not a residence: "A person does not gain or lose a domicile solely by reason of his presence or absence from a place … while kept in an almshouse, asylum or prison." Cal. Elec. Code § 2025 (2010). Court decisions confirm that incarceration does not change a person's domicile, and that incarcerated persons in California remain domiciled at their pre-incarceration address.[4]

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[1] U.S. Department of Justice, Historical Statistics on Prisoners in the State and Federal Institutions, Yearend 1925-1986, Table 1, p. 12; U.S. Department of Justice, Sourcebook of Criminal Justice Statistics Online, Table 6.30.2008, *available at* http://www.albany.edu/sourcebook/pdf/t6302008.pdf.

[2] As explained in more detail below, California's new law establishing a Citizens Redistricting Commission now allows more leeway for population variation, which has implications for steps the Commission could take to minimize the impact of prison-based gerrymandering.

[3] Aleks Kajstura & Peter Wagner, *Importing Constituents: Prisoners and Political Clout in California*, Prison Policy Initiative (Mar. 2010), *available at* http://www.prisonersofthecensus.org/ca/report.html.

[4] *Cohen v. United States*, 297 F.2d 760 (9th Cir. 1962) (even though tax authorities knew taxpayer was incarcerated, *id.* at 772, tax assessment notice was properly sent to taxpayer's pre-incarceration residence, because "[o]ne does not change his residence to the prison by virtue of being incarcerated there[,]" *id.* at 774); *Vivenzi-de la Cruz v. Holder,* 2010 WL 1253286 (D. Az. 2010) (incarceration of California resident in Arizona prison did not make person a resident of Arizona for purposes of jurisdiction over nationality determination); *Hillman v. Stults*, 263 Cal. App. 2d

Prison-based gerrymandering has a significant impact on the political representation of communities of color in California. African Americans and Latinos are substantially overrepresented in California's prison population: while comprising 43% of the overall state population, they comprise more than two-thirds (68%) of incarcerated persons in California.[5] Crediting this population to the prison location rather than to the home communities where they retain their domicile particularly harms the representation of communities of color because prisons are primarily located outside of the urban areas that are home to large numbers of incarcerated persons. Although 34% of incarcerated persons in California come from Los Angeles County, only 3% of the state's prison cells are located in Los Angeles County.[6] Thus, while prison-based gerrymandering dilutes the voting strength of any California resident not residing in close proximity to a prison, the practice disproportionately dilutes the representation of communities of color.

In addition, in states like California where majority-Hispanic or coalition districts can be drawn in regions that contain large prisons, there exists the potential for a second type of negative impact on the voting strength of communities of color. Because people in prison can not vote, it is entirely possible for a plan to be drawn that appears to be majority people of color but will be unable to perform as intended.. The most famous example of this problem is in Somerset County, Maryland. In Somerset, a county commission district was deliberately drawn as a majority–minority district in order to settle a Voting Rights Act lawsuit. The district was unable to elect an African-American, however, because it included the prison population, which can not vote. The actual African-American resident population in the district was too small to elect an African-American candidate, but an effective African-American district could have been drawn if the prison population had not been included in the population data.

II. Ways of Minimizing Prison-Based Gerrymandering

The ideal solution for ending prison-based gerrymandering is to allocate incarcerated persons to their home addresses when determining the population base for ideal district size in the redistricting process. Other states, such as New York and Maryland, have enacted legislation to

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848, 872 (1968) (in determining domicile for conservatorship proceedings, "[p]risoners do not gain or lose residence as a result of being removed to the prison system").

[5] U.S. Census Bureau, California QuickFacts, available at http://quickfacts.census.gov/qfd/states/06000.html; California Dep't of Corrections, California Prisoners & Parolees 2009 at 19, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRIS2009.pdf.

[6] Prison Policy Initiative, *Fixing Prison-Based Gerrymandering after the 2010 Census: California*, available at http://www.prisonersofthecensus.org/50states/CA.html.

implement this solution for the current round of redistricting.[7] In California, Assembly Bill 420 looks to implement this solution to end prison-based gerrymandering in California for the 2020 redistricting cycle.[8]

Even though it may be too late in the 2010 redistricting process to implement this ideal solution for the 2010 round of redistricting in California, there are, nevertheless, several options open to the CRC to help minimize the impact of prison-based gerrymandering in the current round of redistricting.

