

Public Comment of

Aleks Kajstura
Legal Director

&

Ginger Jackson-Gleich
Policy Counsel
Prison Policy Initiative

Submitted to the
Montana Districting and Apportionment Commission
regarding
Avoiding Prison Gerrymandering in Montana

May 25, 2021

Thank you, Presiding Officer Smith and members of the Commission for providing the opportunity to submit public comment on the upcoming Montana redistricting process.

This comment specifically addresses the problem known as “prison gerrymandering,” which arises from the Census Bureau’s practice of crediting incarcerated people to census blocks that contain prisons, rather than the census blocks that contain their home addresses. This results in a significant enhancement of representation in districts with prisons, and consequently a dilution of representation for the residents of all other districts.

We are the Legal Director of and Policy Counsel for the Massachusetts-based Prison Policy Initiative. For nearly two decades, our organization has been leading the national effort to urge the Census Bureau to count incarcerated people as residents of their legal home addresses, rather than as residents of the correctional facilities where they are detained. At the same time, we work closely with state and local governments to develop interim solutions to the harmful distortion of democracy caused by the Census Bureau’s current approach to counting incarcerated people.

Today, we urge the Redistricting Commission to avoid these distortions in the upcoming redistricting cycle by employing one of several solutions available to state governments. Many state governments have already adopted the approaches described here. For example, at least ten states now count incarcerated people as residents of their home communities by using data from their Departments of Corrections to adjust Census data. Other states minimize the impact of prison gerrymandering by using Census data to avoid concentrating prison populations within a single district.

By adopting one of the solutions proposed here, the Redistricting Commission can ensure that the vast majority of Montanans enjoy truly equal representation and do not have their political power diluted relative to those who live near the state's correctional facilities. In doing so, the state would join the national trend towards solving this critical problem.

The problem

As you know, population equality enables everyone to have equal representation from elected officials. However, the Census frustrates this principle by counting incarcerated people as residents of the places in which they are detained instead of at their home addresses. The Bureau does this even though (1) people in prison typically lack a constituent relationship with the elected officials serving prison districts, and (2) most incarcerated people remain legal residents of their home addresses while imprisoned and return home upon release.

Because of the divergence between these practical realities and Census practice, raw Census data fails to accurately reflect the number of local residents in places with correctional facilities. After the 2010 Census, prison gerrymandering affected numerous legislative districts in Montana. For example, state House District 78 is 17% incarcerated, while two other districts (House Districts 18 and 49) are both more than 5% incarcerated. These numbers mean that each group of 83 actual residents in House District 78 was given as much representation as 100 residents in districts without prisons (and that each group of 95 residents in House Districts 18 and 49 was given as much representation as 100 residents elsewhere). Importantly, the practice of counting incarcerated people as residents of the facilities where they are incarcerated is also inconsistent with Montana law, which explicitly states that a prison cell is not a residence. (Montana Annotated Code § 13-1-112(2).)

The optimal solution

As noted above, there are multiple solutions to the problem of prison gerrymandering, and all of them create more equitable districts than what results when prison gerrymandering is simply ignored. However, among those various solutions, the optimal one requires states to adjust the raw data they receive from the Census in order to count incarcerated people at their home addresses.

For states interested in pursuing the optimal solution, they must collect home residence data from incarcerated people and use that data to adjust the federal Census prior to redistricting. This procedure may sound arduous, but the Census Bureau will do the data adjustment for states that are able to provide it with

address data, and experienced demographers are also able to complete the adjustment with primarily automated processes.

Step-by-step implementation of the optimal solution

To pursue the optimal approach, the Redistricting Commission should request that the Department of Corrections (DOC) immediately report an electronic record of the legal residence, presumptively outside of the facility, and other demographic data for any person in its custody on Census Day (April 1, 2020). At a minimum, this record should contain the last known complete street address prior to incarceration, the person's race, whether the person is of Hispanic or Latino origin, and whether the person is over the age of 18.

It is important to note that home address datasets may be incomplete or imperfect (this may be especially likely in Montana, where Native American populations are disproportionately represented in the criminal justice system and may be less likely to report having a specific street address prior to becoming incarcerated). However, missing home address data should not foreclose adjustment of the Census data, and indeed all states that have adopted this approach have home address datasets in which addresses are missing for some percentage of people incarcerated in those states.

The data from the DOC should include:

- (i) a unique identifier, not including the name, or SID (state offender ID) number, for each incarcerated person subject to the jurisdiction of the department on the date for which the decennial census reports population. The unique identifier should permit the Commission to address inquiries about specific address records to the Department of Corrections, without making it possible for anyone outside of the Department of Corrections to identify the inmate to whom the address record pertains;
- (ii) the street address of the correctional facility in which such person was incarcerated at the time of such report;
- (iii) the last known address of such person prior to incarceration or other legal residence (if known);

(iv) the person's race, whether the person is of Hispanic or Latino origin, and whether the person is over the age of 18 (if known);

Notwithstanding any other provision of law, this information should not include the name of any incarcerated person or allow for the identification of any such person therefrom, except by the Department of Corrections. The information should be treated as confidential, and should not be disclosed by the Redistricting Commission except as redistricting data aggregated by census block.

