



**Testimony of Ben Peck Senior Legislative and Policy Associate Demos
Before the National Advisory Committee on Racial, Ethnic and Other Populations
Of the U.S. Census Bureau on:
The Census Count and Prisoners: The problem, the solutions and what the Census can do
October 22, 2012**

Dēmos is a national, non-profit, non-partisan public policy, research and advocacy organization committed to building an America where democracy is robust and inclusive, with high levels of electoral participation and civic engagement. To that end, the Dēmos Democracy Program works to reduce barriers to voter participation and engagement, with a particular focus on participation by traditionally disfranchised communities.

We greatly appreciate this opportunity to submit this testimony to the distinguished members of the Census Bureau's National Advisory Committee on Racial, Ethnic and Other Populations.

Over the past several years, Dēmos has been working in partnership with the Prison Policy Initiative and numerous other advocates at the national, state and local level to highlight the inequities of Prison-Based Gerrymandering and to work for solutions.

We submit this testimony to urge the Committee to recommend that the Census Bureau engage in all necessary research to determine how best to end the inequitable practice of prison-based gerrymandering prior to the next Census. Such a recommendation would be in keeping with prior resolutions by the Racial and Ethnic Advisory Committees to the Census in 2003, 2009, 2010 and 2011 (See list at <http://www.prisonersofthecensus.org/resolutions/>). A recommendation this year would be particularly timely, as it would build on the successes of several states that have enacted legislation to end this practice since 2010; a key U.S. Supreme Court ruling in June 2012 affirming the constitutionality of such reforms; and some important initial steps taken by the Census Bureau during the 2010 Census to assist states in the effort to end prison-based gerrymandering.

What do we mean by "prison-based gerrymandering"? A long-standing flaw in the decennial census counts some 2 million incarcerated people in the wrong place for purposes of redistricting and undermines the "one person, one vote" principle of the 14th Amendment. Census data, of course, forms the basis for re-drawing state and local districts each decade to

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ensure that each district will contain a similar number of people and each resident will therefore have the same access to government, a result required by the one-person, one-vote rule.

However, although people in prison can't vote, and remain legal residents of their home communities under the laws of most states, the Census Bureau currently tabulates people in prison as residents of their prison cells, not their homes. Using this flawed data to draw legislative districts grants the people who live near large prisons extra influence at the expense of voters everywhere else.

The Problem at the State Level

Crediting incarcerated persons from all over the state to the predominately rural districts that contain large prisons enhances the weight of a vote in those districts, diluting all other votes in the state.

Incarcerated persons are disproportionately Black and Latino, and outside of the Deep South, most prisons are built in disproportionately white areas. Using Black and Latino prisoners to pad the populations of white legislative districts dilutes minority voting strength state-wide. Consider a statistic from New York, where the upstate region has steadily been losing population: in the 2000 Census, almost one-third of the persons credited as having "moved" into upstate New York during the previous decade were persons sentenced to prison terms in upstate prisons.¹ In Illinois, 60% of incarcerated persons are from Cook County (Chicago), yet over 90% of them are incarcerated downstate.² In Texas, in two legislative districts drawn after 2000, 12% of the population consisted of incarcerated persons.³

The Problem at the County and Municipal Level

Rural county and municipal districts are smaller than state legislative districts, so prison-based gerrymandering can create an even larger problem in distorting representation in communities that include large prisons. Some examples:

¹ Rolf Pendall, Brookings Institution, *Upstate New York's Population Plateau: The Third Slowest-Growing "State"* (August 2003).

² Prison Policy Initiative, Illinois state page, available at <http://www.prisonersofthecensus.org/illinois.html>.

³ Prison Policy Initiative, "Fixing prison-based gerrymandering after the 2010 Census: Texas," available at <http://www.prisonersofthecensus.org/50states/TX.html>.

