

VIA ELECTRONIC MAIL

September 1, 2016

Karen Humes
Chief, Population Division
United States Census Bureau, Room 6H174
Washington, DC 20233

Re: Census Bureau's Proposed 2020 Census Residence Criteria and Residence Situations (81 Fed. Reg. 42,577)

Dear Ms. Humes,

The U.S. Census Bureau's current practice of interpreting its "usual residence" criteria to mean that it counts prisoners at their correctional facilities contravenes both the purpose of the census, and in some cases, the Equal Protection Clause of the Constitution. Article I, Section 2 of the U.S. Constitution expressly states that the decennial census was created to apportion seats for the House of Representatives using total population as the apportionment base.¹ Subsequent case law has extended the use of the counting of the total population as a basis for redistricting state and local districts.² The Census Bureau's proposed residence rule for the 2020 Census would count inmates of correctional institutions at their correctional facilities.³ This practice undermines the purpose of the census by ignoring the consequences for representation that result from applying this interpretation. This comment urges the Census Bureau to count those in correctional facilities at their pre-incarceration addresses. Making this change will ensure that the residence rule remains faithful to the purpose of the census and is compliant with the protections of the U.S. Constitution.

The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. Our principal mission is to secure equal justice for all through the rule of law, while targeting the inequities confronting African Americans and other racial and ethnic minorities. Today, we continue that vital work by leveraging our unique standing with the private bar to challenge discrimination in its many forms. For more than 50 years, we have been at the forefront of combatting vote dilution and working to ensure the principle of "one person, one vote" is upheld.

¹ U.S. CONST. Art. I, § 2, cl. 3.

² See *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (extending the use of total population as the basis for redistricting state and local districts); *Reynolds v. Sims*, 377 U.S. 533 (1964) (extending to use of total population as a basis for redistricting state legislative districts).

³ Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42,577 (U.S. Dep't of Commerce June 30, 2016) [hereinafter *Proposed Rules*].

Counting Prisoners at Correctional Facilities Undermines the Purpose of the Census; Representation in Apportionment of the House of Representatives

Representation in the government is an essential element of our democracy. In the Second Constitutional Convention, a delegate debating the function of the census stated “If a fair representation of the people be not secured, the injustice of the government will shake it to its foundations.”⁴ Several decades later, in an early 19th century speech to the Senate about the census, Senator Daniel Webster stated “To apportion, is to distribute by right measure; to set off in just parts; to assign in due and proper proportion.”⁵ The current residence rule for inmates fails on each of Senator Webster’s aspirations. As discussed further below, recent court decisions have determined that the residence rule’s application has the potential of violating the U.S. Constitution’s Equal Protection Clause.⁶ In the landmark case *Wesberry v. Sanders*, the U.S. Supreme Court held that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”⁷ Building on its opinion in *Wesberry*, the Court in *Reynolds v. Sims* reinforced the principle that “one man’s vote. . . is to be worth as much as another.”⁸ The Reynolds court discussed the impact of weighing one person’s vote over that of another. “And if a state should provide that the votes of citizens in one part of the state should be given two times, five times or 10 times the weight of votes of citizens in another part of the state, it could hardly be contended that the vote of those residing in the disfavored area had not been effectively diluted.”⁹ The Census Bureau’s method of counting prisoners not only denies them adequate representation, it potentially removes them from the count, particularly where courts hold that they should not be considered in the count of a particular district.

Apportionment of the House of Representatives and Most Other Offices is Based on Total Population so Prisoners Must be Counted Somewhere.

Recently, in *Evenwel v. Abbott*, Supreme Court reaffirmed the use of total population in deciding the population count when drawing districts.¹⁰ The Court noted that for the time of the *Reynolds* decision on, it has consistently used total population when evaluating whether a district was malapportioned in violation of the Equal Protection Clause.¹¹ Further the Court emphasized that

⁴ Peyton Randolph, Second Constitutional Convention, 11 July 1776 (available from http://press-pubs.uchicago.edu/founders/documents/a1_2_3s2.html).

⁵ 2 JOSEPH STORY, LL.D., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 158 (1833), *quoting* Senator Daniel Webster, Senate Speech (Apr. 1832).

