

Ms. Karen Humes
Chief, Population Division
U.S. Census Bureau
Room 5H174
Washington, DC 20233

RE: Comment on Census Residence Rule and Residence Situations
People in Correctional Facilities

Dear Ms. Humes:

I am a Professor of Law at Loyola Law School, Los Angeles.¹ I teach constitutional law and the law of democracy — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the Constitution and the law of democracy is not merely theoretical. I have had the privilege to practice in this arena as well, including work with institutions and organizations attempting to foster meaningful representation of the American public. My work has included the publication of studies and reports; the provision of testimony and informal assistance to federal and state legislative and administrative bodies and officials with responsibility for apportionment, districting, and the electoral process; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under state and federal law.

Much of my work, including my research and scholarship, confronts the structure of representation and the factual predicates of that structure. I have analyzed, in detail, the effect of different voting systems and districting plans that purport to further meaningful representation, the manner in which the Census count impacts that representation, and various jurisdictions' efforts to modify and adapt the Census default. I believe that it is no coincidence that an enumeration of the People is the very first substantive duty that our founding charter gives to the

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

newly established collective government, for it is this enumeration that drives the representation at the core of our constitutional order.

It is therefore a privilege to respond to your call for comment on the existing Census Residence Rule and Residence Situations. I am heartened that the Census Bureau is evaluating its rules governing where individuals should be counted, in order to determine whether they best effectuate the constitutional mandate or whether they might be improved for 2020.

For most individuals, the Census Bureau's current default for determining residence has a sound representational logic. The vast majority of persons counted by the Census will be counted at a place they consider "home": the address that they would also consider their permanent legal, electoral, and social residence. For these people, the residence rules generate no meaningful controversy.

Some people are away from "home" when the Census comes calling. Many (but not all)² of these individuals are counted at the place considered their "usual residence," where they live and sleep most of the time. For most such individuals whose "usual residence" is not "home," the current Census default is also entirely sensible. These individuals may be people who have been called away from home for military or other public service, job relocation, or education, and they are generally intertwined with the communities where they are laying their heads most often. They eat locally, shop locally, seek entertainment locally, and walk, bike, bus, and drive locally. While they are away from home, they use local services, utilities, and public assistance just as their new neighbors do. They interact regularly with the other members of the local community, and in so doing, they are subject to the same rules and regulations and ordinances that govern others in the community, and they enjoy many of the same benefits. All of the above interaction with the local community makes it logical for the Census to tally most of these sojourners in tandem with the local communities in which they are usually physically present, for purposes of representation of their interests by local, state, and federal government.

There is one sizable group of people, however, for whom the above description is not at all accurate. The 2.2 million individuals who are incarcerated in the United States³ were counted by the Census Bureau in 2010 at the locations where they had involuntarily been placed. The vast majority of them showed no intent at all to change their legal or electoral residence. (Indeed, consistent with the common principle that a temporary absence does not amount to a change in legal or electoral residence, 28 states have explicitly provided that incarceration does not itself

² For example, children at a boarding school have been counted at the home of their parents. 2020 Decennial Census Residence Rule and Residence Situations, 80 Fed. Reg. 28,950, 28,951 (May 20, 2015).

³ Lauren E. Glaze & Danielle Kaeble, Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 2013 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

provoke such a change.⁴ And in most if not all of the other states, the implication of their more general rule would lead to the same conclusion.)

Individuals who are transferred to a correctional facility often have little in common with more usual “usual residents” of the area. Incarcerated individuals are often from a demographic and socioeconomic background quite distinct from those who live in the neighborhood. And in many areas, the racial or ethnic disparity is quite stark. For example, a recent study found that there are now more than 450 counties where the proportion of African-Americans in the incarcerated population is larger than the proportion of African-Americans in the surrounding county — and more than 200 counties where the proportion of African-Americans in the incarcerated population is more than ten times larger than the proportion of African-Americans in the surrounding county.⁵ As another researcher concluded, “In 173 counties nationwide, more than 50% of the purported African-American ‘residents’ are behind bars.”⁶

Moreover, unlike all of the other sojourners above who are away from “home” on Census Day, incarcerated individuals do not meaningfully interact — indeed, are not permitted to meaningfully interact — with the communities to which the Census Bureau assigned them in 2010. Individuals incarcerated in Village Township do not eat at the restaurants of Village Township, shop in Village Township stores, attend Village Township movie theaters, or use Village Township roads, sidewalks, or public transportation. While incarcerated, they are not affected by Village Township county or municipal codes and cannot attend Village Township public meetings. They may be confined in a location physically adjacent to Village Township residents, but most Village Township residents will not likely consider them “neighbors.”

