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Missouri State Capitol

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# PRISON POPULATIONS CREATE COMPLICATIONS AT REDISTRICTING TIME

by Peter Wagner

**M**issouri cities that host prisons

have a unique question on their hands at redistricting time: Should the people who live next to the prison be given more influence over city affairs than other residents?

The Supreme Court requires cities and other forms of government to update their legislative districts once per decade to ensure that each contains the same number of people. In this way, each city will ensure compliance with the federal constitutional principle of “One Person One Vote” that gives each person the same access to government regardless of where in a city he/she lives. (For a detailed introduction, see William Geary, “Redistricting in 2011: A Brief Summary for Local Government Officials” *Missouri Municipal Review*, May 2011.)

The question of prison populations arises because the Census Bureau counts prisoners as residents of the city in which they are incarcerated, and the federal census is the typical source of the population data used to draw legislative districts. The Census Bureau does this even though prisoners aren’t allowed to vote and the Missouri State Constitution says that a prison cell is not a residence: “For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while ... confined in public prison.” (Art. VIII, § 6).

In many Missouri municipalities, a prison can account for a substantial portion of a ward’s population, giving the residents of the ward with the prison substantially more influence, and diluting the votes of all city residents in other wards.

The ideal solution, in my view, is for the Census Bureau to count in-



carcerated people as residents of their home communities, not the prisons where they are incarcerated. A federal fix would solve a lot of the problems that contribute to the problem we call “prison-based gerrymandering,” but a city council trying to draw new wards right now must find other solutions.

The next best solution for a city is to simply remove the prison populations prior to redistricting. As I explain below, this is clearly acceptable under federal law but Missouri state law may not be so clear cut. I’ll discuss how some Missouri cities have handled this problem in the past, and review some the precedent from other states.

## FEDERAL LAW

Cities are required by federal law to redistrict each decade, but federal law does not mandate the use of federal census data. Most cities rely on the U.S. Census for redistricting because the data is of high quality and it’s free. But the Supreme Court has said that states, and by extension local governments, are free to use other sources of data.<sup>1</sup>

One Supreme Court case, *Burns v. Richardson*, implicitly approved the type of adjustments to prison populations discussed here:

*“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.”<sup>2</sup>*

Cities are therefore free, at least under federal law, to create their own censuses from scratch or to simply correct how the federal census counts prisoners.

## MISSOURI STATE LAW SEEMS TO ALLOW THESE ADJUSTMENTS

Missouri law somewhat restricts the flexibility granted by federal law, by requiring municipal districts to be based on the U.S. Census: “The population of any political subdivision of the state for the purpose of representation ... is determined on the basis of the last previous decennial census of the United States.”<sup>3</sup>

In my view, a city could conclude that the statute allows them to determine which decennial census product can best be used as the basis of their city council districts.

Recent changes in how the Census Bureau publishes its data makes it possible for a city to use census data to draw its council wards without including the prison population. Although this isn’t commonly understood, there is no one monolithic decennial “census.” There are at least three different decennial data products provided by the U.S. Census Bureau that are relevant to redistricting each with their own purpose, methodology and numbers. The first is the state-level counts that include military and federal employees

## Municipal Redistricting Decisions Do Not Affect Funding

Discussions about whether and where to count incarcerated people for redistricting purposes frequently raise the importance of federal and state funding formulas to municipal budgets. Our research has found that both sides of the debate greatly overstate the impact. In general, prison populations have very little impact on the distribution of federal and state funds, and changes to the redistricting data would have no impact whatsoever because there are no formulas tied to municipal redistricting data.

This confusion arises in part because the Census Bureau encourages participation in the census by appealing to the important use of census data in funding formulas.<sup>12</sup> This leads to a misunderstanding about how the population data is actually used. Most large federal and state funding formulas, particularly those targeted to individual municipalities or school districts, do not use “total population” for their population component. Instead, they use more targeted factors, like people in poverty (which does not include prisoners or other people not in households), the number of school-age children, or non-census data like the number of enrolled children. As a result, the impact of prison populations on funding formulas tends to be quite small.

Each funding formula is a complicated effort to match the program’s resources with the need being addressed. Any changes to the redistricting data be it for state redistricting or municipal redistricting, will have no effect whatsoever. Each formula has its own specific data sources and methodology, none of which rely on state or local redistricting data.

That makes sense. The Missouri cities of Farmington and Licking decided that for redistricting purposes the prisons should not be included as residents of their cities. But this decision about internal redistricting matters will not cost – or earn – the cities a dime.♦

recent redistricting and the redistricting completed after the 2000 Census. Had they done otherwise, the prison would have been 65 percent of the district. Every resident of the third ward would have had more than twice the influence of residents in other wards.

In a few states, removing prison populations when drawing local districts is mandatory. Michigan requires cities and counties to exclude prison populations when redistricting,<sup>6</sup> and Colorado has a state law requiring counties to do the same.<sup>7</sup> Maryland and New York, as part of new state laws that reallocate incarcerated people to their home addresses for redistricting purposes, prohibit municipalities with prisons from using the prison populations when redistricting.<sup>8</sup> Virginia law encourages counties with large prisons to exclude the prisoners when redistricting,<sup>9</sup> and the Mississippi Attorney General encourages counties to exclude prison populations as well.<sup>10</sup>

Other municipal and county governments take action on their own without a state directive. In my research conducted after the 2000 Census, I found municipal and county governments that excluded prison populations when redistricting in Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota and Texas.

