

## ONE LAST CHANCE TO AVOID PRISON-BASED GERRYMANDERING IN KANSAS

by Peter Wagner and Brenda Wright  
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The Kansas legislature's failure to approve a redistricting plan before the end of the session is giving the state one more opportunity to avoid a dubious distinction: enacting the nation's most extreme instance of prison-based gerrymandering in a state legislative district. The federal courts are now in charge and could either adopt the legislature's proposed maps or draft their own. By taking the simple step of dividing the Leavenworth prisons among different districts rather than concentrating them in one, the federal panel can prevent Kansas from winning the "worst prison gerrymander" award for the 2010 cycle of redistricting.

Kansas state law<sup>1</sup>, like that in most states, declares that people in prison remain legal residents of their homes, but the Census Bureau counts incarcerated people as if they were residents of the prison location. The unique concentration of state, federal and private prisons in the Leavenworth area means that a substantial portion of that district will be made up of phantom constituents -- people who are from other parts of the state (or country) and who are not allowed to vote. Using prison populations to pad the districts that contain prisons gives extra influence to voters who live near prisons, and dilutes the votes of residents in all other districts, violating the constitutional guarantee of

"one person, one vote." The practice bears an uncomfortable resemblance to the effects of the infamous "Three-Fifths" clause of the U.S. Constitution, under which the South used its non-voting slave population to gain enhanced political representation in Congress.

A national movement has developed to fix this problem of "prison-based gerrymandering." Four states have recently passed legislation to prevent legislators from using prisons to pad their districts; and the laws in Maryland and New York are already in effect and have been upheld by the courts. But in Kansas, where the impact of prison-based gerrymandering on state legislative districts is potentially larger than that of any other state, progress has been slow.

The legislature failed to pass a redistricting plan before the legislature session ended, so now the federal courts have taken over. The State House passed a state house plan, and the Senate passed a map for the Senate, but political infighting kept both chambers from approving each other's plan, so neither plan could become law.

The House plan was particularly problematic because it took what was one of the most extreme examples of prison-based gerrymandering in the nation and made it worse. Existing District 40 contains a larger incarcerated population than any other district in the state, and includes all but one

<sup>1</sup> Under common law, a residence is the place you inhabit with an intent to remain, and involuntary confinement therefore does not qualify as a residence. For electoral purposes, the Kansas Statutes declare that "'Residence' means the place adopted by a person as such person's place of habitation, and to which, whenever such person is absent, such person has the intention of returning." Kan Stat. §25-407 (2011). Intent is an important element in determining legal residence. *Willmeth v. Harris*, 195 Kan. 322, 326-27 (1965) (voter remained resident of township despite renting out his home there and moving to new residence in different township, when voter intended to return to previous residence). Incarceration is never voluntary and cannot establish a residence.

facility in the region. The House’s proposed new map moves the federal prison – which contains people from all over the country – in to District 40. The result is a legislative district that has a greater portion of its population behind bars than any other state legislative district in the nation.

**Table 1. Correctional facilities in proposed House District 40**

Correctional Facility	Correctional population	Block id #	District in 2002
Leavenworth Detention Center	799	20 103 070500 4041	40
Lansing Central Correctional Facility	2,342	20 103 071102 2050	40
United States Penitentiary at Leavenworth and Camp Leavenworth	2,039	20 103 981900 2026	41
United States Disciplinary Barracks at Fort Leavenworth	442	20 103 981900 1001	40

The combined population of these facilities is 5,622 or 24.7% of the average district in the state. The House’s plan for House District 40 somewhat overpopulated that district, which only slightly reduced the vote distortion caused by the prison. The district ends up with a population deviation of -20.3% when the prison is factored out (See Table 2.)

**Table 2. Proposed House District 40**

Reported population	Correctional population	Actual population	Actual population deviation ideal
23,717	5,622	18,095	-20.3%

As drawn, House District 40 gives every 4 residents of that district the political influence of 5 residents in any other district.

A similar problem exists in the proposed Senate District 5, where all four prisons are also concentrated into a single district. If enacted, Senate District 5 is likely to be the most dramatic instance of prison-based gerrymandering in a state senate district, with a deviation of -5.6%:

**Table 3. Proposed Senate District 5**

Reported population	Correctional population	Actual population	Actual population deviation from ideal
72,640	5,622	67,018	-5.6%

## Solutions

Ideally, the Census Bureau would count incarcerated people at home. Former Census Bureau Director Kenneth Prewitt neatly summarized why this reform would be common sense, explaining, “Current census residency rules ignore the reality of prison life. Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration.”<sup>2</sup> And the National Research Council, in a report commissioned by the Census Bureau, concluded in 2006, “The evidence of political inequities in redistricting that can arise due to the counting of prisoners at the prison location is compelling.”<sup>3</sup>

Alternatively, Kansas could have followed the lead of Maryland, New York, Delaware and California, and enacted legislation to collect the home addresses of incarcerated people and adjust the census data used for redistricting.

Although these solutions cannot be adopted in time for the redistricting at hand, the Court still has tools available to minimize the vote dilutive harm of prison-based gerrymandering. The best solution is for the Court simply to divide the prisons among multiple districts. Assuming that the Court will be starting with the House’s proposed map, this is quite easy.

The three largest correctional facilities are on or near the borders with other House districts and all could be easily moved to other districts.

The Lansing Central Correctional Facility could be moved from House District 40 to House District 42 by shifting the prison and two blocks with zero population that run east of Rt. 73 S.

Either the U.S. Penitentiary or the Leavenworth Detention Center could be moved from House

<sup>2</sup> Kenneth Prewitt, Forward to Patricia Allard & Kirsten D. Levingston, *Accuracy Counts: Incarcerated People And The Census*, at i (2004), available at [http://brennan.3cdn.net/d685e539baf1034ce1\\_w2m6iixeo.pdf](http://brennan.3cdn.net/d685e539baf1034ce1_w2m6iixeo.pdf).

<sup>3</sup> Nat’l Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 9 (Daniel L. Cork & Paul R. Voss eds., 2006), available at [http://www.nap.edu/openbook.php?record\\_id=11727&page=9](http://www.nap.edu/openbook.php?record_id=11727&page=9)

District 40 to House District 41. The U.S. Penitentiary is separated from District 41 by four blocks that contain no population; and the Detention Center is separated from District 41 by nine blocks with no population.

Adding this population to House Districts 41 and 42 would then require some population in these districts to be shifted in to neighboring proposed districts that are underpopulated.

The vote-dilutive effect of counting incarcerated people in the wrong place can be minimized in the Senate districts by adjusting the boundaries to share the prison complex between Districts 5 and 3. This could be done without affecting any other districts.

Splitting the prisons as described above would minimize the vote distortion caused by concentrating the prison populations in one district, and will allow the redistricting plans to better comply with the principle of “one person one vote.”

## About the authors

Peter Wagner is Executive Director of the Prison Policy Initiative, a non-profit, non-partisan center in Easthampton, Massachusetts which for the last decade has been the leading organization studying how the U.S. Census counts people in prison and working to quantify the policy and legal implications flowing from those technical decisions.

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For more information, see <http://www.prisonersofthecensus.org>, <http://www.prisonpolicy.org>, and <http://www.demos.org>.