Because of both the lack of similarity and the lack of interaction, it would be quite surprising to find that incarcerated individuals feel represented — either directly or indirectly — by the officials representing the physical locations to which they were assigned by the Census Bureau in

⁴ See ALASKA STAT. § 15.05.020; ARIZ. CONST. art. VII, § 3; CAL. CONST. art. II, § 4; COLO. CONST. art. VII, § 4; CONN. GEN. STAT. ANN. §§ 9-14, 9-40a(a); HAW. REV. STAT. § 11-13(5); IDAHO CODE ANN. § 34-405; KAN. STAT. ANN. § 11-205(f); ME. REV. STAT. ANN. tit. 21-A, § 112(14); MICH. COMP. L. § 168.11(2); MINN. CONST. art. VII, § 2; MISS. CODE ANN. § 47-1-63; MO. CONST. art. VIII, § 6; MONT. CODE ANN. § 13-1-112(2); N.C. GEN. STAT. ANN. § 153A-257(a)(2); NEV. CONST. art. II, § 2; N.H. REV. STAT. § 654:2; N.M. STAT. ANN. § 1-1-7(D); N.Y. CONST. art. II, § 4; OR. CONST. art. II, § 4; 25 PA. STAT. § 2813; R.I. GEN. LAWS § 17-1-3.1(a)(2); TENN. CODE ANN. § 2-2-122(7); TEX. ELEC. CODE ANN. § 1.105(e); UTAH CODE ANN. § 20A-2-105(3)(c)(iii); VT. STAT. ANN. tit. 17, § 2122(a); WASH. CONST. art. VI, § 4; WYO. STAT. ANN. § 22-1-102(a)(xxx)(B)(III). See generally Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355, 366-67 (2011) (reviewing residency standards).

⁵ Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, July 2015, <http://www.prisonpolicy.org/racialgeography/report.html>. The same study found more than 220 counties where the proportion of Latinos in the incarcerated population is larger than the proportion of Latinos in the surrounding county — and more than 40 counties where the proportion of Latinos in the incarcerated population is more than ten times larger than the proportion of Latinos in the surrounding county. *Id.*

⁶ Ho, *supra* note 4, at 361. This report considered Census data from 2000, but the number has not changed considerably in ten years. In 2010, there were 161 counties where more than half of the African-American individuals tallied by the Census were incarcerated. See Wagner & Kopf, *supra* note 5.

2010. At least some officials representing communities with sizable correctional facilities keenly understand the disconnect. When an Iowa city councilman was asked whether he considered the incarcerated individuals comprising 96% of the population in his district to be his constituents, he said, simply, “not really.”⁷ And in 2002, a New York state legislator representing a district housing thousands of incarcerated individuals said that given a choice between the district’s cows and the district’s prisoners, he would “take his chances” with the cows, because “[t]hey would be more likely to vote for me.”⁸

The practice of tallying incarcerated individuals at the facilities where they are confined is wrong. It creates both informational and democratic harm, and should be corrected in the 2020 Census.

The practice creates informational harm by painting a misleading picture of community demographics. A researcher or policymaker or planner seeking to better understand an area will look to the valuable information compiled by the Census for a rich portrait of the local residents. For those areas that include a correctional facility, the snapshot will include those who are incarcerated, when it is likely that neither the people inside nor those outside the facility regard the prison population as a true part of the community.

The practice creates democratic harm as well, in several ways. The Constitution requires that local, state, and federal districts be drawn such that district populations are approximately equal.⁹ When the population tally counts incarcerated individuals where they are confined, districts are built on the backs of “ghost constituents,” with no meaningful ability to influence their purported representatives, directly or indirectly.¹⁰ These individuals and the communities where they are truly from, accordingly, lose representation; in certain circumstances, the dilution may give rise to a claim under the Voting Rights Act.¹¹ As the National Academy of Sciences recognized, “The prison population includes disproportionate numbers of racial minorities and persons from large urban areas; that this population is counted in the largely rural areas where prisons tend to

⁷ Sam Roberts, *Census Bureau’s Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES, Oct. 24, 2008, <http://www.nytimes.com/2008/10/24/us/politics/24census.html>.

⁸ Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, Newhouse News Service, 2002, <https://web.archive.org/web/20021009134128/http://www.newhousenews.com/archive/story1a031202.html>.

⁹ *Tennant v. Jefferson County Comm’n*, 133 S. Ct. 3 (2012); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968).

¹⁰ All states other than Maine and Vermont bar individuals who have been convicted of a felony from voting while incarcerated. The Sentencing Project, Fact Sheet: Felony Disenfranchisement Laws, April 2014, http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf. And in most cases, family members or loved ones who are eligible to vote and might advocate for the interests of these individuals live far away, in other legislative districts.