## BEST PRACTICES

Nationally, the methods used to adjust the census vary, as do the level of detail that are given to documenting the rationale.

Some municipalities and counties adjust the census figures, some cut a hole in their map where the prison is, and some “overpopulate” the district that contains the prison by the exact size of the prison. To the line drawer, these methods are very different, but the outcome of each is identical and the redistricting professional’s convenience should dictate the methodology.

The justifications and documentation of the redistricting process are more important. In a few cases, we’ve seen municipalities and counties note the adjustment on their redistricting map, but the best practice might be illustrated in New York’s Essex County, where the County explained their rationale for excluding the prison population in Local Law Number 1 of 2003:

clear, in footnote 1, that the opinion was “limit[ed] to whether to count prisoners for federal and state funding purposes.” The Attorney General discussed why the Census Bureau has chosen to count incarcerated people as residents of the prison location but did not address the far more significant vote dilution issues involved in the redistricting context.

## REMOVING PRISON POPULATIONS IS COMMON

At least two Missouri cities (Farmington and Licking) recently decided to exclude the prison populations when drawing city council wards. Nationally, our research has found that the majority of municipalities and counties with large prisons exclude the prison populations.

In Licking, the construction of the South Central Correctional Facility doubled the City’s census population. Including the prison population would have resulted in drawing a district that was entirely incarcerated and would have no way to elect a representative.

The city of Farmington did not include the Farmington Correctional Facility in its third ward during the most

overseas and is used for congressional apportionment. The second is the PL94-171 redistricting data file, produced since 1980, that is most commonly used for redistricting. The third is the Advance Group Quarters Summary file, produced for the first time after this census, for the explicit purpose of helping governments with a problem of prison-based gerrymandering. As the Census Bureau explains:

*This early release of data on the Group Quarters population may be beneficial to many data users including those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries ... It will permit state and local redistricting officials to overlay this file with the 2010 Census Redistricting Data (Public Law 94-171) Summary File data.*<sup>4</sup>

Potentially complicating matters is an advisory 2002 Missouri Attorney General Opinion that predates the Census Bureau’s Advance Group Quarters data file. This opinion states that “inmates of state correctional institutions should be included in the population count.”<sup>5</sup> However, I note that the Attorney General makes it

... Persons incarcerated in state and federal correctional institutions live in a separate environment, do not participate in the life of Essex County, and do not affect the social and economic character of the towns in which ... the correctional facilities where they are incarcerated are located.

The inclusion of these federal and state correctional facility inmates unfairly dilutes the votes or voting weight of persons residing in other towns within Essex County. This is particularly so if the 1,898 inmates in the town of North Elba are included in its population of 8,661 since those inmates would then represent 21.914 percent of the North Elba's population.

The board of supervisors finds that the population base to be utilized in and by the plan apportioning the Essex County Board of Supervisors should exclude state and federal inmates.<sup>11</sup>

Putting this rationale into the public record would show the basis for an adjustment to any court looking at the districts, and would make it more likely that the city council in a decade's time would recall and repeat the previous decision. (In our research, we've found many examples where municipalities and counties were unaware of the basis of their previous maps until we per-

formed a population analysis for them.)

In any event, municipalities that host prisons have to make a choice at redistricting time: Do they include the prison populations and give extra influence to the residents who live next to the prison, or do they fix the Census Bureau's prison miscount?□

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**Footnotes:**

<sup>1</sup> 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 states legislative redistricting, and suggesting that a state may not use Census data it knows to be incorrect). And 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. Borough of Bethel Park v. Stans*, 499 F.2d 575, 583 n.4 (3<sup>rd</sup> Cir. 1971).

<sup>2</sup> *Burns v. Richardson*, 384 U.S. 73, 92 (1966)

<sup>3</sup> Mo. Rev. Stat. § 1.100(1)

<sup>4</sup> U.S. Census Bureau, Redistricting Data, 2010 Census Advance Group Quarters Summary file, available at: [http://www.census.gov/rdo/data/2010\\_census\\_advance\\_group\\_quarters\\_summary\\_file.html](http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html) (last viewed Nov. 30, 2011)

<sup>5</sup> Mo. Att'y Gen. Op. 65-2002 (2002)

<sup>6</sup> Mich. Comp. Laws § 117.27a(5) (municipal redistricting) Mich. Comp. Laws § 46.404(g) (county redistricting)

<sup>7</sup> C.R.S. 30-10-306

<sup>8</sup> Maryland HB496/SB400 (2010) and New York Part XX of A9710D/S6610C (2010)

<sup>9</sup> Va. Code Ann. § 24.2-304.1, see also proposed amendment HB 13, 2012 Session Gen. Assem. (Va. 2012) available at <http://lis.virginia.gov/cgi-bin/legp604.exe?121+ful+hb13>

<sup>10</sup> Miss. Att'y Gen. Op. 2002-0060 (Miss. 2002).

<sup>11</sup> For the full text, please see archived copy at <http://www.prisonsofthecensus.org/nycounties/essex.html>

<sup>12</sup> On average, each person in the census is worth about \$1,400 a year in federal funds, but the funds are not distributed on an average. Very little of this money goes directly to municipalities on the basis of population. The largest federal funding formulas are block grants to states, and population plays only one part in most of the formulas.