These issues are of particular interest given the necessity of submitting the CRC's redistricting plans to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act, and the importance of ensuring the state's compliance with the more general protections against minority vote dilution in Section 2 of the Voting Rights Act.

A. Exclude Incarcerated Population from Redistricting Counts

The Citizens Redistricting Commission could take an important step to minimize prison-based gerrymandering by making a determination to treat the prison population as if the addresses of the incarcerated people were unknown, and to use this data when determining ideal district size for the purpose of drawing state legislative district lines. This would not credit incarcerated people back to their homes, but it would end the practice of crediting them to different communities of interest in the wrong part of the state.

[7] Maryland HB496/SB400 was signed by the governor on April 13, 2010, and New York's Part XX of A9710D/S6610C was signed by the governor on August 11, 2010.

[8] The California Assembly passed AB 420, and it is now before the Senate. AB 420 would require the CDCR, for the 2020 redistricting cycle to provide the Citizens Redistricting Commission with the last known place of residence of each person incarcerated in a state adult correctional facility. "Last known place of residence" means the address at which the person was last domiciled prior to his or her current term of incarceration, as determined from court records of the county in which the person was sentenced to his or her current term of incarceration.

The specific information required would be, for each incarcerated person, a unique identifier, other than the person's name or CDCR number, and last known address information that is sufficiently specific to determine the congressional, State Senatorial, State Assembly, or State Board of Equalization district in which the incarcerated person's last known place of residence is located. That address information might include ZIP Code information or street address information from which a ZIP Code can be derived. The CDCR would not be required to provide the last known place of address for incarcerated persons whose last known place of residence is outside of California. Under the bill, the CDCR would be required to provide that data no later than December 31, 2019, in time for California's 2020 redistricting cycle.

In fact, many California counties that contain prisons, including Amador, Del Norte, Imperial, Kern, Kings, Lassen, Madera, Monterey, San Luis Obispo, and Tuolumne Counties, already use this approach to redistricting when drawing their local electoral districts.[9] The California Attorney General has issued a formal opinion finding that California counties have the authority to exclude incarcerated population in calculating district size.[10] As the Attorney General Opinion observes, including such populations in drawing districts "might well create an imbalance in voting strength and a dilution of voting power among district voters":

> For example, if a district has 20,000 in population of which 5,000 are state prisoners, the non-prisoner population in that district will have greater voting power in selecting a supervisor, as well as greater access to that supervisor, than the non-prisoner populations in the other four districts. A vote in the district containing the state prison will necessarily count more; in comparison, the voting power of persons in the other districts will be diluted. Claims of minority vote dilution will be especially significant if the prisoner and ward populations are not reflective of the racial and language minority populations of the county as a whole.[11]

If the CRC will not consider removing the prison populations in determining ideal district size for legislative districts, there may still be ways to minimize the impact of the prison miscount. The CRC can seek to configure districts so that multiple large prisons are not concentrated in an individual district, thereby lessening the size of the vote enhancement in the prison districts. Similarly, if a single block contains a massive prison, the block could be split in two, so that the prison population can be placed in two different districts, thereby lessening the vote enhancement in any one district.

B. Use permissible population deviations to compensate for prison populations

The Voters FIRST Act, which shifted responsibility to the CRC for drawing state political districts in California, also authorized a certain amount of deviation from strict population equality for those districts. The CRC is required to, in compliance with the United States Constitution, draw congressional districts that achieve "population equality as nearly as is practicable," and to draw Assembly, Senate, and Board of Equalization districts that are "reasonably equal in population," except where the deviation is required to comply with the

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[9] Prison Policy Initiative, *10 Calif. Counties Reject Prison-Based Gerrymandering,* available at http://www.prisonersofthecensus.org/factsheets/ca/ca_counties.pdf.

[10] Office of the Attorney General, State of California, Opinion No. 91-601, 74 Ops. Cal. Atty. Gen. 162, 1991 WL 495473 (Cal.A.G. Aug. 23, 1991).

[11] *Id.* at *3.