¹¹ *Cf. Hayden v. Pataki*, 449 F.3d 305, 328-29 (2d Cir. 2006) (en banc) (remanding to determine whether the issue was properly raised by the plaintiff); *id.* at 337 (Straub, J., concurring in part and concurring in the judgment). In the trial court, plaintiffs clarified that they had not stated such a claim, and the case was dismissed. Memorandum and Order, *Hayden v. Pataki*, No. 00-8586, 2006 WL 2242760 (S.D.N.Y. Aug. 4, 2006).

be located, and that they are included in redistricting calculations despite being barred from voting in most cases, raises legitimate concerns of equity and fairness in the census.”¹²

On the other side of the coin, the non-incarcerated residents of districts with prisons garner unduly disproportionate influence. For example, in Lake County, Tennessee, after the most recent census, 87% of the population of one County Commissioner district was allotted to a local correctional facility. As a result, the 344 non-incarcerated residents of the district receive the same voice on county policy as the approximately 2500 or 2600 individuals in each of Lake’s two other districts.¹³

Even when correctional facilities do not distort representation, they may well distort the candidate pool. Many jurisdictions allow voters throughout the jurisdiction to vote on candidates, but require the candidates to be from geographic districts of approximately equal size. If such districts are drawn to include large correctional facilities, there may be districts with no individuals eligible to run as candidates.¹⁴

Sometimes, these factors align. In Anamosa, Iowa, after the 2000 Census, 1300 of the 1358 individuals allotted to City Council ward 2 were incarcerated there, giving the 58 other residents of that ward strikingly disproportionate political power.¹⁵ And after subtracting individuals ineligible to run for city council, that also left the ward strikingly few potential officeholders. In the 2005 municipal election, ward 2 had no candidates on the ballot, and only three voters, total.¹⁶ The winner, selected with two write-in votes, did not even vote for himself.¹⁷

¹² NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS 8* (Daniel L. Cork & Paul R. Voss, eds. 2006).

¹³ See Lake County 2014 County Commission Districts and Current Voting Precincts, <http://comptroller.tn.gov/repository/LG/DistrictMaps/Lake/County%20Commission/2014%20Countywide.pdf>; U.S. Census Bureau, 2010 Census Summary File 1, tbl. P1 (Total Population), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P1&prodType=table; *id.* PCT20 (Group Quarters Population by Group Quarters Type), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_PCT20&prodType=table; Tenn. Dep’t of Correction Planning & Research Section, Tennessee Bed Space and Operating Capacities Report at 1, July 2010, <http://www.tn.gov/assets/entities/correction/attachments/BedJuly2010.pdf>. The county’s districts were similarly skewed after the last Census. See Peter Wagner & JooHye DellaRocco, Phantom Constituents in Tennessee’s Boards of County Commissioners, Prison Policy Initiative, Feb. 21, 2008, <http://www.prisonersofthecensus.org/tncounties/report.html>.

¹⁴ See, e.g., Tilove, *supra* note 8 (“In eastern Colorado’s Crowley County, commissioners are elected by the countywide electorate but must run from and live in a particular district. Counting inmates there, according to commissioner T.E. ‘Tobe’ Allumbaugh, would have created a ‘prison’ district without possibility of representation. ‘It’s a little bit of a joke,’ Allumbaugh said.”).

¹⁵ See Roberts, *supra* note 7.

¹⁶ Jones County Auditor, Official Canvass of the Votes Cast at the November 8, 2005 Anamosa City Election Held in Jones County, Iowa, at 1, <http://www.jonescountyiowa.org/Documents/Aud.CanvassCity05.pdf>; Maureen Turner, *The Prison Town Advantage*, VALLEY ADVOCATE, Oct. 8, 2009, <http://www.valleyadvocate.com/2009/10/08/the-prison-town-advantage/>.

¹⁷ See Turner, *supra* note 16.

Though Anamosa’s situation is an extreme, the practice of counting incarcerated individuals where they are confined does democratic damage everywhere. This explains why more than 200 known counties, cities, and school boards in at least 30 states have attempted to correct or otherwise compensate for the 2010 Census tally, usually adjusting local population totals to account for populations in correctional facilities when drawing their own districts.¹⁸ At least six states require certain local governments to adjust existing population tallies in order to more equitably account for incarcerated individuals when drawing local districts;¹⁹ additional states expressly permit or encourage the practice.²⁰ And four states, representing 65 million people, have already decided that in 2020, they will endeavor to correct the Census Bureau’s count of incarcerated populations in drawing state and federal legislative districts, if the Census Bureau does not correct its own misallocation.²¹ Legislation has been proposed in others.

The Census Bureau’s practice of counting incarcerated individuals where they are confined was based on principles developed well before the Supreme Court cases establishing the equal representation principle, and well before the comparatively recent explosion in the incarcerated population.²² States and localities are attempting to compensate for the inadequate allocation as best they can. It is time for the Census Bureau to assist them.

