

Testimony of Peter Wagner  
Executive Director, Prison Policy Initiative  
Before the  
Education, Health & Environmental Affairs Committee  
of the Maryland State Senate  
March 4, 2010

Thank you, Madame Chairman and members of the Committee for inviting me here today. My name is Peter Wagner and I am Executive Director of the Prison Policy Initiative, a non-profit, non-partisan research organization-based in Massachusetts. For the last decade, we have studied how the U.S. Census counts people in prison and worked to quantify the policy and legal implications flowing from those technical decisions.

Before you today is SB400, the “No Representation Without Population Act” which would correct within the state of Maryland a long-standing flaw in the decennial Census that counts incarcerated people as residents of the wrong location. Crediting incarcerated people to the census block that contains the prison, rather than the census block that contains their home address, results in a significant enhancement of the weight of a vote cast in districts with prisons at the expense of all other residents in all other districts in the state.

I would like to briefly address the factual situation in Maryland and then put Maryland’s proposed reforms in a national context.

Each decade, Maryland and its counties redraw their legislative districts on the basis of population to ensure that each district contains the same population as other districts. In this way, all residents are given the same access to government, fulfilling the Supreme Court’s “One Person One Vote” rule.

However, unless the state takes action to correct a flaw in the Census Bureau’s data, this effort to draw fair districts will fail.

The Census Bureau counts incarcerated people as residents of the prison location, even though they cannot vote and are not a part of the community that surrounds the prison. In Somerset County, a large prison is 64% of the 1st Commission District, giving each resident in that district 2.7 times as much influence as residents in other districts. Using prison populations to enhance the weight of a vote in districts that contain prisons dilutes the votes of all other residents in the county.

Counting prisoners in the wrong place also distorts state legislative districts. For example, in House District 2B (near Hagerstown), 18% of the district’s population consists of incarcerated residents from other parts of the state. Padding this legislative district with

additional prison populations dilutes the votes of all residents in other parts of the state. The state has decided, in effect, that every group of 4 people who live next to the large prisons in District 2B should have as much representation as 5 people who live anywhere else in the state.

The basic principle of our democracy is that representation is distributed on the basis of population. Crediting incarcerated people to the wrong location has the unfortunate and undemocratic result of creating a system of “Representation Without Population.”

The solution is simple. Maryland should join New York, Illinois and other states in developing a method to fix the census. The state is required by federal law to redistrict each decade, but it is not required to use federal Census data to do so. See Mahan v. Howell, 410 U.S. 315, 330-332 (1973) (rejecting Virginia's argument that it was compelled to use Census Bureau assignments of residences of military personnel in its state legislative redistricting, and suggesting that a state may not use Census data it knows to be incorrect). As the Third Circuit has explained:

Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature. Borough of Bethel Park v. Stans, 449 F.2d 575, 583 n.4 (3rd Cir. 1971).

Furthermore:

Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Burns v. Richardson, 384 U.S. 73, 92 (1966)

In fact, there is a long tradition of state and local governments fixing shortcomings in Census data. The Kansas Constitution requires the legislature to adjust federal census data to exclude nonresident military personnel and nonresident students and count resident military and students at their home addresses when conducting legislative apportionment. Kan. Const. art. 10, § 1.

The Alaska Supreme Court held that it was permissible under the Fourteenth Amendment to use a formula based on registration numbers to reduce the census tally of military personnel in the population base used for state legislative redistricting. See Groh v. Egan, 526 P.2d 863, 870, 873-74 (Alaska 1974).

The Supreme Court of Oregon has held that the Secretary of State is not obligated to rely on census data in apportioning districts. Hartung v. Bradbury, 33 P.3d 972, 598 (Or. 2001). Indeed, the court held that the Secretary of State violated the Oregon Constitution by failing to make corrections to federal census data to place a prison population in the correct census block. Id. at 599.

An Illinois Appeals Court upheld excluding prisoners from the population when apportioning a county into districts. Knox County Democratic Cent. Committee v. Knox County Bd., 597 N.E.2d 238 (Ill. App. Ct. 1992). The court stated that “to require that ineligible voters must always be included in the apportionment base merely because they were included in the census would violate the Equal Protection Clause.” Id. at 239.

New Jersey statutes require, and the state appellate court upheld, a requirement that prison inmates be excluded from the population for purposes of apportionment in certain school districts. Board of Educ. of Northern Burlington Co. Regional School Dist. v. New Jersey State Bd. of Educ., 858 A.2d 576, 580-81 (N.J. Super. Ct. App. Div. 2004)

Colorado and Virginia have enacted legislation allowing and encouraging, respectively, a departure from federal Census data so as to exclude prison populations for purposes of county or local redistricting. See Colo. Rev. Stat. § 30-10-306.7(5)(a) (requiring boards of county commissioners to subtract, from federal census numbers, the number of persons confined in any correctional facility in the county when calculating population equality for purposes of redistricting; Va. Code Ann. § 24.2-304.1 (C) (permitting governing body to exclude prison population in redistricting when such population exceeds 12 percent of the total county population).

The Mississippi Attorney General directed Wilkinson County to adjust census data for redistricting purposes, stating that prison populations:

should not be used in determining the population of county supervisor districts for redistricting purposes by virtue of their temporary presence in a detention facility or jail in the county, unless their actual place of residence is also in the county.

Mississippi Attorney General Opinion 2002-0060, 2002 WL 321998 (February 22, 2002).

Beyond these state-sanctioned changes, many counties have, on their own authority, modified the Census to change where incarcerated people are counted when drawing districts or designing weighted voting systems.<sup>1</sup>

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<sup>1</sup> See Prison Policy Initiative, “Select counties and cities that adjust Census data to correct for the prison miscount,” available at [http://www.prisonersofthecensus.org/factsheets/select\\_cities\\_and\\_counties.pdf](http://www.prisonersofthecensus.org/factsheets/select_cities_and_counties.pdf).

This year, for the first time, the Census Bureau will be publishing an early data file that will assist states and counties in finding correctional facilities in the census data. The state can simply collect the home addresses of incarcerated people and adjust the Census data prior to redistricting to count these populations at home.

Before concluding, I would like to address one the question of federal funding and whether a change in current practices on how incarcerated persons are counted would affect how federal funding is distributed. In short, federal funding would not be affected by either SB400 or a national change at the Census Bureau in the future. My research has shown that while decisions about where to count prison populations are important from the standpoint of fair representation, this issue actually has little impact on distribution of federal funding to communities. Most federal funding based on Census data consists of block grants to states, meaning that the federal government gives money to states based on their total population. Once the states receive the federal money, they are free to distribute it as they see fit within their own borders. For state block grant purposes, in other words, it does not matter where within any given state an incarcerated person is counted.<sup>2</sup> Policy in this area should be based on issues of fair political representation and not on concerns about funding distribution. Furthermore, SB400, the “No Representation Without Population Act” would apply only to redistricting at the state and local level and would not affect any funding distributions.

The basic principle of our democracy is that representation is distributed on the basis of population. SB400/HB496 will end the practice of granting “Representation Without Population.”

I thank you for your time today and I would be happy to answer any questions you may have about the issue of prison-based gerrymandering, how other states are addressing the problem, and what Maryland may do to eliminate it.

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<sup>2</sup> For more information on this point, see Prison Policy Initiative, “The Census Bureau’s Prison Miscount: It’s about political power, not funding,” available at [http://www.prisonersofthecensus.org/factsheets/ny/political\\_power\\_not\\_money.pdf](http://www.prisonersofthecensus.org/factsheets/ny/political_power_not_money.pdf).