Voting Rights Act or is otherwise allowable by law.[12] In accord with the Supreme Court's interpretation of permissible population deviations, most state and local governments draw their districts so that the smallest district is no more than 5% smaller, and the largest district no more than 5% larger, than the average district – keeping the total difference to less than 10%.[13]

This permitted deviation from exactly equal districts creates the opportunity for the CRC to avoid underpopulating any districts having large prisons compared to ideal district size, because including prison population magnifies the underpopulation of the district. (A district that is "underpopulated" compared with ideal size exercise more political power than an "overpopulated" district, because in underpopulated districts, fewer people get the same opportunity to elect a representative as a larger number of people crowded into an overpopulated district.)

For that reason, a district that nominally falls within the 5% deviation rule, but would fall outside that deviation without the prison population, should be examined carefully to determine if the deviation should be reduced. The inverse is, of course, also a concern: the fact that incarcerated people should have been counted at home is a strong reason to avoid extreme overpopulation of urban districts where incarcerated people disproportionately come from.

III. Analysis of CRC's Proposed Plans and Recommendations for Avoiding Prison-Based Gerrymandering

We looked at the impact of the Census Bureau's prison counts on the districts drawn for the Assembly, the Senate and Congress, both under a "one person, one vote" analysis and an analysis intended to ensure that the districts would function as intended to enable communities of color to elect candidate of their choice.

For our analysis of prison populations, we used the Advance Group Quarters Summary File released by the Census Bureau in April, and we attached the California portion of this summary file as GROUP-QUARTERS-POP-BY-BLOCK.zip. This file contains a column with the correctional population in each census block. While it does not separately contain information on race, ethnicity, or citizenship for the correctional population, we were able to use other Census data for the blocks in question to perform our analysis.

We also performed the same analysis of the districts drawn by MALDEF submitted on May 26. In general, we found the MALDEF districts in this region superior under both a "one person, one

[12] CAL. CONST. art. XXI, § 2(d)(1).

[13] *See Reynolds v. Sims*, 377 U.S. 533 (1963); *White v. Regester*, 412 U.S. 755 (1973).

vote" analysis and with an eye towards maximizing the number of districts where communities of color would be able to elect a candidate of their choice. The principles underlying our analysis are generally applicable, however, and we focus our recommendations on the districts proposed by the Commission.

We will discuss the Assembly, Senate and Congressional districts in detail below, but in general, we discovered that the concentration of prisons in all three kinds of districts near Kings County could be greatly reduced with some simple block swaps with neighboring districts without crossing any additional county lines.

A. Analysis of State Assembly Districts

In the CRC's proposed first round plans, the Assembly districts were drawn within a narrow range of -2.84% to +2.49%. But these calculations rely on prison populations in a number of districts. Without relying on the prison population, the deviations would be -7.36% to + 2.9%.