⁶ Several cases cited herein demonstrate how prison populations are used to redistrict in violation of the U.S. Constitution and federal statutes. Although the census results may be used in ways that violate the U.S. Constitution and various statutes, the courts have generally limited the Census Bureau’s liability in the administration of the decennial census and the results thereof. *See, e.g.*, *City of Detroit v. Sec’y of Commerce*, 4 F.3d 1367 (6th Cir. 1993) (holding the Census Bureau free from liability in possibly undercounting the population of Detroit); *see also* *Tucker v. U.S. Dep’t of Commerce*, 958 F.2d 1411 (7th Cir. 1992); *City of New York v. U.S. Dep’t of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1992).

⁷ *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

⁸ 377 U.S. 533, 559 (1964).

⁹ *Id.* at 562.

¹⁰ *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

¹¹ *Id.* at 1131.

use of total population in apportionment promotes equitable and effective representation.¹² Referring to one of the Framers' interpretations of the relationship between the population and the representatives who serve them, Justice Ginsburg, writing for the Court, quoted Alexander Hamilton's statement that "There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government."¹³

Prisoners Have More Ties to their Home Community Than Their Prison Community.

The practice of moving prisoners away from their home communities is a relatively recent one. As the U.S. has become a world leader in imprisoning its population,¹⁴ the trend has been to build prisons in rural areas.¹⁵ Although rural communities make up about 20% of the U.S. population, they contain about 40% of prison facilities.¹⁶ And, these rural prisons are often filled with inmates from urban areas.¹⁷ Further, these prisoners are usually people of color as they make up more than 60% of people in prisons, with black men nearly six times more likely to be imprisoned by whites.¹⁸ Particularly, minorities are disproportionately represented in state prisons; in some states more than 10 times that of whites.¹⁹ As a result, urban minority prisoners as currently counted as part of the rural community population that elects representatives with little or no concern for the interests of prisoners.²⁰ This practice of counting prisoners at correction facilities also results in an outsized influence on the election of representatives where the prison is located on the part of the area's non-incarcerated residents.

The racial disparity within the prison population opens the door for violations of Section 2 of the Voting Rights Act where minority populations are being used as "census persons" as part of a district's population, but have no real representation.²¹ Section 2 addresses not only the denial of the right to vote, but also diluting the impact of the vote. As the Supreme Court noted in *Allen v. Board of Elections*, "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."²² The current census rule can potentially render a

¹² *Id.* at 1132.

¹³ *Id.* at 1127 (quoting 1 RECORDS OF THE FED. CONVENTION OF 1787, at 473 (M. Farrand ed. 1911) (emphasis added)).

¹⁴ Danielle Kaeble, Lauren Glaze, Anastatsios Tsoutis and Todd Minton, *Correctional Populations in the United States, 2014*, BUREAU OF JUSTICE STATISTICS, (Revised January 21, 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>. The U.S. currently has 2.2 million persons in prisons and jails.

¹⁵ Dale Ho, *Captive Constituents: Prison-Based Gerrymandering and The Current Redistricting Cycle*, 22 STAN. 355, 362 (2011)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Fact Sheet: Trends in U.S. Corrections*, THE SENTENCING PROJECT (December 2015), <http://www.sentencingproject.org/publications/trends-in-u-s-corrections/>

¹⁹ Ashley Nellis, *The Color of Justice: Racial & Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (2016)

²⁰ See, e.g., Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES (Oct. 23, 2008), <http://www.nytimes.com/2008/10/24/us/politics/24census.html> (quoting a city councilman who stated that he did not consider the approximately 1,300 prisoners in his district as constituents because they could not vote even though the district had only 58 non-prisoners); Letter from Rep. Jeff Irwin, Mich. H.R., to Karen Humes, Chief, Population Division, U.S. Census Bureau (July 14, 2015) (available from http://www.prisonersofthecensus.org/letters/Rep_Jeff_Irwin_FRN_letter.pdf).

²¹ Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES (Oct. 23, 2008), <http://www.nytimes.com/2008/10/24/us/politics/24census.html>

²² *Id.*

significant number of minority populations as non-existent, both for representation purposes, where the prison is located and also at their prior address in violation of both the constitution and the Voting Rights Act.

The 2005 city council election in Anamosa, Iowa dramatically exemplifies the consequences of counting prisoners where they are incarcerated. Anamosa, home of Iowa's largest penitentiary, was divided into four wards, each with a population of approximately 1,400 following the 2000 Census.²³ Ward 2 contained the entire penitentiary—about 1,300 inmates who were unable to vote for their representatives.²⁴ The balance left only 58 non-prisoners in Ward 2.²⁵

Consequently, a councilman won his seat with only two votes. Asked about his representation of most of his constituents, the Councilman responded “Do I consider them my constituents? They don't vote so, I guess, not really.”²⁶ Because inmates can rarely vote²⁷ and typically have few ties to the communities where prisons are located, representatives of districts with prisons have little incentive to serve and represent the interests of the inmates. Such representatives “represent” inmates in name only. As a result, each non-incarcerated constituent of a district with a prison is given a greater effective voice than the constituents of districts without prisons.

