

United States Senate

WASHINGTON, DC 20510

September 21, 2016

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

Dear Ms. Humes:

We write to express our concern regarding the U.S. Census Bureau's proposed "2020 Census Residence Rule and Residence Situations" criteria.¹ Specifically, we disagree with the Census Bureau's proposal to continue counting incarcerated persons as "residents" of the prisons or other facilities where they are confined.² By continuing to count incarcerated persons as residents of their places of confinement, rather than their home communities, the Census Bureau's practice would compound the criminal justice system's inequities with electoral unfairness and undermine the constitutional principle of one person, one vote. For these reasons, we respectfully request that the U.S. Census Bureau reconsider this discredited practice and count incarcerated persons at their pre-incarceration residences.

The Census Bureau's assignment of incarcerated people to the communities where they are confined is an inequitable redistribution of political power. Most individuals admitted to jail over the course of a year are released within hours or days,³ and the average length of time served by federal inmates is 37.5 months.⁴ When the Census counts individuals who are in a correctional facility on Census Day as if that correctional facility is their home, legislative redistricting can inflate the political power of areas around prisons with added "residents" who often cannot vote while simultaneously disempowering the communities these individuals consider home.⁵

This treatment of incarcerated persons raises constitutional concerns. According to Article I, Section 2, "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers" pursuant to an "Enumeration . . . within every subsequent Term of ten Years."⁶ As the Supreme Court recognized in *Reynolds v. Sims*, the Fourteenth Amendment's "Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races," and "[t]he weight of a citizen's vote cannot be made to depend on where he

¹ 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42,577, et seq. (proposed June 30, 2016).

² "Incarcerated persons" refers to individuals in federal and state prisons, local jails and other municipal confinement facilities, and federal detention centers.

³ Ram Subramanian et al., VERA Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 5 (2015).

⁴ Public Safety Performance Project, Pew Charitable Trusts, *Prison Time Surges for Federal Inmates* (2015).

⁵ Editorial, *The Wrong Way to Count Prisoners*, N.Y. Times, July 15, 2016.

⁶ U.S. Const. art. I, § 2.

lives.”⁷ In May 2016, a federal district court in Rhode Island applied this precedent to hold that including inmates as residents of the facility where they are incarcerated violates the Fourteenth Amendment, reasoning that “the inclusion of the State’s entire prison population in a single city ward operates to dilute the voting strength and political influence of the residents of the other wards.”⁸ A federal district court in Florida came to the same conclusion earlier this year, finding that treating prisoners as residents of the district containing the prison where they are confined “greatly dilutes the voting and representational strength of denizens in other districts.”⁹

Although the Census Bureau’s proposed interpretation of the “usual residence” rule for the 2020 Census is consistent with its prior treatment of the incarcerated population, correction of this problem is increasingly important and long overdue. In recent decades, the prison population has expanded dramatically, with approximately two million people currently confined in state prisons, federal prisons, and local jails.¹⁰ Even ten years ago, a National Research Council report commissioned by the Census Bureau concluded that counting incarcerated individuals as residents of the prisons where they are housed fundamentally distorts the political process.¹¹ The report found that:

The prison population includes disproportionate numbers of racial minorities and persons from large urban areas; that this population is counted in the largely rural areas where prisons tend to be located, and that they are included in redistricting calculations despite being barred from voting in most cases, raises legitimate concerns of equity and fairness in the census.¹²

A host of other analyses have echoed these sentiments.¹³ Indeed, Dr. Kenneth Prewitt, who served as Director of the U.S. Census Bureau from 1998-2001, has opined that “[c]ounting people in prison as residents of their home communities offers a more accurate picture of the size, demographics, and needs of our nation’s communities.”¹⁴

The Census Bureau already intends to consider factual circumstances for other groups in determining their residence for Census purposes. For individuals on overseas military

⁷ *Reynolds v. Sims*, 377 U.S. 533, 567-68 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (“as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected ‘by the People,’ a principle tenaciously fought for and established at the Constitutional Convention.”).

⁸ *Davidson v. City of Cranston*, 2016 WL 3008194, at *1 (D.R.I. May 24, 2016).