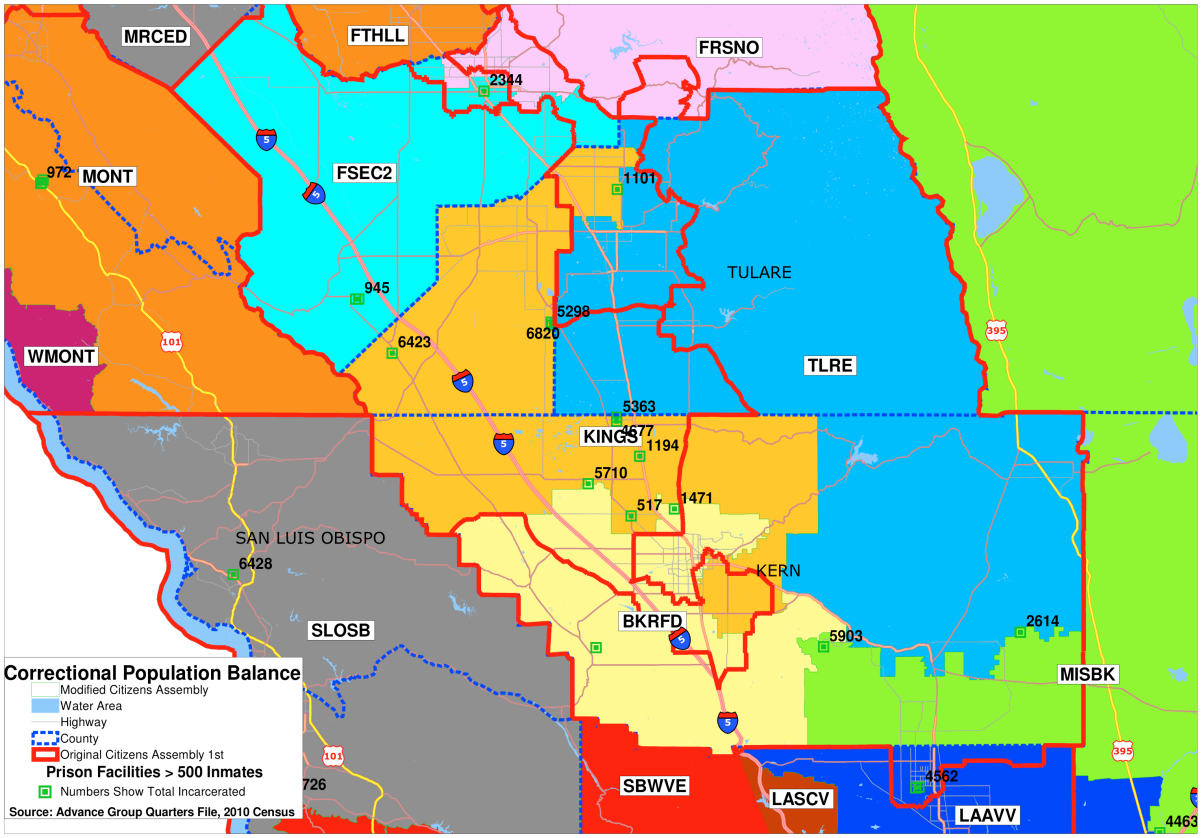
The Assembly District in Kings County is problematic from the standpoint of prison-based gerrymandering. It was drawn to have a population deviation of +0.25%, but it contains a correctional population of 38,413, almost all of which is state prisons. Excluding the correctional population from that district alone would make the district 8% below the ideal population, and compared to an ideal district size adjusted to exclude prison populations, it would be 7.36% below the ideal.

The impact of prison-based gerrymandering in this district could be reduced by shifting some of the prisons in the southern part of the district (in Kern County) into the Bakersfield district and replacing those prison populations with the surrounding non-prison population.

For example, our consultant Bill Cooper prepared a map (below) of the Assembly district near Kings County which transferred some of the prisons in the Kings district to the Bakersfield districts. In the process, the LCVAP of the Kings district rises to 50.5%.

Alternatively, we note that the MALDEF May 26 proposal for the Assembly does a good job of balancing the prison populations between districts in this region.

We have attached a block equivalency file for this map in PPI_DEMOS_EQUIV_7_14_ASSEMBLY.zip.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MISBK
SBWVE
LASCV
4562
LAAVV
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726
Correctional Population Balance
Modified Citizens Assembly
Water Area
Highway
County
Original Citizens Assembly 1st
Prison Facilities > 500 Inmates
Numbers Show Total Incarcerated
Source: Advance Group Quarters File, 2010 Census

California Citizens Redistricting Commission Assembly 1st Draft -- Correctional Population Balance

Modified Districts

District	Pop	Dev.	% Dev.	18+_Pop	% 18+ Latino	%18+ NH Asian	% 18+_NH DOJ Black	% 18+ Minority	Group Quarters Incarcerated	% Group Quarters Incarcerated	%_Latino Citizen Voting Age	%_Black Citizen Voting Age
BKRFD	465456	-218	-0.05%	329762	33.56%	3.46%	6.12%	47.17%	10091	2.17%	23.74%	6.70%
KINGS	469233	3559	0.76%	310131	66.83%	2.78%	3.93%	76.84%	14810	3.16%	50.51%	6.88%
MISBK	464472	-1202	-0.26%	333651	31.88%	2.01%	8.15%	46.34%	13281	2.86%	22.79%	8.74%
TLRE	462406	-3268	-0.70%	324725	43.56%	2.11%	3.63%	52.82%	17825	3.85%	30.79%	2.99%