Additionally, the constitutional purpose is better served if prisoners are counted not just as bodies in a district, but are counted as persons worthy of representation. That representation is likely to come from officials from their prior address. Prisoners will inevitably have “enduring community ties” in the community they resided in before incarceration.²⁸ Furthermore, if the prisoner seeks any redress regarding the circumstances that lead to their imprisonment, they will likely reach out to officials in the community they lived in before arrest not the officials in the community where the prison is located. Even if the prisoner did reach out to a county official, that official is unlikely to be able to help since most prisons are run by the state not the county in which the prison is located.²⁹

Inmates retain an entitlement to vote in only two states: Maine and Vermont.³⁰ Representatives in those states have incentives to respond and answer to incarcerated voters. However, prisoners in other states are best represented in the districts where they previously lived and will likely return after serving their sentences. Inmates have more social ties to home districts where family and friends live. Furthermore, if an inmate requires assistance from an elected official, any response is likely to be at the behest of a family member or friend who votes. Given the reality of

²³ *Id.*

²⁴ *Id.*

²⁵ NATIONAL COUNCIL OF STATE LEGISLATURES: FELON VOTING RIGHTS, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited July 27, 2016).

²⁶ *Id.*

²⁷ See Brian Albert, National Association of Counties, STATE PRISONERS IN COUNTY JAILS (February 2010) available at <http://www.naco.org/sites/default/files/documents/State%20Prisoners%20in%20County%20Jails%20Updated.pdf>

²⁸ Captive Constituents, p. 369 – 70. “The only opportunity for incarcerated persons to have any contact with the outside world is with their home communities, through relationships prior to arrest.”

²⁹ *Calvin v. Jefferson Cty. Bd. of Comm'rs*, No. 4:15CV131-MW/CAS, 2016 WL 1122884, at *26 (N.D. Fla. Mar. 19, 2016) (finding that a district with a prison composing a large share of a district's population unconstitutional).

³⁰ *Id.* at 19.

where individuals in prison are likely to have true representation, the Census can best serve them by adopting a rule that allows them to be counted at their previous address.

Courts Are Finding that Counting Prisoners Where Imprisoned Violates the Principle of One Person, One Vote And Have Upheld the Counting of Prisoners in Their Home Communities

Recently, two courts have confronted the impact of districts comprised primarily of a prison population. In *Calvin v. Jefferson Cty. Bd. of Comm'rs*, the court, after extensively detailing the history of the right to vote and discussing the nature of representational equality determined that the challenged district was significantly malapportioned in violation of the Constitution.³¹ The Court came to this conclusion after developing a test to determine whether there was a “meaningful representational nexus” when a legislative district had a population made up of a large number of nonvoters.³² In that case, a state prison’s inhabitants made up a significant number of the population of one of Jefferson County’s five districts. Observing that those individuals did not have representation solely based on physical location, the Court determined that it was difficult to see how the representatives of the district in which the prison was located “represent[ed]” inmates in the same way as others who were physically in the District. The Court noted “. . . the scheme gives the non-incarcerated population of [a district with a prison] (whether they vote or not) an increased ability to access and influence their representatives and increased opportunities to reap the benefits of that influence.”³³ Moreover, the Court determined that through its actions, the state implicitly deprived the prisoners in the district in question of their representational rights with respect to units of local government.³⁴

In *Davidson v. City of Cranston*, the Court adopted the *Jefferson County* court’s “representation nexus” test. In *Davidson*, the Court agreed with the plaintiffs’ claim that a redistricting plan that placed the state’s entire prison population in a single ward in Cranston diluted the vote and political influence of residents in the city’s other wards.³⁵ The Court noted that Cranston’s elected officials did not engage or attempt to represent the ward’s prison inmates.³⁶ It also noted that of the 3,433 prisoner inmates in the ward, only about 155 were from Cranston.³⁷ Both courts acknowledged that elected officials of districts where inmates live and sleep most of time typically do not represent the interests of those inmates. The Davidson Court ordered that the prisoners be removed from the population count. However, the prisoners must be counted somewhere. By adopting a rule counting prisoners at their previous address, the Census Bureau will avoid the indefensible situation of prisoners removed from the count completely.

