



# Dēmos

## States are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do

States can fix the Census data by creating a special state-level census that collects the home addresses of people in prison and then adjusts the U.S. Census counts prior to redistricting. In 2010, three states — New York, Maryland and Delaware — passed legislation to do just that for redistricting purposes.

More than 100 counties with large prisons throughout the United States already reject Census data for redistricting purposes and fairly apportion political power within the county on the basis of actual — not prison — populations. The U.S. Supreme Court has held that states are not required to use the Census Bureau's data; the state can choose what population base to use for redistricting. Basic ideas of fairness in our democracy, such as "one person, one vote," require that districting be based on a population count that accurately reflects local populations.

For more information about Prison-Based Gerrymandering, see the Prison Policy Initiative website and weekly newsletter at <http://prisonersofthecensus.org>

or the Dēmos website at <http://www.demos.org>

### Federal law does not require states to use Census data in redistricting

Although states are required to redraw state legislative districts each decade to assure compliance with the federal Constitution's "one person, one vote" requirements, they are not required to use federal Census data in doing so. See Mahan v. Howell, 410 U.S. 315, 330–332 (1973) (rejecting Virginia's argument that it was compelled to use Census Bureau assignments of residences of military personnel in its state legislative redistricting, and suggesting that a state may not use Census data it knows to be incorrect). As the Third Circuit has explained:

Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature. Borough of Bethel Park v. Stans, 449 F.2d 575, 583 n.4 (3rd Cir. 1971).

Furthermore:

Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include ... persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Burns v. Richardson, 384 U.S. 73, 92 (1966)

States are therefore free to use their own censuses or to correct how the federal census counts prisoners.

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## Other precedent for deviating from the Census for redistricting purposes

The **Kansas** Constitution requires the legislature to adjust federal census data to exclude nonresident military personnel and nonresident students and count resident military and students at their home addresses when conducting legislative apportionment. Kan. Const. art. 10, § 1.

The **Alaska** Supreme Court held that it was permissible under the Fourteenth Amendment to use a formula based on registration numbers to reduce the census tally of military personnel in the population base used for state legislative redistricting. See Groh v. Egan, 526 P.2d 863, 870, 873–74 (Alaska 1974).

The Supreme Court of **Oregon** has held that the Secretary of State is not obligated to rely on census data in apportioning districts. Hartung v. Bradbury, 33 P.3d 972, 598 (Or. 2001). Indeed, the court held that the Secretary of State violated the Oregon Constitution by failing to make corrections to federal census data to place a prison population in the correct census block. Id. at 599.

An **Illinois** Appeals Court upheld excluding prisoners from the population when apportioning a county into districts. Knox County Democratic Cent. Committee v. Knox County Bd., 597 N.E.2d 238 (Ill. App. Ct. 1992). The court stated that “to require that ineligible voters must always be included in the apportionment base merely because they were included in the census would violate the Equal Protection Clause.” Id. at 239.

**New Jersey** statutes require, and the state appellate court upheld, a requirement that prison inmates be excluded from the population for purposes of apportionment in certain school districts. Board of Educ. of Northern Burlington Co. Regional School Dist. v. New Jersey State Bd. of Educ., 858 A.2d 576, 580–81 (N.J. Super. Ct. App. Div. 2004)

**Colorado** and **Virginia** have enacted legislation allowing and encouraging, respectively, a departure from federal Census data so as to exclude prison populations for purposes of county or local redistricting. See Colo. Rev. Stat. § 30–10–306.7(5) (a) (requiring boards of county commissioners to subtract, from federal census numbers, the number of persons confined in any correctional facility in the county when calculating population equality for purposes of redistricting; Va. Code Ann. § 24.2–304.1 (C) (permitting governing body to exclude prison population in redistricting when such population exceeds 12 percent of the total county population).

The **Mississippi** Attorney General directed Wilkinson County to adjust census data for redistricting purposes, stating that prison populations:

should not be used in determining the population of county supervisor districts for redistricting purposes by virtue of their temporary presence in a detention facility or jail in the county, unless their actual place of residence is also in the county.

Mississippi Attorney General Opinion 2002–0060, 2002 WL 321998 (February 22, 2002).

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**Peter Wagner** is Executive Director of the non-partisan Prison Policy Initiative which documents the impact of mass incarceration on the larger society. As a law student in 2002, Peter wrote the first district-by-district analysis of how the Census Bureau’s prison count distorts state legislative redistricting. In 2003, he founded the Prisoners of the Census project and began work nation-wide to develop workable policy solutions to prison-based gerrymandering at the state and county levels.

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