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Testimony of Peter Wagner, Executive Director, Prison Policy Initiative

**Before the Special Joint Committee on Redistricting of the
Massachusetts General Court May 31, 2011**

Thank you, Chairman Rosenberg, Chairman Moran, and members of the Committee for providing the opportunity for testimony here today. I am an attorney and the Executive Director of the Prison Policy Initiative, a national, non-profit, non-partisan research and policy organization, established in 2001, with an office in Easthampton Massachusetts.

Our largest project concerns what the *New York Times* editorial board has coined “prison-based gerrymandering.” The Census Bureau counts incarcerated people as if they were residents of the census blocks that contain correctional facilities, and not as residents of their legal addresses. When legislative bodies use Census counts of correctional facilities to draw legislative districts, they unintentionally grant extra representation to those districts and dilute the votes of every resident of every district without a large prison.

For the last decade, I have been working to convince the Census Bureau to change where it counts incarcerated people, and working with state and local governments on interim solutions. Most notably, Maryland and New York have changed their laws and will be counting incarcerated people at home for redistricting purposes in this round of redistricting. Unfortunately, a restrictive state constitutional clause in Massachusetts may make a similar effort difficult here, but there are other things you can do.

First, the state can simply ask the Census Bureau to change where it counts incarcerated people. The Census has historically been responsive to requests from the state, and a resolution from the Massachusetts legislature requesting a change in the residence rule for incarcerated people would carry great weight for the Census 2020 planning process.

Second, the state can use its existing discretion to draw the districts this year to minimize, if not entirely eliminate, the harm of prison-based gerrymandering. I understand that at the Dorchester hearing, my colleague Brenda Wright of Dēmos briefly discussed this solution with you. I’d like to speak in more detail about how you can do that.

As you know, state legislative districts need not be exactly equal. The Supreme Court has said

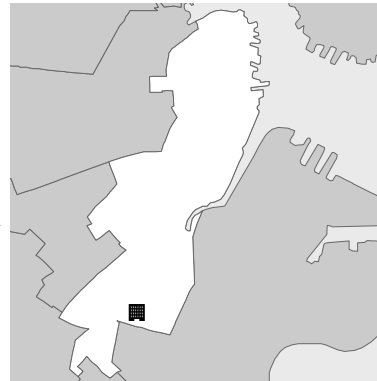
that it will assume any population deviations of 5% from the ideal district size had a legitimate state purpose,¹ and Massachusetts has traditionally used that population variation in its districts. If the joint committee made avoiding prison-based gerrymandering a priority, you could use that allowable discretion to avoid the problems seen in the last round of redistricting.

I'd like to share two problems I discovered in my research,² and then discuss a few solutions.

Problems seen in 2000

Problem 1. Large prisons were often in districts at the low end of the acceptable population range.

In this example from the last round of redistricting, the 3rd Suffolk District had a Census population of 37,986, just above the then-minimum of 37,698. But this district reached that population only by claiming the 1,549 people incarcerated at the Suffolk County House of Correction as residents. The actual population of this district was about 8% below the ideal district size, giving every 92 actual residents of this district the influence of 100 residents in other parts of the state.



2002 District: 3rd Suffolk

Allowable District Size in 2002:
37,698-41,666

3rd Suffolk Census population: 37,986
Prison population: 1,549
Actual population: 36,437

The actual population of this district was smaller than the minimum allowable.

Problem 2. One district that likely had a large number of incarcerated people living in it was drawn at the high end of the acceptable population range.

In this example from the last round of redistricting, the 12th Hampden district in Springfield and Wilbraham was drawn to contain 41,642 just below the then-maximum of 41,666. But as this district includes Springfield which has one of the highest rates of incarceration in the state, a large number of people in prison are residents of this district, and the actual population was likely out of the permissible range. As I explained above, using incarcerated people to pad the legislative districts that contain the prisons dilutes the votes of all residents who live in other districts, but the communities that are denied their true populations pay an additionally high price.



2002 District: 12th Hampden

Allowable District Size in 2002:
37,698-41,666

Census population: 41,642
Residents incarcerated elsewhere:
Likely sizable
Actual population:
Likely more than 41,666

If incarcerated people had been counted at home, this district would be outside federal requirements and would have to be redrawn.

¹ *White v. Regester*, 412 U.S. 755 (1973).

² Elena Lavarreda, Peter Wagner and Rose Heyer, *Importing Constituents: Prisoners and Political Clout in Massachusetts*, Prison Policy Initiative, October 6, 2009 available at <http://www.prisonersofthecensus.org/ma/report.html>

Suggested solutions:

Massachusetts can take 3 easy steps to minimize prison-based gerrymandering in this round of redistricting.

