



Testimony of
Aleks Kajstura, Legal Director, Prison Policy Initiative and
Brenda Wright, Vice President for Legal Strategies, Dēmos,
Before the Joint Committee on Election Laws
March 27, 2013

Dēmos and the Prison Policy Initiative respectfully submit this testimony in support of S 309 and H 3185 “Resolutions urging the Census Bureau to provide redistricting data that counts prisoners in a manner consistent with the principles of ‘One Person, One Vote.’”

As background, Aleks Kajstura is the Legal Director at the Prison Policy Initiative, a non-profit, non-partisan center in Easthampton. The Prison Policy Initiative 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 for over a decade.

Brenda Wright is the Vice President for Legal Strategies at Dēmos, a national, non-profit, non-partisan research and policy organization, established in 2000, with offices in Boston, New York, and Washington, D.C. The Dēmos Democracy Program works to ensure high levels of voting and civic engagement, and supports reforms to achieve a more inclusive and representative democracy. Brenda is an attorney with over 20 years of experience in redistricting, voting rights, and election reform, and was part of the legal team that represented community groups and organizations in the federal lawsuit challenging the Massachusetts House redistricting plan adopted after the 2000 Census.

Origin of the problem of prison-based gerrymandering

The problem of prison-based gerrymandering stems from a long-standing flaw in the Census that counts incarcerated people as residents of the prison address rather than their home address, even though the home address remains the legal residence of incarcerated persons for virtually all other purposes. Using this flawed Census data in redistricting results in a significant enhancement of the weight of a vote cast in districts with prisons at the expense of all other residents in all other districts in the state. It particularly distorts fair representation for communities of color which are disproportionately affected by high rates of incarceration.

The rules that the Census Bureau uses for determining “residence” were adopted long before prison populations in the U.S. became large enough to have a significant effect on representation. The U.S. now has some 1.6 million persons in state and federal prisons, compared to only 200,000 as recently as 1970. In Massachusetts, the growth of the prison population in recent decades has been enormous. As a percentage of population, Massachusetts now incarcerates three times as many people as it did as recently

as 1980. And prisons often are located in areas geographically and demographically removed from the home communities of incarcerated persons.

Because of the rise in incarceration rates, the practice of allocating incarcerated persons to prison districts substantially skews redistricting. The co-chairs of the Special Joint Committee on Redistricting (Senator Rosenberg and Representative Moran) agreed, saying that "...the way prisoners are currently counted does a disservice to the state and should be changed."¹

The *Report from the Chairs of the Special Joint Committee on Redistricting* concluded that the "most expedient and streamlined avenue" towards a solution is for the Census Bureau to tabulate incarcerated people at their home addresses. Action at the Census Bureau would ensure a "systematic and consistent tabulation approach" that would relieve legislatures of the burden of each adjusting their own redistricting data. The message was clear: "The tabulation of prisoners should be at the forefront of Bureau priorities in evaluating and adjusting how the 2020 U.S. Census will be conducted."

Our Analysis of Problem in Massachusetts

According to our analysis of the new districts, four Massachusetts House districts, and three Senate districts meet minimum constitutional population requirements only by claiming prison populations as constituents. When Massachusetts relied on 2010 census data to calculate district sizes, the results appeared to conform to the 5% constitutionally-allowable deviations, but when the prison populations that were hidden in this data are taken into consideration, the actual population deviation falls outside of equal protection limits.

In the House, there are four districts that meet federal minimum population requirements only by claiming incarcerated people as residents. The 8th Plymouth, 37th Middlesex, 7th Middlesex, and 12th Worcester districts each have actual resident populations that are 5.6% to 7.4% smaller than the ideal district size:

House District	Apparent Population Deviation	Actual Population Deviation
8th Plymouth	-2.4%	-7.4%
37th Middlesex	0.7%	-5.8%
7th Middlesex	-3.9%	-5.7%
12th Worcester	-2.5%	-5.6%

We also note that the three smallest Senate districts appear to meet federal minimum population standards only because they include prison populations. The Second Suffolk, the Norfolk & Suffolk, and the Berkshire, Hampshire, Franklin & Hampden districts appear to be drawn right on the permissible line of having too little population to be districts, but they actually fall below that threshold because those

¹ Senator Stanley Rosenberg and Representative Michael Moran, *Report from the Chairs of the Special Joint Committee on Redistricting*, December 12, 2012, available at: www.malegislature.gov/District/FinalReport

calculations relied on redistricting data that counted incarcerated people as residents of the prison. Each of those districts has an actual population that is 5.1-5.8% smaller than the ideal:

Senate District	Apparent Population Deviation	Actual Population Deviation
Second Suffolk	-4.7%	-5.8%
Norfolk & Suffolk	-4.7%	-5.1%
Berkshire, Hampshire, Franklin & Hampden	-4.8%	-5.1%

Solutions used in other states and the Massachusetts constitution

Massachusetts law makes it clear that incarcerated persons generally cannot claim a prison as their home residence. Until a ballot initiative amending the Massachusetts Constitution in 2000,² incarcerated Massachusetts residents could vote, and the question of where they could vote was a frequent subject of litigation. In the late 1970s, people in prison were considered to be presumptive residents of their home addresses. Only in rare special situations could an incarcerated person argue that he intended to remain in the prison community permanently and thus could claim residency there; but by the early 1980s, even this narrow loophole was removed and all incarcerated voters in the state were required to vote as residents of their pre-incarceration homes. *Cepelonis v. Commonwealth*, 389 Mass. 930 (1983). Regardless of whether a specific prisoner was intending to never return home, state law barred him from adopting the prison address as his residence.

In order to correct the distortions caused by counting incarcerated persons as residents of the prison, Maryland and New York amended their statutes to count incarcerated people at their home addresses for the 2010 round of redistricting.³ California and Delaware enacted similar laws that will take effect for the 2020 round of redistricting.⁴ Both the New York and Maryland laws have been upheld against legal challenges, with the Maryland law affirmed by the United States Supreme Court.⁵ Both states have successfully enacted redistricting plans that are free of the distortions caused by prison-based gerrymandering.

² See Constitution of the Commonwealth of Massachusetts, Articles of Amendment, art. 120.

³ 2010 N.Y. Laws ch. 57, Part XX; Md. Code Ann., Art. 24 § 1-111, Election Law § 8-701.

⁴ Del. Code Ann. tit. 29, § 804a; Cal. Elec. Code § 21003.

⁵ *Little v. New York State Legislative Task Force on Redistricting and Reapportionment*, Decision and Order, No. 2310-2010 (Sup. Ct. Albany County, Dec. 1, 2011); *Fletcher v. Lamone*, ___ F. Supp. 2d ___, 2011 WL 6740169 (Dec. 23, 2011), *summarily affirmed*, No. 11-1178 (Sup. Ct., June 25, 2012).

Restrictive language in the Massachusetts Constitution⁶ made it too difficult for our state's Special Joint Committee on Redistricting to count incarcerated persons at their home address for purposes of the 2010 redistricting process. But now Massachusetts can act by asking the Census Bureau to count incarcerated people as residents of their home address and end the harmful practice of prison-based gerrymandering by the next Census in 2020.

Recommendations for Massachusetts

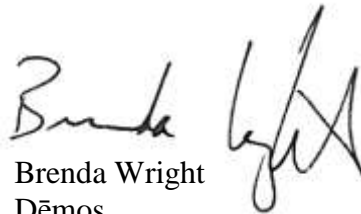
The basic principle of our democracy is that representation is distributed on the basis of population. Crediting incarcerated people to the wrong location has the unfortunate and undemocratic result of creating a system of "representation without population." Massachusetts should make its best efforts to ensure that the 2010 redistricting becomes the last redistricting cycle in which thousands of incarcerated persons are counted in the wrong place. We therefore urge you to pass these resolutions urging the Census Bureau to provide states with redistricting data that counts incarcerated persons at their residential address, rather than the address of the correctional institution where they are temporarily located.

The Census Bureau is actively soliciting feedback from states about the uses of redistricting data, and Massachusetts' opinion on this matter would carry great weight.

Thank you for considering these resolutions.



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Importing Constituents: Prisoners and Political Clout in Massachusetts, is a district-by-district analysis of prison-based gerrymandering in Massachusetts state legislative districts after the 2000 Census:

<http://www.prisonersofthecensus.org/ma/report.html>

Summary of Prison-based gerrymandering issues in Massachusetts (part of a report on all 50 states):

<http://www.prisonersofthecensus.org/50states/MA.html>

⁶ Constitution of the Commonwealth of Massachusetts, Articles of Amendment, art. 119. See, however, Opinion of the Justices to the House of Representatives, 365 Mass. 661 (1974) which predated Article 119's requirement that the "federal census shall be the basis for determining the representative districts" but spoke directly to our concern that the U.S. Census Bureau's "usual residence rule" was incompatible with the Massachusetts state constitutional definition of "inhabitant" in MA Const. Pt. 2, Ch. 1, Sec. II, Art. II.