

Testimony of Peter Wagner
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Before the
Joint Committee on Judiciary
of the Connecticut General Assembly

Public Hearing
March 21, 2011

SUPPORT HB6606/SB1193

Thank you, Chairman Coleman, Chairman Fox, and members of the Committee for providing the opportunity for me to provide testimony here today. My name is Peter Wagner and I am an attorney and Executive Director of the non-profit, non-partisan Prison Policy Initiative. For the last decade, I have been working to convince the Census Bureau to update their methodology and count incarcerated people as residents of their legal home addresses. Because the Census is slow to make changes, for the last decade I have also been working very closely with state and local governments to adopt interim solutions.

Before you today are two bills, HB6606 and SB1193 which would correct within the state of Connecticut a long-standing flaw in the decennial Census that counts incarcerated people as residents of the wrong location. Crediting incarcerated people to the census block that contains the prison, rather than the census block that contains the home address of the incarcerated persons, 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.

I would like to briefly address the factual situation in Connecticut, and then put Connecticut's proposed reforms in a national context.

Each decade, Connecticut redraws its state and local legislative districts on the basis of population to ensure that each district contains the same population as other districts. In this way, all residents are given the same access to representation and government, fulfilling the Supreme Court's "one person, one vote" rule.

However, the Census Bureau's practice of counting incarcerated people as residents of the prison location, instead of their home communities, results in significant distortions in achieving fair representation.

The Census Bureau's rule for counting prison population is in conflict with the law of Connecticut and that of most states,¹ which says that prison is not a residence. A legal residence is the place where a person chooses to live and does not intend to leave. The Connecticut statute is explicit:

No person shall be deemed to have lost his residence in any town by reason of his absence therefrom in any institution maintained by the state. (Sec. 9-14.)

The clearest illustration of this comes from how persons are treated for voting purposes. In Connecticut, some persons in prisons retain the right to vote – for example, if they are awaiting trial or are serving time for misdemeanors. For voting purposes, they are not permitted to claim residence in the prison, but must vote absentee in their home communities.² Yet when the state draws legislative districts, it credits the prison population to the prison community, in clear conflict with the treatment of incarcerated persons for voting.

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.”

It's important to stress that this is not at its heart an issue that pits urban districts against rural or suburban districts. The distortion in representation caused by miscounting the prison population means that every district in Connecticut that does not contain a prison – whether urban, rural, or suburban – has its voting strength diminished compared to the handful of districts that contain significant prison populations.

The solution is simple. Connecticut should join New York, Maryland, and Delaware in adjusting the census data for redistricting. The state is required by federal law to redistrict each decade, but it is not required to use federal Census data to do so. See *Mahan v. Howell*, 410 U.S. 315, 330-332 (1973) (rejecting Virginia's argument that it was compelled to use Census Bureau assignments of residences of military personnel in its state legislative redistricting, and suggesting that a state may not use Census data it knows to be incorrect). As the Third Circuit has explained:

Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature.

¹ See Dēmos, “A Prison Is Not a Home: The Lesson of *People v. Cady*,” available at <http://www.demos.org/publication.cfm?currentpublicationID=B1EBEA26-3FF4-6C82-507573810BDBA00D>.

² See Caroline Porter, “State Prisons Create Uneven Districts,” *Cheshire Record-Journal*, November 8, 2005 (noting issuance of absentee ballots to eligible incarcerated persons in Cheshire).

Borough of Bethel Park v. Stans, 449 F.2d 575, 583 n.4 (3rd Cir. 1971).

Furthermore, as the Supreme Court stated in Burns v. Richardson, 384 U.S. 73, 92 (1996):

Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include . . . persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

In fact, there is a long tradition of state and local governments fixing these kinds of shortcomings in Census data. The Kansas Constitution requires the legislature to adjust federal census data to exclude nonresident military personnel and nonresident students and to count resident military and students at their home addresses when conducting legislative apportionment. Kan. Const. art. 10, § 1.

The Alaska Supreme Court held that it was permissible under the Fourteenth Amendment to use a formula based on registration numbers to reduce the census tally of military personnel in the population base used for state legislative redistricting. See Groh v. Egan, 526 P.2d 863, 870, 873-74 (Alaska 1974).

The Supreme Court of Oregon has held that the Secretary of State is not obligated to rely on census data in apportioning districts. Hartung v. Bradbury, 33 P.3d 972, 598 (Or. 2001). Indeed, the court held that the Secretary of State violated the Oregon Constitution by failing to make corrections to federal census data to place a prison population in the correct census block. Id. at 599.

An Illinois Appeals Court upheld excluding prisoners from the population when apportioning a county into districts, and suggested that a contrary rule might violate the Equal Protection Clause. Knox County Democratic Cent. Committee v. Knox County Bd., 597 N.E.2d 238 (Ill. App. Ct. 1992).

New Jersey statutes require, and the state appellate court upheld, a provision mandating that prison inmates be excluded from the population for purposes of apportionment in certain school districts. Board of Educ. of Northern Burlington Co. Regional School Dist. v. New Jersey State Bd. of Educ., 858 A.2d 576, 580-81 (N.J. Super. Ct. App. Div. 2004)

Colorado and Virginia have enacted legislation allowing and encouraging, respectively, a departure from federal Census data so as to exclude prison populations for purposes of county or local redistricting. See Colo. Rev. Stat. § 30-10-306.7(5)(a) (requiring boards of county commissioners to subtract, from federal census numbers, the number of persons confined in any correctional facility in the county when calculating population equality for purposes of

redistricting; Va. Code Ann. § 24.2-304.1 (C) (permitting governing body to exclude prison population in redistricting when such population exceeds 12 percent of the total county population).

An opinion by the Mississippi Attorney General establishes that counties should adjust census data for redistricting purposes, stating that prison populations:

should not be used in determining the population of county supervisor districts for redistricting purposes by virtue of their temporary presence in a detention facility or jail in the county, unless their actual place of residence is also in the county.

Mississippi Attorney General Opinion 2002-0060, 2002 WL 321998 (February 22, 2002).

Beyond these state-sanctioned changes, many counties and localities across the United States have, on their own authority, modified the Census to change where incarcerated people are counted when drawing districts or designing weighted voting systems.³ Here in Connecticut, the city of Enfield, which contains Enfield and Willard Correctional Institution and Robinson Correctional Institution, already adjusts Census data to remove the prison populations when drawing local districts. If it did not do this, 30% of the population of one of the districts would have been composed of incarcerated persons, giving every 70 of the actual residents of that district the same representation as each 100 persons elsewhere in the city.

This year, for the first time, the Census Bureau will be publishing an early data file that will assist states and localities in finding correctional facilities in the census data. This change,⁴ will be of substantial assistance to states seeking to make adjustments in assignment of prison populations. The state can simply collect the home addresses of incarcerated people and adjust the Census data prior to redistricting to count these populations at home.

The basic principle of our democracy is that representation is distributed on the basis of population. HB6606 and SB1123 will end the practice of granting "Representation Without Population."

I thank you for your time today and I would be happy to answer any questions you may have about the issue of creating greater accuracy for prison populations in redistricting, the legal and constitutional basis for doing so, and any other questions.

³ See Prison Policy Initiative, "Select counties and cities that adjust Census data to correct for the prison miscount," available at http://www.prisonersofthecensus.org/factsheets/select_cities_and_counties.pdf.

⁴ See Prison Policy Initiative, Using the Census Bureau's Advanced Group Quarters Table, <http://www.prisonersofthecensus.org/technicalsolutions.html>