Original Citizens Commission Districts

BKRFD	466643	969	0.21%	335600	28.56%	3.61%	4.81%	41.17%	8771	1.88%	21.31%	5.01%
KINGS	466850	1176	0.25%	315978	63.64%	2.42%	7.33%	76.54%	38413	8.23%	46.26%	10.60%
MISBK	470317	4643	1.00%	335660	31.51%	2.03%	8.27%	46.18%	7378	1.57%	22.60%	8.54%
TLRE	457757	-7917	-1.70%	311031	52.42%	2.31%	1.37%	59.47%	1445	0.32%	37.94%	1.66%

B. State Senate Districts

Because Senate districts contain a larger population than Assembly districts, the prisons have a smaller impact in the Senate, although the same basic conclusions and remedies apply. The Senate districts were drawn within a narrow range of -2.22% to +2.31% deviations. If prisons had been excluded from the districts, the deviation would be -5.16% to + 2.60%

The most problematic district is the Kings County district, which was drawn to have a deviation of -0.81%, but contains a correctional population of 46,595, most of which is state prisons. Excluding the correctional population from that district alone would make the district 5.81% below the ideal population, and compared to an ideal district size adjusted to exclude prison populations, it would be 5.16% below the ideal.

Presumably, the impact of prison-based gerrymandering could be reduced by swapping prisons for non-prison populations in Fresno, Tulare or Kern Counties.