³¹ *Id.* at 21.

³² *Id.* at 1.

³³ *Id.* at 28.

³⁴ *Davidson v. City of Cranston*, C.A. No. 14-91L, 2016 WL 3008194, at *5 (May 24, 2016 D.R.I.).

³⁵ *Id.* at 2.

³⁶ *Id.* at 1.

³⁷ *Calvin* at 3, 25-26, *See also* *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron, Inc. v. Nat’l Res. Def. Council, Inc.* 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Usual Residence Rule Has Been Defined Differently by the Census Bureau at Different Times

The Census Bureau can and should update its interpretation of the “usual residence” rule, particularly when its rigid application has proven inconsistent with the U.S. Constitution’s Equal Protection Clause.³⁸ This request asks the Census Bureau to act as it has in the past. It has made previous changes to how certain populations are counted for apportionment and representation purposes, and has defined inmates differently over time.³⁹ For several decades starting in 1850, the Census Bureau treated inmates as family members under the head-of-household jailor.⁴⁰ The 1900 Census specifically asked about prisoners’ residences, acknowledging that “[M]any prisoners are incarcerated in a state or county of which they are not permanent residents. In every case, therefore, enter the name of the county and state in which the prisoner is known, or claims to reside.”⁴¹ As recently as Census 2010, Director Robert Groves stated that those in jails awaiting hearings would be counted at their homes.⁴² Yet the proposed residence rule for Census 2020 goes so far as to eliminate even this reasoning by recommending that “People in local jails and other municipal confinement facilities on Census Day . . . are [to be] counted at the facility.”⁴³

Several states have answered the question of where prisoners should be counted by passing laws mandating that prisoners be counted where they lived before incarceration. They include California⁴⁴, Delaware⁴⁵ and Maryland⁴⁶ and New York.⁴⁷ Notably, the New York State legislature cited the violation of the Equal Protection Clause’s one person, one vote principle as a flaw of the current Census residence rule. Maryland’s law was challenged in *Fletcher v. Lamone*.⁴⁸ The plaintiffs claimed that Maryland’s “No Representation Without Population Act” was unconstitutional because only number generated by the Census can be used to determine congressional districts.⁴⁹ The Court rejected this argument and significantly noted that “[a]ccording to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones.”⁵⁰ However, as discussed above, this

³⁸ See, e.g., *2010 Census: Counting Americans Overseas as Part of the Census Would Not Be Feasible: Hearing Before the H.S. Comm. on Tech., Info., Pol., Intergovernmental Relations and the Census, Comm. on Gov’t Reform.*, (testimony of Patricia A. Dalton, Director, Strategic Issues of the Gov’t Accountability Office; report GAO-04-1077TT).

³⁹ Panel on Residence Rules in the Decennial Census, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 84 (2006).

⁴⁰ *Id.*

⁴¹ Robert M. Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU: DIRECTOR’S BLOG (Mar. 1, 2010), <http://directorsblog.blogs.census.gov/2010/03/01/so-how-do-you-handle-prisons/>.

⁴² *Id.*

⁴³ *Proposed Rules*, *supra* note 3, D(15)(b), at 42584.

⁴⁴ CAL. ELEC. CODE § 21003 (West 2016).

⁴⁵ DEL. CODE ANN. tit. 29, § 804A (West 2016).

⁴⁶ MD. CODE ANN., ELEC. LAW § 8-701 (West 2016); MD. CODE ANN., LOCAL GOV’T § 1-1307 (West 2016).

⁴⁷ N.Y. LEGIS. LAW § 83-m (McKinney 2011).

⁴⁸ *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D. Md. 2011).

⁴⁹ *Id.* at 894.

⁵⁰ *Id.*

pragmatic approach has significant legal consequences. Prisoners are at risk of not being counted at all.

Conclusion

The Census Bureau can avoid a piecemeal approach to addressing the consequences of its current and proposed rule by adopting a change that ensures representational equality for prisoners. Doing so would fortify the “enduring ties” of prisoners to their communities and prevent the voices of those in jurisdictions surrounding districts with significant prison populations from being diluted.

Thank you for the opportunity to comment on the Proposed 2020 Census Residence Rule and Residence Situations. If you have any questions about these comments, please contact Marcia Johnson-Blanco at mblanco@lawyerscommittee.org or 202.662.8346.

Sincerely,



Kristen Clarke
President and Executive Director

Marcia Johnson-Blanco
Co-Director, Voting Rights Project
Lawyers' Committee for Civil Rights Under Law