The Redistricting Commission should also request that every agency that operates a federal facility in Montana that incarcerates persons convicted of a criminal offense to provide the Commission with a report including the information listed above. The Bureau of Prisons has historically refused to share this data with states, but it is best practice to request the data anyway.

Once the Redistricting Commission has the address data, they need to “geocode” the addresses – this is just a fancy term for “mapping.” Geocoding is a process that takes an address like “123 Main St.” and matches it to coordinates on a map. This step makes it possible to take the list of addresses from the DOC and match them up to their corresponding Census blocks.

Most GIS software can do this as an automated process. And the Census Bureau, acknowledging that many states are counting incarcerated people at their home addresses this decade, has instituted a new procedure for states to use the Bureau's geocoder tool for large batches of addresses (https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files/2020/GQAssistance_CensusGeocoder.html).

We understand that Montana may have an unusually high number of incomplete addresses, particularly in rural areas. Automated geocoding will likely struggle to find effective matches for some of these addresses. But many could be manually mapped onto randomly assigned blocks within the home community. For example, if only a town name is available, and that town is so small that it will not be split when districts are drawn, it does not matter where in the town a person's address is located, and any random block in the town will do – for state or congressional redistricting purposes.

This data preparation should start immediately to eliminate any unnecessary delay once the Census releases the PL 94-171 redistricting data in August or September. Once all the home address data are mapped out, it will be a relatively quick process to adjust the block populations in the state's copy of the redistricting data received from the Census Bureau.

Policy considerations for the optimal solution

Making the data adjustment is sound policy that will remedy a significant distortion of Montana's democracy. Here, we address additional concerns that often accompany discussion of these sorts of adjustments, as well as some of the more subtle benefits.

Funding is not affected. Adjusting redistricting data to count incarcerated people at their home address does not impact funding formulas. The actions proposed here would result in the creation of a new dataset for use in state redistricting. This dataset would not affect the distribution of federal or state funds simply because there is no federal or state funding formula that is distributed on the basis of redistricting data.

Both state law and common sense dictate that incarcerated people are residents of their homes, not the correctional facilities where they are detained. The changes we propose here would make the data used for redistricting in Montana consistent with the state's statutory definition of residence:

“For registration, voting, or seeking election to the legislature, the residence of an individual must be determined by the following rules as far as they are applicable: The residence of an individual is where the individual's habitation is fixed and to which, whenever the individual is absent, the individual has the intention of returning. . . . An individual may not gain or lose a residence while kept involuntarily at any public institution, not necessarily at public expense; as a result of being confined in any prison; or solely as a result of residing on a military reservation.”
(Montana Annotated Code § 13-1-112(2).)

While correctional facilities may look permanent, the individuals who are inappropriately tabulated there are typically quite transient. We've occasionally heard the argument that it makes sense to count incarcerated people as residents of the prisons where they are detained because they will be incarcerated there for a long time. However, the reality is that prison populations are actually surprisingly transient. For example, the majority of people released from state prisons in 2014 served less than one year. In addition, most people in state prisons do not stay in any given facility for long. Incarcerated people are transferred frequently between facilities, at the discretion of the prison's administration, and nearly 75% of incarcerated people are moved between facilities before they return home. In fact, 30% of people in federal and state prisons have been at the current facility for less than six months. Half have been there for under a year.

An alternative stop-gap solution

A partial solution is also available if the Commission cannot get address data from the Department of Corrections; by adopting a stop-gap solution, the Commission can still limit the impact of prison gerrymandering in drawing the lines this redistricting cycle.

Essentially, the Commission can *minimize* prison gerrymandering when drawing the lines using unadjusted PL 94-171 redistricting data by distributing correctional facilities among multiple districts (rather than concentrating them within a small number of districts), and then using the allowable population deviations to correct for the distribution of the prison population.

Under this approach, the commission would use the deviation budget to lower the apparent populations in districts where incarcerated people disproportionately come from (knowing that many of their residents were counted toward the total of the districts containing correctional facilities). And similarly, they can should use the population deviations to include a bit of extra population in the districts that contain the prisons (knowing that their population on paper over-states their actual resident count.)

This alternative stop-gap solution is not as optimal as counting incarcerated people at their home addresses, but it is a valuable partial solution if collecting home address data proves impossible.

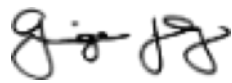
Conclusion

We hope that the Redistricting Commission will adopt the optimal solution discussed above – it is the best option for ensuring truly equal representation for Montanans. However, if that is not possible, we urge the Commission to distribute correctional facilities among multiple districts and use allowable population deviations to correct for the presence of prison populations. Both approaches would significantly enhance equality of representation in Montana and permit the state to join the national trend of jurisdictions choosing to end the practice of prison gerrymandering.

Please do not hesitate to contact us if we can answer any questions or provide you with additional resources. We thank you for the opportunity to present this testimony.



Aleks Kajstura
Legal Director
Prison Policy Initiative
69 Garfield Ave Floor 1
Easthampton, MA 01027
413-203-9790
akajstura@prisonpolicy.org



Ginger Jackson-Gleich
Policy Counsel
Prison Policy Initiative
69 Garfield Ave Floor 1
Easthampton, MA 01027
413-527-0845, ext. 310
gingerjg@prisonpolicy.org