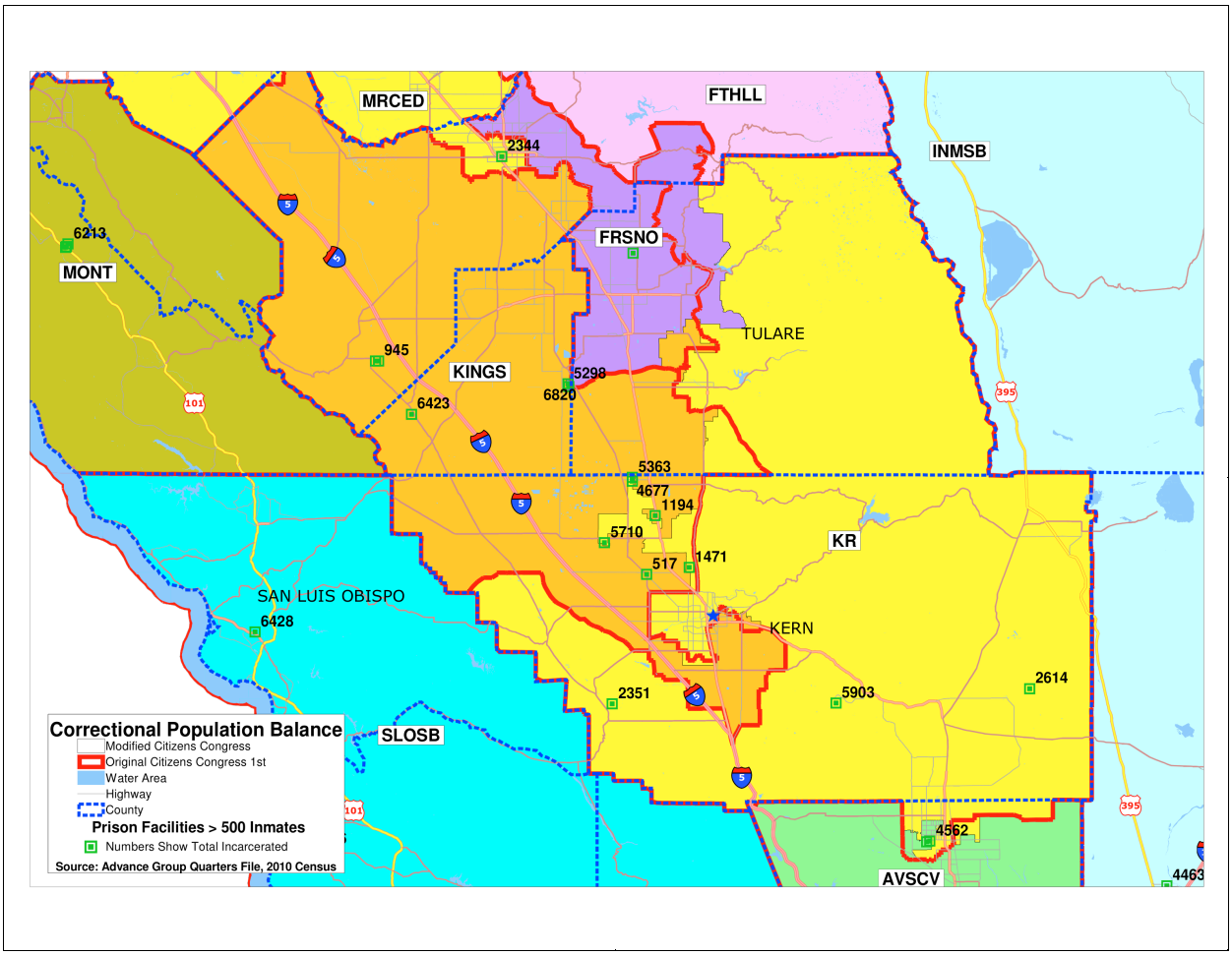
C. Congressional Districts

The CRC's congressional districts were drawn to be exactly equal in population, yet the inclusion of 44,754 people in the Kings district who are almost entirely residents of other parts of the state seems to negate the exact population requirement. (Kings County is currently within the 20th District.) This congressional district, whose population is more than 6% incarcerated, would most likely have the greatest distortion from prison-based gerrymandering of any congressional district in the nation.

We note that the FTHLL, INMSB, and IMSAN districts also contain large correctional facilities, but the impact in Kings is more than twice as large as any of these.

Our consultant, Bill Cooper, was able to draw the attached plan that modifies the ACSCV, FRSNO, KINGS and KR districts, in order to substantially reduce the correctional population in the KINGS district from 44,754 to 29,238. In the process, he only had to split a small number of precincts and was able to increase the LCVAP above 50%, in line with the MALDEF May 26 Kings proposal.

We have attached a block equivalency file for this map as PPI_DEMOS_EQUIV_7_14_CONGRESS.zip.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SAN LUIS OBISPO
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2614
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SLOSB
4562
AVSCV
4463
Correctional Population Balance
Modified Citizens Congress
Original Citizens Congress 1st
Water Area
Highway
County
Prison Facilities > 500 Inmates
Numbers Show Total Incarcerated
Source: Advance Group Quarters File, 2010 Census

California Citizens Redistricting Commission Congress 1st Draft -- Correctional Population Balance

Modified Districts

District	Pop	Deviation	18+_Pop	% 18+ Latino	%18+ NH Asian	18+_NH DOJ Black	% 18+ Minority	Group Quarters Incarcerated	%_Latino Citizen Voting Age	%_Black Citizen Voting Age
AVSCV	702906	1	503840	31.40%	5.40%	7.80%	49.15%	12804	22.88%	7.81%
FRSNO	702904	-1	503094	38.58%	5.18%	3.55%	51.78%	13543	29.28%	3.24%
KINGS	702906	1	464605	67.40%	2.56%	3.70%	76.68%	14678	50.30%	6.75%
KR	702898	-7	508015	30.85%	3.27%	6.84%	45.12%	29238	22.57%	6.61%

Original Citizens Commission Districts

AVSCV	702906	1	502068	31.37%	5.38%	7.75%	49.02%	7129	22.82%	7.66%
FRSNO	702898	-7	497805	39.49%	5.20%	2.94%	52.10%	1349	29.99%	3.21%
KINGS	702905	0	475175	65.85%	2.53%	5.36%	76.71%	44549	49.27%	7.70%
KR	702905	0	504506	30.77%	3.30%	5.97%	44.34%	17236	22.69%	6.11%

Conclusion

Prison-based gerrymandering is incompatible with the goals of fair representation in the redistricting process. We have submitted maps of the relevant regions showing how the distortions resulting from inclusion of incarcerated population can be minimized for the affected state assembly, state senate and congressional districts. We also note that the maps submitted on May 26 by MALDEF for this region do a much better job of minimizing prison-based gerrymandering than the first-round plans proposed by the Commission. We greatly appreciation the Commission's consideration of this input.