

#55

Prison Policy Initiative

PO Box 80887
Springfield, MA 01138-0887

(413) 736-7873
<http://www.PrisonPolicy.org>
pwagner@prisonpolicy.org

Before the New York State Legislative Task Force
on Demographic Research and Reapportionment
Testimony of Peter Wagner
March 14, 2002

Good morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify today. My name is Peter Wagner and I am assistant director of the Prison Policy Initiative, an organization that conducts research and policy advocacy around incarceration policy. I am also a third-year student at the Western New England College School of Law in Springfield, Massachusetts. For the last year, I have been researching the constitutional requirements for redistricting given the unique demographics of New York prisoners and New York prison construction.

I urge you to adjust the US Census data you used to redraw state legislative district lines because the Census methodology is not applicable for purposes of state redistricting. The purpose of the US Census is to conduct a count for purposes of apportioning representatives between the states. To fulfill that national aim, the Census counts prisoners where they are incarcerated. Such a procedure is a low cost way to accurately count populations between states. But the Census methodology is not applicable to New York State.

New York State has experienced a tremendous growth in the size of its prison population since 1980. Twenty years ago, New York incarcerated 123 out of every 100,000 citizens. Now the State incarcerates more than 3 times that rate.¹ Sixty-six percent of New York State's prisoners are from New York City², but since 1982, all new prisons built in New York have been upstate.³

While incarceration may have dipped slightly since the 2000 Census, the lines you are drawing are based on those numbers and will be the law for the next decade. If anything, the decrease in the prison population underscores my point that prisoners are phantom rural residents.

As you know, since 1963 in *Reynolds v. Sims*⁴, the Supreme Court has required state legislative districts to be divided on an equal population basis. As the court remarked, "legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."⁵ The principle is that "[T]he weight of a citizen's vote cannot be made to depend on where he lives."⁶

¹ Mother Jones Interactive Debt to Society Prison Atlas. <http://www.motherjones.com/prisons/atlas.html> viewed March 13, 2002.

² Department of Correctional Services. State of New York. Characteristics of New Commitments 1999 74 (2000)
Department of Correctional Services. State of New York. The Hub System: Profile of Inmates Undercustody on January 1, 2000 8 (2000).

³ City Project. Following the Dollars: Where New York State Spends Its Prison Moneys. March 2000, p. 2.

⁴ *Reynolds v. Sims* 377 U.S. 533 (1963). The equal protection clause "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis... An individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens in other parts of the State."

⁵ *Reynolds v. Sims* 377 U.S. 533, 562; 84 S. Ct. 1362, 1381-1382 (1963).

⁶ *Reynolds v. Sims* 377 U.S. 533, 567; 84 S. Ct. 1362, 1384 (1963).

However, unlike Congressional districts, which must be as equal "as nearly as is practicable"⁷, state legislative districts are — within limits — allowed to deviate from precisely equal sizes in order to protect traditional state community boundaries.⁸

However, taking in large numbers prisoners from elsewhere in the state to boost the rural population violates the concept of respecting *traditional* community boundaries. Actual population must be the starting point of any redistricting, and counting urban prisoners as rural residents violates the equal protection requirement of the 14th Amendment. Urban prisoners are far from traditional rural residents.

Because of the large increase in the prison population and where the prisons have been built, the impact on redistricting is not slight. The more than 11,000 prisoners in Senator Volker's district make up 3.3% of his district, and Senator Stafford's district is 4.4% prisoners. Assemblyman Ortloff, your current district is 7.5% prisoners. Eight-six percent of the Black adults you represent are imported into your district and barred by law from voting for you.

While I have not yet completed a study of the proposed districts, preliminary analysis reveals similar relationships. For example, I expect Assemblyman Ortloff's district to drop slightly to 7% prisoners.

The remedy here is simple. Adjust the Census data by restoring prisoners to their home addresses via the addresses on file with the Department of Corrections. Future Censuses should be planned around letting prisoners disclose if their home of record has changed from the address on file.

This idea of using "home of record" to address special Census populations is not new. When at the last minute the 1990 Census decided to count military personnel stationed abroad as state residents, they used the Department of Defense's home of record information despite fact that this information tended to be outdated and biased towards the income tax laws of New Hampshire.⁹

The best solution would be to adopt the rule of the federal courts when determining a prisoner's residence for purposes of diversity jurisdiction, namely to create a rebuttable presumption that a prisoner's last address is his home address. Let me quote briefly from the Second Circuit's rationale in *Stifle v. Hopkins*:

It makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile. The rule shields an unwilling sojourner from the loss of rights and privileges incident to his citizenship in a particular place, such as, for example, paying resident tuition at a local university, invoking the jurisdiction of the local divorce courts, or voting in local elections.¹⁰

I am not here to ask you to give prisoners the vote. While the New York State Constitution authorizes felon disenfranchisement¹¹, it also explicitly instructs as to where prisoners should be counted: "For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence ... while confined in any public prison."¹²

⁷ *Baker v. Carr*, 369 U.S. 186 (1962)

⁸ *White v. Regester*, 412 U.S. 755 (1973)

⁹ *Franklin v. Massachusetts* 505 U.S. 788 (1992)

¹⁰ *Stifel v. Hopkins* 477 F.2d 1116, 1121 (1973)

¹¹ New York State Const. Article 2, Section 3.

¹² New York State Const. Article 2, Section 4.

There are a lot of prisoners in New York State, but the prisoners don't live in the prisons. Law enforcement recognizes this fact. When a prisoner escapes, the first place they check is with the prisoner's home and family. The Census ignores this distinction of a prisoner's true home address because it does not affect their primary purpose of national apportionment. But the State's interest requires a correction to the U.S. Census methodology.

Rural unemployment, urban crime, budgetary constraints and drug addition are serious issues. Counting prisoners at their homes and not in their cells is the only way to ensure that issues of crime policy and rural unemployment are resolved fairly by advocates from the communities actually affected. Given the State Constitution and controlling Supreme Court precedent, I believe you are required to count prisoners at their home addresses for the purposes of apportioning the state legislature.

Thank you.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent, by depositing a true copy thereof, enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of Federal Express addressed to:

Stephen M. Kerwin
Assistant Attorney General
The Capitol
Albany, New York 12224-0341
FedEx Trk No. 7951 3807 1226

New York State Legislative Task Force
On Demographic Research and Reapportionment
250 Broadway, Suite 2100
New York, New York 10007
FedEx Trk No. 7951 3808 1320

Myrna Perez, Esquire
Brennan Center for Justice at New York University
161 Avenue of the Americas, 12th Floor
New York, New York 10013
FedEx Trk No. 7951 3809 2040

Dale Ho, Esquire
NAACP Legal Defense and Education Fund, Inc.
88 Hudson Street, Suite 1600
New York, New York 10013
FedEx Trk No. 7951 3811 3167

Leonard Kohen, Esquire
67e 11th Street, No. 703
New York, New York 10003
FedEx Trk No. 7974 6865 7406

on this, the 2nd day of September 2011.


Bernadette Frostbutter