

Comment on the 2020 Decennial Census Residence Rule and Residence Situations
Docket No. 150409353-5353-01

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July 18, 2015

Prison inmates should be counted as residents of their permanent home addresses, not at the places of incarceration. I will not attempt a comprehensive discussion of this issue, which many competent persons have addressed. I wish, however, to call attention to one facet of the question that should receive more attention: the inconsistent treatment of transient populations.

I will then offer some observations based on my own experience. I directed the staff work on redistricting for successive Minority Leaders of the New York State Senate, from 1980 through my retirement at the end of 2005; was the principal consultant to the Committee on Election Law of the Bar Association of the City of New York in the development of its 2007 report on reform of the New York redistricting process; worked closely with legal teams on litigation concerning New York redistricting during each of the last four decades; consulted with New York State Senate and Assembly staff on the drafting of the prison population re-allocation law enacted in 2010; and consulted with California Assembly staff in connection with the latest amendment to California's prison population re-allocation law. (I am not a lawyer.)

I. The counting of prisoners at the places of incarceration is not part of a consistent rule for defining residence.

This can be understood by comparing the rules for counting three categories of transient populations: a) college and university students away from home; b) persons traveling for business and pleasure; and c) those who are away from home as prison inmates. I do not wish to argue that the rules for students and travelers should be changed. But the comparison will illuminate the problem with the rule that applies to prisoners.

Students and prisoners are counted at their temporary residences, and travelers are counted at their permanent home addresses. Yet the students and the travelers have much in common with each other, in ways in which both groups differ from the prisoners. Unlike the prisoners, both the students and the travelers:

1. are at their Census Day location voluntarily;
2. are part of the social and economic fabric of the communities where they temporarily reside: walking freely in the streets, using the roads and public transit, frequenting restaurants, visiting parks, attending sports events, museums, theatres, etc., and free to participate in politics and other aspects of civic life;

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3. use public services financed by local taxes: roads, public transport, police, ambulances and emergency rooms, building code enforcement, restaurant inspections, etc.; and
4. pay local taxes: sales taxes, for both groups; hotel occupancy taxes and, indirectly, real estate taxes, for travelers; and real estate taxes, either directly or indirectly (depending on whether they own or rent), for students living off-campus.

Students may also be employed, holding the sort of jobs that might also be held by permanent local residents, and likewise subject to taxes on their earnings. And many travelers are paid to perform duties away from home in connection with their employment.

Furthermore, members of Congress and state legislators, in furthering the interests of the permanent residents of their districts, also seek to further the interests of the students and visitors. It is not only from the love of learning or recognition of the social value of research that elected officials seek to support and expand institutions of higher learning in their districts. But by seeking to maximize the local economic benefit derived from such institutions – supporting expansion and making the colleges and universities attractive to students – they also further the interests of the students.

Similarly, in seeking prosperity for their districts by making them attractive destinations for business travelers and tourists, they serve the interests of the visitors. In both cases, the elected representatives would entirely fail to serve the interests of their permanent constituents if they did not also faithfully serve the interests of the students and visitors.

In contrast, no Congress member or state legislator seeks to represent the interests of the prisoners incarcerated in his or her district. Their offices do not offer the prisoners the ‘constituent services’ that they provide to permanent residents of their districts. To the degree that they seek to maximize the economic value of the prisons – which are, indeed, the major local employer in some places, as universities are in others – they regard the prisoners merely as the raw material of a local industry. To the degree that the prisoners enjoy representation in Congress or state legislatures, it is only from the representatives of the communities where they left behind their families and friends, to which they will eventually return, and where they may once again be voters.

New York City, where I live, is disadvantaged by the census rules relating to both prisoners and visitors.

On the one hand, thousands of permanent residents of the city are counted at prisons outside of the city. Under the New York State law¹ subtracting prisoners, for purposes of legislative apportionment, from their places of incarceration, and re-

¹¹¹ Legislative Law, Section 83-m, Subsection 13, enacted by Part XX of Chapter 57 of the Laws of 2010.

allocating them insofar as possible to their permanent home addresses, the population of New York City showed a net increase of 21,082, while the balance of the state showed a net decrease of 14,705. This actually understates the effect on New York City of the rule for counting prisoners, because the legislative task force² charged with making the calculations had no access to data from Federal agencies or other states, a subject I will return to below.

At the same time, the city's population is permanently swollen by hundreds of thousands of visitors, but these persons are not counted here.³ There is, of course, a good deal of turnover among the individuals who constitute this transient population, but the total remains fairly steady. There is seasonal variation in this number, but not nearly so large as the seasonal variation in the number of students in a college town. In many college towns, almost the whole student population will vanish about two months after Census Day, not to return for about three months. And when the fall term begins, many who were counted in April will be gone, to be replaced by new enrollees.

For all of these reasons, if visitors are to be counted at their permanent home addresses, not where they are sleeping on Census Day, there is an even stronger argument for applying that principle to prisoners.

The Census Bureau should be guided by the ruling of the three-judge court in *Fletcher v. Lamone*, 831 F. Supp.2d 887 (D. Md. 2011), that the careful attribution of prisoners to their permanent home addresses for congressional and legislative redistricting is consistent with the constitutional rules. There is no basis for supposing that such attribution is permissible for congressional redistricting, but not for congressional reapportionment. Note especially the Court's observation distinguishing prisoners from other 'group quarters' populations:

We also observe that the plaintiffs' argument on this point implies that college students, soldiers, and prisoners are all similarly situated groups. This assumption, however, is questionable at best. College students and members of the military are eligible to vote, while incarcerated persons are not. In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage

² The Legislative Task Force on Demographic Research and Reapportionment, known as LATFOR, an acronym derived from an older name of the task force.