- A true “rotten borough”: In Anamosa Iowa, a man won a city council seat with two write-in votes, neither of which he cast. There were no candidates and only a handful of voters, because 96% of the district population was incarcerated in a large prison. The handful of voters in the district had 25 times as much influence on the city council as residents elsewhere in the city.⁴
- “Majority-minority” in name only: In Somerset County, MD, a county commission district that was deliberately drawn as a majority–minority district in order to settle a Voting Rights Act lawsuit in the late 1980s was unable to elect a candidate of its choice to the commission because an incarcerated population, which cannot vote, was counted in the district’s population. The actual African-American resident population in the district was too small to elect a candidate of its choice. After Maryland enacted a reform law in 2010 to count incarcerated persons at their home address instead of the prison address, Somerset County finally was able to adopt a redistricting plan that provides a realistic opportunity for not just one, but two, African Americans to be elected to the county government.⁵

States and Localities are Ready for Accurate Counts

Since 2010, New York,⁶ Maryland⁷ Delaware⁸ and California⁹ have passed legislation to use state correctional data to ensure that districts are drawn on data that counts incarcerated

⁴ See Sam Roberts, *Census Bureau’s Counting of Prisoners Benefits Some Rural Voting Districts*, New York Times, October 23, 2008.

⁵ Testimony of Brenda Wright, Demos, before the Rules and Executive Nominations Committee of the Maryland State Assembly on House Bill 496, March 8, 2010, available at <http://www.demos.org/sites/default/files/publications/Wright%20testimony%20MD.pdf>; Leah Sakala, Maryland Law Brings Long Awaited Racial Justice to Somerset County, Prisoners of the Census blog, August 16, 2012, available at <http://www.prisonersofthecensus.org/news/page/2/>.

⁶ Prison Policy Initiative, “New York prison-based gerrymandering bill,” available at http://www.prisonersofthecensus.org/NYS_A9710-D.html.

⁷ No Representation Without Population Act, H.B. 496, 2010 Leg., 427th Sess. (Md. 2010), available at <http://mlis.state.md.us/2010rs/billfile/hb0496.htm>.

⁸ H.B. 384, 2010 Leg., 145th Gen. Assem. (De. 2010), available at <http://legis.delaware.gov/LIS/LIS145.nsf/vwLegislation/HB+384?Opendocument>.

⁹ A.B. 420, California Legislature, 2011-1012 regular session, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0401-0450/ab_420_bill_20110822_amended_sen_v93.pdf; see also A.B. 1986, making technical

people at home. New York and Maryland implemented this reform in drawing their districts following the 2010 Census; California and Delaware will implement their reforms for the redistricting following the 2020 Census.

The legislative or executive branches in several states (Virginia, Colorado, New Jersey, Mississippi) require or encourage local governments to modify the census and refuse to use prison populations as padding. More than 100 rural counties and municipalities around the country make these adjustments on their own.¹⁰

The U.S. Supreme Court and Lower Courts Have Upheld Reform Laws to End Prison-Based Gerrymandering

The Maryland and New York reform laws that ended prison-based gerrymandering in those states for the 2010 round of redistricting were challenged in court actions, and both laws have been upheld in the face of those challenges.

On December 23, 2012, [a three-judge federal district court](#) upheld the constitutionality of Maryland's No Representation Without Population Act.¹¹ In June 2012 [the U.S. Supreme Court summarily affirmed](#) that decision, which gives it the status of Supreme Court precedent.¹²

In New York, in December 2012, [a state trial court upheld the constitutionality of New York's reform law](#) against a legal challenge filed by Senate Republicans. The Senate Republicans sought a direct appeal to the New York Court of Appeals. [On February 14, 2012, the New York Court of Appeals](#) rejected the plaintiffs' application for a direct appeal, and as a result of that ruling [the plaintiffs decided to drop their appeal](#), making our legal victory final.¹³

improvements to the 2011 bill, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1951-2000/ab_1986_bill_20120829_enrolled.pdf.

¹⁰ See Demos and Prison Policy Initiative, *States Are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do* (updated September 2010), available at <http://www.prisonpolicy.org/factsheets.html>.

¹¹ *Fletcher v. Lamone*, 831 F. Supp. 2d 837 (D. Md. 2011), *aff'd mem.*, ___ U.S. ___, 2012 WL 1030482 (June 25, 2012).

¹² *Fletcher v. Lamone*, ___ U.S. ___, 2012 WL 1030482 (June 25, 2012).

