



captive constituents

Prison-Based Gerrymandering & The Distortion of Our Democracy

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**LDF's POLITICAL
PARTICIPATION GROUP**

The Political Participation Group's mission is to use legal, legislative, public education, and advocacy strategies to promote the full, equal, and active participation of African Americans in America's democracy.



CAPTIVE “CONSTITUENTS”

Prison-Based Gerrymandering and the Distortion of Our Democracy

Most state and local governments count incarcerated persons as residents of the prison communities where they are incarcerated when drawing election district lines, despite the fact that prisoners are not integrated into those communities and are not residents there.

This practice, known as “**prison-based gerrymandering**,” artificially *inflates* the population count—and thus, the political influence—of the districts where prisons and jails are located. At the same time, this practice *reduces* the political power of everyone else. The viability of our communities, integrity of our democracy, and basic principles of equality suffer as a result.



The “One Person, One Vote” Principle

The United States Constitution requires that election districts must be roughly equal in size, so that everyone is represented equally in the political process. Elected officials (with the exception of United States Senators) must represent roughly the same number of people, and each constituent is entitled to the same level of access to an elected official. This is known as the “**one person, one vote**” principle.¹

But because of prison-based gerrymandering, a person’s vote counts more if that person lives near a prison, in violation of the basic principle that each person’s vote should count equally.

Prison-based gerrymandering uses a captive and disfranchised population that is comprised disproportionately of people of color to inflate the political strength of the surrounding jurisdiction. It is all-too reminiscent of the infamous “three-fifths compromise,” whereby enslaved and disfranchised African Americans were counted to inflate the number of constituents—and thus, the political influence—of Southern states before the Civil War.

Incarcerated Individuals Are Not Constituents of the Districts Where They Are Incarcerated

Incarcerated people should not be counted where they are incarcerated for several reasons:

Incarcerated Individuals Are Not Legal Residents Where They Are Held.

Nearly every state has a constitutional provision or statute providing that a person does not gain or lose residence in a place by virtue of being incarcerated there.² Rather, an incarcerated person retains the legal residence that he or she had *prior to arrest*, and continues to maintain residence in that county for a variety of purposes, such as court and tax filings. And where incarcerated individuals are permitted to vote, as in Maine and Vermont, they do so by absentee ballot in their home communities.³

Incarcerated Individuals Are Not Integrated Into the Communities Where They Are Held. Unlike groups such as students or military personnel, incarcerated individuals cannot establish ties to the surrounding community where they are imprisoned. They cannot utilize services such as parks and libraries. They are not located where they are by choice; rather, they are held at a particular facility at the discretion of the state, and can be moved at any time for any reason. They cannot vote in the districts where they are held, and the residents of surrounding communities generally do not share their concerns or interests.

Incarcerated Individuals Remain Members of Their Home Communities. They remain legal residents of the communities where they lived prior to arrest. To the extent that they have connections to the outside world, it is through their families and other relationships in these communities, to which they are released upon completion of sentence. But while the average length of incarceration for a state prisoner in the U.S. is less than 3 years,⁴ the population counts that treat incarcerated individuals as residents of a prison district remain in effect for a decade.

In spite of all this, incarcerated individuals in most states are counted as members of the districts where they are confined, artificially inflating the political power of those districts at the expense of their own communities.



Prison-based gerrymandering uses people's bodies to count against their interests.



Minority Vote Dilution

African Americans are 12.7% of the general population, but are 41.3% of the federal and state prison population.⁸ African Americans and Latinos account for nearly 90% of all prison sentences for drug offenses,⁹ even though rates of drug use are roughly equal among racial groups.¹⁰

But incarcerated persons are often held in areas that are far removed from their home communities in both distance and composition. Although non-metropolitan counties contain only 20% of the national population, they are host to approximately 60% of new prison construction.¹¹

In 173 counties nationwide, half of the purported African-American population are not true residents, but are actually prisoners imported from elsewhere.¹² Thus, prison-based gerrymandering not only weakens the political strength of communities of color, it is also eerily reminiscent of the infamous “three-fifths compromise,” which enabled Southern states to amplify their political power by counting enslaved African Americans amongst their constituents.

Prison-based gerrymandering undermines minority voting rights in other ways as well. In 1986, Somerset County in Maryland created a majority African-American voting district in compliance with the Voting Rights Act, but more than half of the new district was comprised of prisoners, and over 60% of the district’s purported African-American population was incarcerated. As a result, African Americans in that district did not have a meaningful opportunity to elect a candidate of their choice.¹³



Prison-Based Gerrymandering Has Massive Electoral Consequences

Over the last several decades, the number of incarcerated Americans has exploded. The state prison population nationwide, which was 220,000 in 1974, more than quintupled in size by 2000 to over 1.3 million, due in large part to the “War on Drugs.”¹⁴

Today, the incarcerated population of the U.S. is over 2 million. It is roughly equal to Houston, our fourth-largest city. It is larger than that of fifteen individual states, and larger than the three smallest states *combined*. If the incarcerated population could form its own state, it would qualify for *five votes in the Electoral College*.¹⁵



Where prison populations are counted has tremendous influence in shaping our democracy.



Frequently Asked Questions

Q: *How are incarcerated individuals different from other groups like students? If we count students in their dorms, shouldn't we count prisoners where they are housed?*

A: Unlike students, incarcerated individuals are not a part of the local community. They are even prohibited from becoming legal residents there. They are barred from leaving their facility without official permission. And, of course, they cannot vote in the districts where they are incarcerated. Students, on the other hand, can utilize local services like parks, libraries, highways and roads, and can build ties in the local community. The college is the place they willingly live, which is the very definition of residence.