It would be in keeping with the bulk of the Census Bureau’s representational logic to tally incarcerated individuals in the communities to which they are most closely connected on Census Day. That location is not where they are involuntarily confined, but rather where their relatives and friends and support systems are often located, where their children may live, where they are most likely to return when they are released from incarceration,²³ and where their inclusion will illuminate and not distort the snapshot of the true local community. While in individual cases these indicators may point to different addresses, the best available proxy — and a far superior proxy than the deeply flawed alternative of the carceral facility — is the individual’s last known residence before incarceration. This is the most recent place that an incarcerated individual is

¹⁸ There are is no official compilation of local governments that have taken such measures. The most comprehensive such list appears to be kept by the Prison Policy Initiative, at <http://www.prisonersofthecensus.org/local/> (last updated July 3, 2015).

¹⁹ COLO. REV. STAT. §§ 22-31-109(2)(c), 30-10-306.7(5)(a) (Colorado); MD. CODE ANN., LOCAL GOV’T § 1-1307 (Maryland); MICH. COMP. L. §§ 46.404(g), 117.27a(5) (Michigan); Op. No. 2002-0060, 2002 WL 321998 (Miss. A.G. 2002) (Mississippi); N.J. STAT. § 18A:13-8 (New Jersey); N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(13)(c) (New York); *cf.* IND. CODE § 3-10-6-1(b) (providing specific rules for elections in cities of a certain population size, excluding incarcerated individuals).

²⁰ VA. CODE ANN. § 24.2-304.1(C).

²¹ *See* CAL. ELEC. CODE § 21003; 29 DEL. CODE § 804A; MD. CODE ANN., ELECTION LAW § 8-704; MD. CODE ANN., STATE GOV’T, § 2-2A-01; N.Y. LEGIS. LAW § 83-m(13)(b).

²² *See* NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *supra* note 12, at 28-30, 38, 86-87.

²³ *See* Kirsten D. Levingston & Christopher Muller, Brennan Ctr. for Justice at NYU School of Law, “Home” in 2010: A Report on the Feasibility of Enumerating People in Prison at Their Home Addresses in the Next Census 9 (Feb. 15, 2006), <https://www.brennancenter.org/publication/home-2010>.

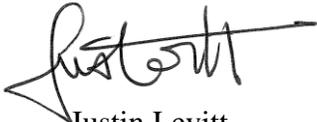
from, and the last place that they chose to make their “usual” residence. A decision to tally incarcerated individuals at their last known address would come far closer to aligning such individuals with their legal and social residence than the Census Bureau’s past practice. And it would further the opportunity for these individuals to be adequately represented, better fulfilling the rationale for the Census’s core function.

Counting incarcerated individuals at their last known residence before incarceration, rather than where they are involuntarily confined, is a feasible solution as well as a just one. There are several options for collecting this information. Incarcerated individuals may be surveyed by interview and questionnaire, just as the vast majority of other individuals are surveyed.²⁴ In the alternative, or to supplement coverage gaps, the Census Bureau could collect most last prior addresses from the existing administrative records of correctional, parole and probation, or judicial offices.²⁵

I encourage the Census Bureau to consider revising its Residence Rule and Residence Situations, to tally incarcerated individuals at their last known address before incarceration. Correcting the outmoded alternative practice in place during the last Census is a pragmatic means to align the residence rules in a way that furthers just representation of individuals in the communities to which they are truly attached on Census Day.

I thank the Census Bureau for this opportunity to comment. If you have any further questions, please feel free to contact me at your convenience. I can best be reached by email, at justin.levitt@lls.edu, or by phone at 213-736-7417.

Sincerely,



Justin Levitt

²⁴ See, e.g., Michelle Inderbitzin & Anna Chan, *Ethnographic Study of the Group Quarters Population in the 2010 Census: Prisons for Adults and Juvenile Correctional Facilities 25-26*, Mar. 7, 2013, <https://www.census.gov/srd/papers/pdf/ssm2013-08.pdf> (describing a visit to a maximum security prison to collect Census data, and finding the surveyed random sample of the incarcerated population to be “[o]n the whole, . . . extremely polite and cooperative”); *Even Prisoners Counted in Census*, DESERET NEWS, May 22, 2000, <http://www.deseretnews.com/article/761559/Even-prisoners-counted-in-census.html?pg=all>; Annette Kondo, *At Prison, Census Reactions of All Stripes*, L.A. TIMES, Apr. 20, 2000, <http://articles.latimes.com/2000/apr/20/local/me-21623>; Tina A. Brown, *Asking ‘Stupid’ Questions*, HARTFORD COURANT, Apr. 4, 2000, http://articles.courant.com/2000-04-04/news/0004040079_1_seven-inmates-prison-population-census-bureau (“In Connecticut, when the correction department locked down all of its prisons Monday morning, it expected to have counted 17,511 inmates within a four- hour period.”).

²⁵ See Levingston & Muller, *supra* note 23, at 11-12.