1. Be aware of which census blocks contain correctional facilities. For the first time, the Census Bureau has released the group quarters counts in time for redistricting.³ You can now know for sure exactly which populations are incarcerated.

For quick reference here, Laura Meyer of Dēmos and I prepared this annotated list of the significant federal, state and local correctional facilities reported by the Census Bureau in the Bureau's Advance Group Quarters Summary File.

County	Tract	Block	Correctional Population	Facility Name(s)
Barnstable	014100	1188	438	Barnstable County Jail & House of Correction
Berkshire	901100	4013	352	Berkshire County Jail & House of Correction
Bristol	651700	2007	185	Ash Street Jail and Regional Lock-Up
Bristol	653102	2022	1,133	Bristol County House Of Correction, Jail, & Women's Center; C. Carlos Carreiro Immigration Detention Center
Dukes	200300	3039	30	Dukes County Jail & House of Correction
Essex	212100	4009	1,196	Essex County Correctional Center
Essex	250800	3005	215	Essex County Alternative Correctional Center
Essex	267102	3039	20	Essex County Women in Transition
Franklin	041400	1000	176	Franklin County Jail and House of Correction
Hampden	801102	2000	160	Western Massachusetts Correctional Alcohol Center
Hampden	810414	1007	1,069	Hampden County
Hampden	810414	1016	159	Hampden County
Hampden	810902	3044	110	Western Massachusetts Women's Correctional Center
Hampshire	821903	2001	249	Hampshire County Jail
Middlesex	316400	6001	798	Middlesex County Jail & House of Correction
Middlesex	361200	1003	1,122	MCI Concord
Middlesex	361300	4044	272	Northeastern Correctional Center
Middlesex	383101	1014	763	So Middlesex Correctional Center; MCI Framingham
Middlesex	388200	3086	1,454	MCI Shirley
Norfolk	402500	2016	610	Norfolk County Jail
Norfolk	409101	3017	1,491	MCI Norfolk
Norfolk	409101	3029	318	Bay State Correctional Center
Norfolk	409101	3042	186	Pondville Correctional Center
Norfolk	409101	3048	246	MCI Cedar Junction
Norfolk	411302	2021	482	MCI Cedar Junction
Plymouth	525300	1016	874	Massachusetts Treatment Center
Plymouth	525300	1019	170	Old Colony Correctional Center
Plymouth	525300	1026	1,010	Bridgewater State Hospital
Plymouth	530600	1021	1,319	Plymouth County Correctional Facility
Plymouth	530600	4046	197	MCI Plymouth
Suffolk	010404	2000	81	Coolidge House
Suffolk	020303	2013	727	Suffolk County Jail
Suffolk	071101	3002	21	McGrath House (Women)
Suffolk	080100	1002	1,512	Suffolk County House of Correction
Suffolk	980300	1025	25	Lemuel Shattuck Hospital
Suffolk	981100	4004	193	Boston Pre-Release Center
Worcester	707500	2027	1,021	NCCI/Gardner
Worcester	713100	4001	1,259	Souza-Baranowski Correctional Center
Worcester	729100	1048	1,138	Worcester County Jail and House of Correction
Worcester	761400	6154	1,194	FMC Devens

³ Census Bureau's Advance Group Quarters Summary File available at http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html and Demos and Prison Policy Initiative press release "Advocates Hail Census Bureau's Release of Data to Assist in Correcting Prison-Based Gerrymandering", April 20, 2011, available at <http://www.prisonersofthecensus.org/news/2011/04/20/groupquartersreleased/>

2. Make sure that multiple large prisons are not put within the same district.

Conveniently for Massachusetts, no individual prison is larger than the allowable population deviation. As long as multiple large prisons are not clustered together in the same district, it should be possible keep the actual population of each district within the traditional maximum population variance of 5%.

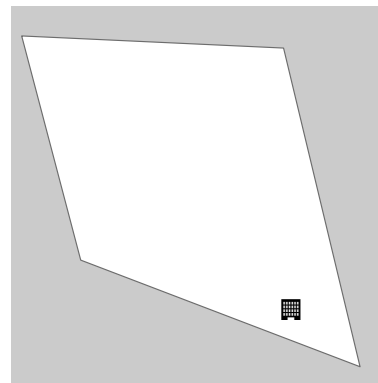
3. Deliberately overpopulate any district that contains a correctional facility by approximately the population size of the correctional facility.

Not only can your committee take care to not greatly under-populate districts that contain correctional facilities or greatly overpopulate districts that disproportionately are home to incarcerated people as discussed above, but your committee can actually draw the lines to all but eliminate the effect of prison-based gerrymandering.

You can do this through a careful use of your allowed population deviation between districts. The ideal size of House districts to be drawn this year is 40,923, with each district ranging in size from 38,877 to 42,969.