Q: *If most incarcerated individuals can't vote, why count them at all?*

A: Everybody counts, whether they can vote or not. The Census counts non-voting populations such as children, who are included as part of a district's population during redistricting. The issue is not whether incarcerated individuals should be counted, but where. Tellingly, in the two states that permit incarcerated individuals to vote without restriction (Maine and Vermont), incarcerated individuals vote by absentee ballot in their home communities.

Q: *Are states and localities required to use the federal census when conducting redistricting?*

A: State and local governments are not required by federal law or the U.S. Constitution to use any particular set of data when redistricting.¹⁶ Although redistricting must be based on reliable population numbers, states and localities are free to adjust census data. In fact, the Bureau will provide additional data to make that process easier during this redistricting cycle.

Q: *Do states have the means to count incarcerated individuals in their home communities during the redistricting process?*

A: States already possess the address information of incarcerated individuals, or have access to that information. After address information from prisoners is compiled, computer mapping software would make it relatively easy to reallocate those individuals back to their home communities for redistricting purposes.¹⁷

Fixing the Problem

Reform at the State and Local Level

In 2010, New York, Maryland, and Delaware enacted legislation requiring that incarcerated individuals be counted at their pre-arrest addresses when drawing election district lines. This will ensure that incarcerated individuals are counted at the proper locations, and that everyone's vote in those states will count equally. Many other states are currently considering similar legislation.

In May 2011, the U.S. Census Bureau released information on prison population numbers to states and localities in time for those figures to be taken into account in the redistricting process. States and localities will now have the ability to draw election districts without engaging in prison-based gerrymandering.¹⁸

At the local level, dozens of counties nationwide have refused to engage in prison-based gerrymandering by not counting incarcerated individuals when drawing district lines. Because nearly all incarcerated individuals come from communities outside of the county, this local practice has the same practical effect as counting them at their true home addresses.

Reform at the National Level

Advocates are engaged in a long-term campaign to encourage the Census Bureau to implement a permanent solution, in which the decennial census would identify the home communities of incarcerated persons and count them appropriately. An accurate population count during the next Census can solve the problem of prison-based gerrymandering once and for all.

Additional Information

For additional information on prison-based gerrymandering, please visit:



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PRISON POLICY INITIATIVE

www.prisonersofthecensus.org

Endnotes

¹ *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

² See, e.g., N.Y. Const. Article II, Section 4.

³ Me. Rev. Stat. Ann. tit. 21-A, § 112 (2010); Vt. Stat. Ann. tit. 17, § 2122 (2010).

⁴ Nat'l Research Council, Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census 93 (Daniel L. Cork & Paul R. Voss eds., 2006), available at http://print.nap.edu/web_ready/0309102995.pdf [hereinafter "NRC"].

⁵ Peter Wagner, Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in New York*, § 1 (Apr. 22, 2002), available at <http://www.prisonpolicy.org/importing/>.

⁶ See *id.* § V.

⁷ Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. Times, Oct. 23, 2008, at A12.

⁸ See NRC, *supra* note 4, at 86 (citing F.T. Cullen & J.L. Sundt, Imprisonment in the United States 485 (2000)).

⁹ Marc Mauier & Tracy Huling, The Sentencing Project, *Young Black Americans and the Criminal Justice System: Five Years Later* 12-13 (Oct. 1995), available at http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf.

¹⁰ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

¹¹ Patricia Allard & Kirsten D. Livingston, Brennan Center for Justice, *Accuracy Counts: Incarcerated People and the Census* 6 (2004), available at http://www.brennancenter.org/page/-/d/RV4_AccuracyCounts.pdf.

¹² Rose Heyer & Peter Wagner, Prison Policy Initiative, *Too Big to Ignore: How Counting People in Prisons Distorted Census 2000* (Apr. 2004), available at <http://www.prisonersofthecensus.org/toobig/size.html>.

¹³ Letter from Deborah A. Jeon, Legal Director & Ajmel Quereshi, Skadden Fellowship Attorney, Am. Civil Liberties Union of Md., to Douglas F. Gansler, Attorney General, State of Maryland (Feb. 19, 2010), at 4-5, available at http://www.aclu-md.org/aPress/Press2010/ACLU_NAACP_Letter_AG.pdf.

¹⁴ Sarah Lawrence & Jeremy Travis, Urban Inst., *The New Landscape of Imprisonment: Mapping America's Prison Expansion* 2 (2004).

¹⁵ David Hamsher, Comment, *Counted Out Twice—Power, Representation, and the “Usual Residence Rule” in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. Crim. L. & Criminology 299 (2005).

¹⁶ See, e.g., *Borough of Bethel Park v. Stans* 449 F.2d 575 (3d Cir. 1971).

¹⁷ N.Y. City Bar Ass'n, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting From Partisan Gerrymanders* app. C-5 (2007), available at http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

¹⁸ See U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, available at http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html; Robert Groves, Director, U.S. Census Bureau, *So, How Do You Handle Prisons?*, 2010 Census: The Director's Blog (March 12, 2010), available at <http://blogs.census.gov/2010/census/2010/03/so-how-do-you-handle-prisons.html>; Sam Roberts, *New Option for the States on Inmates in the Census*, N.Y. Times, Feb. 11, 2010, at A18, available at <http://www.nytimes.com/2010/02/11/us/politics/11census.html>.