⁹ *Calvin v. Jefferson County Board of Commissioners*, 2016 WL 1122884, at *28 (N.D. Fla. March 19, 2016).

¹⁰ Danielle Kaeble et al., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 249513, *Correctional Populations in the United States, 2014 2* (2015); Jodi M. Brown et al., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 160091, *Correctional Populations in the United States, 1994 7* (1996).

¹¹ Panel on Residence Rules in the Decennial Census, National Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 89 (2006).

¹² *Id.* at 8.

¹³ See, e.g., Peter Wagner & Daniel Kopf, Prison Policy Initiative, *The Racial Geography of Mass Incarceration* (2015); Ben Peck, DÉMOS, *The Census Count and Prisoners: The Problem, the Solutions and What the Census Can Do* (2012); Kirsten D. Levingston & Patricia Allard, Brennan Center for Justice, *Accuracy Counts: Incarcerated People and the Census* (2004).

¹⁴ Levingston & Allard, *supra* note 13.

deployments, juveniles in residential treatment facilities, hospital patients, children in boarding schools, people on vacation or business trips, and individuals with multiple residences, the Census Bureau does not default to the place where the individual is staying on Census Day.¹⁵ Yet the Census Bureau counts incarcerated individuals as residents of the facility where they are confined on Census Day, irrespective of the duration of their confinement.¹⁶

We appreciate the Census Bureau's plans to offer information to assist with states' reallocation, but we do not believe such acts are sufficient.¹⁷ While some states have attempted to correct for inequities by redistributing prison populations when establishing their redistricting plans – and the Supreme Court has previously affirmed such adjustments – other states' laws mandate the use of official Census Bureau residence information.¹⁸ A citizen's rights under the U.S. Constitution should not vary based on his or her state of residence.

We are not alone in this conclusion. Last year, when the Census Bureau solicited public comments on the 2010 residence rules and suggestions for changes to be made for the 2020 Census, the majority of responding comments pertained to the treatment of incarcerated individuals. Of these 162 comments, 156 recommended that prisoners should be counted at their home or pre-incarceration addresses, including submissions from civil rights advocates, voting rights organizations, state and local representatives, academics, and previously incarcerated individuals.¹⁹

To ensure that all people are fairly counted as part of their home communities, and in pursuit of our constitutional ideals, we join this chorus of support to ask that the Census Bureau act without delay to correct for this inequity in the 2020 Census.

Sincerely,



Christopher A. Coons
United States Senator



Sheldon Whitehouse
United States Senator

¹⁵ 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,577-80; U.S. Census Bureau, *How We Count America: People Away From Their Usual Residence On Census Day*, www.census.gov/2010census/about/how-we-count.php (last visited Aug. 31, 2016).

¹⁶ 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578.

¹⁷ *Id.*; see also Peter Wagner et al., Prison Policy Initiative, *Fixing Prison-Based Gerrymandering After the 2010 Census: A 50 State Guide* (2010).

¹⁸ 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578; see *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 894-97 (D. Md. 2011) (three-judge panel) (“prisoners are counted [by the Census Bureau] where they are incarcerated for pragmatic and administrative reasons, not legal ones”), *aff’d* 133 S. Ct. 29 (2012); see, e.g., Sen. Stanley C. Rosenberg & Rep. Michael J. Moran, *Report from the Chairs of the Special Joint Committee on Redistricting, Massachusetts General Court 15-17* (2012) (concluding that the Massachusetts Constitution required the use of the U.S. Census count in the 2010 redistricting cycle, despite differences between the Census Bureau definition of “usual place of residence” and the Massachusetts definition of “legal residence”).

¹⁹ 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578; *Full-Text Log of Comment Submissions to “2020 Decennial Census Residence Rule and Residence Situations; Notice and Request for Comment,”* U.S. Census Bureau, available at https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2015-12118_FRN_Comments.pdf (last visited August 31, 2016).



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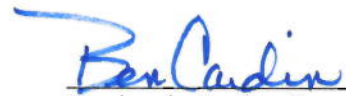
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cc: Mark Dorsey, Congressional Liaison
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