

Re-allocation of Prison Populations in the 2030 Census

In the 2030 Census, incarcerated persons should be counted at their prior home addresses, not at their places of imprisonment.

Counting prisoners at their places of imprisonment distorts the apportionment and redistricting of congressional and legislative districts. To the degree that the interests of prisoners are represented by congressmembers and state legislators, those interests are represented by the representatives elected from the districts in which their prior home addresses are located. In no sense are the interests of prisoners represented by the congressmembers and legislators elected from the districts where the prisons are located, nor do the elected representatives of those districts pretend to represent the interests of the prisoners. Counting prisoners at their places of incarceration magnifies artificially, and entirely without reason, the representation and voting power of persons who happen to live in proximity to the prisons.

Counting prisoners at the places of incarceration is inconsistent with the treatment of other categories. Persons in military deployment and elementary and secondary school students at boarding schools are counted at their home addresses, even though they may be at their temporary locations much longer than many prisoners. Persons who travel between multiple homes get to decide where they wish to be counted, regardless of which home they happen to be occupying on Census Day. In New York City, where I live, the huge number of visitors from elsewhere in the US filling the hotels on Census Day will properly be counted at their permanent home addresses. This practice will be followed even though the visitors will be in their temporary Census Day location by choice, unlike the prison populations.

The counting of university students where they attend school is an entirely different matter. Unlike prisoners, they are eligible to vote at places where they attend school, and they are at those locations by choice. Moreover, the congressmembers and legislators representing those communities have a strong interest in making them attractive places to attend school. Elected representatives have no such relation with the prisoners held in their districts.

I need not repeat here the extensive additional data compiled by the Prison Gerrymandering Project of the Prison Policy Initiative, all of which support this argument.

In 2010 I advised the NY State Senate staff attorney who drafted New York's prisoner re-allocation law. In 2021, the NYS Legislative Task Force on Demographic Research and Reapportionment reported that they had successfully re-allocated, to the census blocks of their prior home addresses, approximately 92% of the prisoners on the list supplied to the Task Force by the NYS Department of Corrections and Community Supervision (DOCCS). The Census Bureau staff can surely do at least as well. And in several respects the Census Bureau would be able to improve on that performance:

1. The state can, under the 2010 statute, require the cooperation of NYS DOCCS in supplying a list of prisoners' prior home addresses. But the state is unable to obtain such information from the US Bureau of Prisons or other federal agencies. The state can subtract prisoners in federal custody from their places of incarceration, so that at least they will not be counted in the wrong place, but the state cannot re-allocate those prisoners to the census blocks of their prior home addresses. The Census Bureau should be able to obtain the necessary information from the BOP and other federal agencies.
2. The state cannot re-allocate prisoners in state custody whose prior home addresses are in other states, nor can they reallocate prisoners being held in other states whose prior home addresses are in New York. Again, the Census Bureau would be in a position to do this.

For all of these reasons, and in the interests of consistency, persons incarcerated on Census Day 2030 should be counted at their prior home addresses.

A further note about myself. In addition to my role, noted above, in drafting the NYS prisoner reallocation law, I was the co-author of the chapter on reapportionment (Chap. 4) in P. Galie, C. Bopst, and G. Benjamin, eds., *New York's Broken Constitution* (SUNY Press, 2016), and I was a witness for New York State in *State of New York, et al., v. United States Department of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018), the lawsuit that prevented the addition of a citizenship question to the 2020 Census.