I suggest that you deliberately overpopulate each district that contains a correctional facility by about the same population as the correctional facility. Each district will be within allowable federal limits on population variation by an analysis of both the Census figures and the actual residents of the state.⁴

For example, if a prison has a population of 1,000 people, try to draw the district that contains this prison to contain about 41,923, instead of the ideal size of 40,923.



**2012 District:
Hypothetical District
with prison**

Ideal District Size in 2012: 40,923
Allowable District Size in 2012:
38,887-42,969

Census population: 41,923
Prison population: 1,000
Actual population: 40,923

Deliberately overpopulating this district by the prison population counted within it will result in a district with the ideal number of actual residents.

Some Massachusetts precedent

I would like to emphasize that responding to the Census Bureau’s misallocation of prison populations is not new to Massachusetts. In 2001, the City of Gardner removed the prison population from the city council apportionment base in order to prevent the residents of the eastern side of the city (where the prison is located) from exercising undue influence over the city council.⁵

⁴ I note that *Mahan v. Howell* allows a state to have a higher population deviation of more than plus or minus 5% if it can show a legitimate state interest was met by doing so. I would argue that overpopulating a district by more than 5% — ie. higher than the normal maximum of 42,969 — would be entirely permissible when justified that the extra population is the result of a prison which contained residents from other parts of the state; but the size and distribution of Massachusetts’ prisons may make this argument unnecessary.

⁵ See sidebar: Peter Wagner, Gardner, MA rejects Census Bureau’s prison count in *Importing Constituents: Prisoners and Political Clout in Massachusetts*, October 6, 2009 available at: <http://www.prisonersofthecensus.org/ma/report.html#gardner>

And this year, the towns of Lancaster and Harvard have requested special legislation to allow the towns to exclude the prison populations from the population calculations used to determine if additional precincts, at an unnecessary fiscal cost, must be created.⁶

It is clear under state law⁷ that people in prison remain residents of their homes. For example, people incarcerated for misdemeanors and those awaiting trial who wish to vote must do so via absentee ballot at their home address. Prior to 2000, when all people in prison were allowed to vote, people incarcerated for felonies who chose to vote were also required to vote via absentee ballot at their home addresses.⁸ The state legislative districts should be drawn on the same principle: a prison cell is not a residence.

Thank you very much for this opportunity to testify.

More info at:

- *Importing Constituents: Prisoners and Political Clout in Massachusetts*, is a district-by-district analysis of prison-based gerrymandering in Massachusetts state legislative districts: <http://www.prisonersofthecensus.org/ma/report.html>
- *Preventing Prison-Based Gerrymandering in Redistricting: What to Watch For* is a guide for advocates who want to minimize the effects of prison-based gerrymandering in their state or community: http://www.demos.org/pubs/Preventing_pbg.pdf
- *States are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do* is a fact sheet summarizing the discretion given under federal law to adjust the Census for redistricting purposes: <http://www.prisonersofthecensus.org/factsheets/adjusting.pdf>

6 The bills, H03440 and H03439, were ordered for a 3rd reading in the House on May 26, 2011.

7 See MA Const. Chapter I, Section II, Article II. “And to remove all doubts concerning the meaning of the word “inhabitant” in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district or plantation where he dwelleth, or hath his home.”

Also, the Supreme Judicial Court addressed the direct question of the compatibility of the federal census with the Massachusetts State constitutional definition of inhabitant in a 1974 Advisory opinion. Asked by the House of Representatives to determine whether the state census could use the “usual residence rule” of the federal census in conducting the state census, the Court issued a very clear “no.” Reiterating that the federal census uses a simple method and ignores domicile, the Court concluded:

We think it clear without elaboration that a census that determines the place of which a person is an inhabitant on the basis of where he or she lives and sleeps most of the time will not satisfy the requirement of the Constitution of the Commonwealth that a person be assigned as an inhabitant to the place of his or her domicile. Opinion of the Justices, 365 Mass 661, 663-664 (1974).

8 In *Dane v. Board of Registrars of Concord* 374 Mass 152 (1977), the Supreme Judicial Court reiterated that prisoners are presumptively residents of their home districts and not of the prison district, although it did allow the Concord registrar to accept registrations from prisoners who had shown they had willingly established themselves as residents of the town of Concord. When such a showing was not present, the Supreme Judicial Court upheld the refusal of the Norfolk registrar to register 619 residents of Norfolk prison as residents of the town. *Paul Ramos v. Board of Registrars of Voters of Norfolk*, 374 Mass. 176 (1978) Subsequent legislation and *Cepelonis v. Commonwealth*, 389 Mass. 930 (1983) effectively removed this narrow discretion and required prisoners to vote via absentee ballot in their community of origin. *Regardless of whether a specific prisoner was intending to never return home, state law barred him from adopting the prison address as his residence.*