¹³ *Little v. LATFOR*, No. 2310-2011 (N.Y. Sup. Ct. December 1, 2011), Mem. Decision, available at http://www.demos.org/sites/default/files/publications/Decision%20and%20Order_Little_v_LATFOR.pdf; see Decision List, New York Court of Appeals, February 14, 2012, at 8, transferring appeal to Appellate Division, Third Department, available at <http://www.nycourts.gov/ctapps/Decisions/2012/Feb12/DecisionList021412.pdf>. See

As a result of these legal victories, for the first time, incarcerated persons have now been allocated to their home addresses, rather than to the prison location, in the state legislative and local districts that will be used in New York and Maryland for the coming decade (Maryland's law also includes congressional districts).

Solutions: What the Census Can Do

In a groundbreaking policy shift, the Census Bureau changed its 2010 data publication schedule to make it easier for states and localities to identify prison populations in its redistricting data.¹⁴ This interim solution of releasing accelerated data assisted governments in removing prisoners from the prison districts; however, states must rely on their own data to assign prisoners to their proper home districts, and the new release was not early enough for every state to benefit.

Fortunately, the Census Bureau can achieve a full and permanent solution for the 2020 Census: revising its "usual residence" rule to tabulate incarcerated persons as residents of the community where they resided prior to incarceration. As established by court cases, and as demonstrated by the variety of policies which the Census Bureau has adopted in absence of specific legislation, the Census Bureau has broad discretion over how to determine where to tabulate individuals in the decennial census.

Dr. Robert M. Groves, then-Director of the U.S. Census Bureau, addressed some of these issues in a blog post¹⁵ in 2010, and noted that the Bureau re-evaluates its residence rules after each census:

Some users of census data care about this [the prison counts] for redistricting purposes within states. They observe that prisoners often resided in areas far removed from the location of the prison and should be counted where they're from. They note that the former homes of the prisoners are "cheated" of the benefits derived from the census counts. They argue that the locales of the prisons unfairly benefit from the counted

also Demos, Law Ending Prison-Based Gerrymandering Stands; Plaintiffs Drop Challenge, March 16, 2011, available at <http://www.demos.org/press-release/law-ending-prison-based-gerrymandering-stands-plaintiffs-drop-challenge>.

¹⁴ Prison Policy Initiative, "Census gives data users new opportunities to draw fair districts with its data," available at <http://www.prisonersofthecensus.org/technicalsolutions.html>.

¹⁵ United States Census 2010, "So, How do You Handle Prisons?" available at <http://blogs.census.gov/2010census/2010/03/so-how-do-you-handle-prisons.html>

prisoners, even though the prisoners do not enjoy the benefits that the census counts provide to the area.

This decade we are releasing early counts of prisoners (and counts of other group quarters), so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale.

Counting members of all group quarters is complicated; we re-evaluate our “residence rules” after each census, to keep pace with changes in the society. We’ll do that again after the 2010 Census.

For all these reasons, the time is right for the Bureau to undertake the evaluation and research that will be necessary to change its practices for determining the residence of incarcerated persons, so that in the next Census incarcerated persons will be properly tabulated as residents of their home communities. In 2010, the Hispanic and Asian American subcommittees of the Census Bureau’s Racial and Ethnic Advisory Committee adopted a resolution making this recommendation to the Census Bureau, and in 2011, the African American subcommittee made a similar recommendation.¹⁶ We urge the National Advisory Committee on Racial, Ethnic and Other Populations to address this issue and to make the following recommendation to the Census Bureau:

The National Advisory Committee on Racial, Ethnic and Other Populations recommend that the Census Bureau conduct research as part of their 2020 Census planning to describe a process to implement changes to the “usual residence” rule to provide a tabulation in the 2020 Census of incarcerated persons at the pre-incarceration addresses, including identifying the best means of gathering such information and incorporating it into Census tabulations nationwide.

Thank you again for this opportunity to present our views on this important issue.

¹⁶ Joint Resolution of the Hispanic and Asian American subcommittees of the Census Bureau’s Race and Ethnic Advisory Committee, October 8, 2010, available at http://www.prisonersofthecensus.org/resolutions/REAC_Oct082010.html; Recommendation 2, Residence Rule, African American subcommittee of the Census Bureau’s Racial and Ethnic Advisory Committee, October 2011, available at <http://www.prisonersofthecensus.org/resolutions/>.