³ NYC & Company, the city's tourism promotion organization, estimates that there were 54.3 million visitors in 2013. [<http://www.nycgo.com/articles/nyc-statistics-page>] The *New York Times* reports that there were 108,592 hotel rooms in the city in 2013, and estimates that the average daily occupancy was 68% in January 2015, down 4.7% from January 2014 (the January 2014 figure having been swollen by the Super Bowl). [<http://www.nytimes.com/2015/03/04/realestate/commercial/hotel-market-staggers-in-new-york-city.html>; web edition, March 3, 2015; New York print edition, March 4, 2015, p. B6] Allowing for some uncertainty about the estimated number of visitors, the proportion who did not remain for the night, the average number of persons in an occupied hotel room, and the proportion of visitors who found other accommodations, it is reasonable to suppose that some 200,000 visitors sleep here on an average night. That is a good enough estimate for the present discussion.

fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners. (*Id.* at 896)

The Court also observed that:

According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones. The Bureau has explained that counting prisoners at their home addresses would require "collecting information from each prisoner individually" and necessitate "an extensive coordination procedure" with correctional facilities. (*Id.* at 895)

But while it is possible to imagine many technical difficulties that would arise in counting business travelers and tourists where they are actually sleeping on Census Day, we now have extensive experience demonstrating that it would be quite practicable to count prisoners at their permanent home addresses. The states of New York and Maryland successfully adjusted their population databases for the 2010-12 redistricting without a huge investment of resources. An account of how New York and Maryland accomplished this, and an excellent review of the entire subject, is provided in Prof. Erika L. Wood's study, *Implementing Reform: How Maryland and New York Ended Prison Gerrymandering* (New York: Demos, 2014).⁴ These experiences can provide a model, and should lead the Census Bureau to reconsider its previous view that it would be prohibitively expensive to do what New York and Maryland accomplished.

II. I wish to add a few observations from my own experience to Prof. Wood's findings and recommendations.

A. In the discussions leading to the enactment of the New York law in 2010, those of us who had experience with redistricting databases, and with the use of geographic information systems to geocode addresses to census blocks, agreed that it would be possible to re-allocate to their home addresses about 60% of the prisoners on the list to be provided by the NYS Department of Corrections and Community Supervision (DOCCS).⁵ We were wrong. As Prof. Wood documents, 79% of the addresses on the DOCCS list were successfully attributed to New York census blocks. And even that figure understates the success of the project, since the remaining 21% includes those prisoners whose permanent homes were not in New York State.

B. In my consultations during 2010 with New York legislative staff concerning the drafting of Part XX of Chap. 57, it was clear that the decision to exclude congressional redistricting from the use of the adjusted database was entirely a matter of legal caution. There was case law supporting the use of an adjusted database for state

⁴ Available at: <http://www.demos.org/publication/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering>

⁵ The list provided all of the address information available to DOCCS about each prisoner, but no names. Each record was identified only by a number that the Legislative Task Force could use in addressing inquiries to DOCCS. Furthermore, the Task Force was required to hold all of the address information in confidence, making public only the revised block-level counts. The California law has a similar provision.

legislative redistricting, but there was much uncertainty about whether the courts would permit such a database to be used for congressional redistricting. The use of the adjusted database was limited to legislative redistricting to avoid creating a possible basis for a legal challenge to the congressional districts to be enacted in 2012. Happily, Maryland was more bold, and the matter was settled in *Fletcher*. I am certain, from the discussions in which I participated, that the New York law would have encompassed congressional redistricting if the issues later decided in *Fletcher* had already been settled in 2010.⁶

C. The California re-allocation law, which will apply to the next decennial redistricting, originally provided for subtraction of prisoners from their places of incarceration only if they could be re-allocated to a permanent home address within the state. The law therefore excluded prisoners in the custody of the U.S. Government. The law has now been amended to provide, as in the New York law, for the subtraction of all inmates of Federal and state prisons, and then for their re-allocation to their permanent home addresses insofar as possible. The laws in both states are now based on the principle that counting a person in the *wrong* place distorts the apportionment database even more than excluding the person entirely.

D. There is nothing novel about excluding from the PL94-171 data set those persons who are part of the U.S. population, but who cannot be attributed to a specific U.S. address for purposes of reapportionment and redistricting. That is the rule for U.S. citizens and their dependents living outside the U.S. while in the employ of the U.S. Government or serving in the armed forces.

E. The drafters of the New York law assumed that it would be impossible to obtain from the U.S. Bureau of Prisons the sort of list that was provided by NYSDOCCS. Maryland did attempt to obtain such a list from BOP, and was rebuffed. BOP explained its refusal as based on a concern to protect the confidentiality of records about prisoners. This a legitimate concern, and underlies the confidentiality provisions that were written into the New York and California re-allocation laws. One cannot blame BOP for being cautious about providing such lists to state agencies, and of course the state legislatures cannot command BOP's cooperation. But the Census Bureau may well be able to address BOP's concerns about preserving confidentiality. If the Census Bureau can obtain the necessary lists from BOP (and also from ICE), it will be in a far better position than the states, individually or collectively, to allocate prisoners to the census blocks of their permanent home addresses. The Census Bureau, unlike the states, will also be able to re-allocate those prisoners who are being held, either by Federal or state authorities, in a state other than that of their permanent residence.

For all of the above reasons, the residence rule for prison inmates should be changed. Prisoners should be counted at the homes to which they will eventually return, where they left behind their families and friends, where they are represented by elected officials, and where they may once again be voters.

⁶ In the event, the New York Legislature failed to agree on a congressional redistricting plan in 2012, and the task fell to a U.S. District Court after all. But that was not foreseen in 2010.