

PRISONERS COUNT

Lawmakers look at fixing Massachusetts' "representation without population" problem.

By Maureen Turner

It's almost a decade until Statehouse leaders will begin the work of redrawing legislative district lines again—indeed, the most recently redrawn districts don't even assume their new shapes until after this November's elections—but a number of groups are already looking ahead to how to make the process as equitable as possible. Late last month, the legislative committee charged with overseeing redistricting held a public hearing on the issue, seeking public testimony on how to improve things the next go-around.

Among the issues raised: the question of where prisoners are counted in the U.S. Census, data from which is used to create legislative districts. Right now, they're counted at the places where they're incarcerated, a practice that critics say results in a grave imbalance of power. In Massachusetts, as in 47 other states (Vermont and Maine are the exceptions), incarcerated felons cannot vote. But they are counted as residents of the districts where they're incarcerated—in essence, artificially inflating both those districts' populations and, by extension, the voting power of those district residents who are eligible to vote. (See "The Prison Town Advantage," Oct. 8, 2009, www.valleyadvocate.com.)

"The way the Census Bureau counts people in prison

creates significant problems for democracy and for our nation's future," in the words of the Prison Policy Initiative, a think tank based in Easthampton. This "prison-based gerrymandering," PPI says, "leads to a dramatic distortion of representation at local and state levels, and creates an inaccurate picture of community populations for research and planning purposes."

PPI and other groups have been pushing to change that system for years, and it appears they now have some powerful allies on their side—among them, state Sen. Stan Rosenberg (D-Amherst), the Senate's president pro tempore and co-chair of the Legislature's Joint Committee on Redistricting. "The whole point of redistricting and the whole point of our system is, we all have equal representation," Rosenberg told the *Advocate*. By counting incarcerated people who, by law, are not able to vote in the districts where they're locked up, he explains, "you are creating disproportionate voting power in those districts among those people who are eligible to vote." In light of that inequity, Rosenberg said, it just makes sense for the census to change the way it counts prisoners.

Historically, states use data from the Census Bureau to draw their Congressional, state and municipal legislative districts. Every 10 years, the Census releases figures from its decennial count to

individual states; those figures are then used to check that existing districts are roughly equal in population and, if not, to redraw district lines to get them there. (Districts can also be reshaped to serve other purposes, such as to create or keep intact so-called "communities of interest," defined as communities with shared ethnic, economic or other characteristics.)

But in the cases of districts whose populations are inflated by large prison populations, the equal-population requirement is being met in name, perhaps, but not in spirit. As a result, legislators from those districts benefit politically from their prisoner "constituents" but are not directly accountable to them, since they cannot vote. Meanwhile, because prisoners are not counted in the districts in which they lived previously, and to which they're likely to return, those places suffer from artificially low population counts, which can result, among other things, in their not receiving adequate government services and programs.

In Massachusetts, the PPI researchers have found, five state legislative requirements only meet their minimum population requirement because they include prisons. They include, in this region, the 7th Hampden district, represented by state Rep. Tom Petrolati (D-Ludlow), which includes the Hampden County House of Corrections.

The problem of prison gerrymandering was, until recently, particularly glaring in neighboring New York

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state. A 2002 PPI study found that in New York—where the majority of prison cells are upstate, and the majority of prisoners come from downstate, particularly New York City—seven upstate legislative districts only reached the minimum population requirement thanks to their prison populations.

But in 2010, New York legislators passed a law requiring that incarcerated people be counted at their previous addresses. In December, a state court ruled that the law was valid, after upstate Republicans filed a lawsuit saying it was written to unfairly favor Democrats.

In addition to New York, California, Delaware and Maryland have also recently passed laws requiring that prisoners be counted at their last homes for redistricting purposes, according to the advocacy group Demos. A similar bill has been twice proposed in Connecticut but has failed to pass.

The law passed by Maryland legislators—2010's No Representation Without Population Act—could be a groundbreaker, inspiring other states to take similar actions. Like the New York law, the Maryland act requires that inmates be counted, for purposes of congressional redistricting, at their last known addresses, not their prison addresses.

As in New York, Republicans contend the change was designed to bolster Democrats' election prospects. In 2011, the Legacy Foundation, a conservative group based in Iowa, funded a federal lawsuit challenging the law. The case made its way to the U.S. Supreme Court, which last month affirmed an earlier decision by a lower court upholding the law.

Peter Wagner, PPI's executive director, said the Supreme Court's decision has implications for all states, making it clear that they can follow Maryland's example in addressing the problem of prison-based gerrymandering. In the past, he said, there's been some concern that states would be violating federal law if they didn't closely adhere to the data provided by the Census Bureau. But after last month's ruling, Wagner said, "States can have zero doubt that, as far as federal laws go, they are free to revise the census for state legislative districts and, most critically, for Congressional districts. ... This sends a really clear signal to states that federal law leaves this entirely up to the states."

In Massachusetts, though, there's an additional wrinkle: the state constitution requires that redistricting be based on *fédéral* census data. That means that before Massachusetts legislators could pass a law like Maryland's, they'd have to amend the state constitution, a lengthy process that takes multiple legislative votes over multiple sessions, then needs to go before voters for approval.

But there is another option, Wagner noted: the Legislature could ask the Census Bureau to change the way it counts prisoners, which would spare individual states from having to fix the

problem themselves. "That's better, cheaper, easier for everybody," Wagner said. "It's more work for the Bureau, but it's easier than for all the states to do it."

Legislators could make the formal request to the Census by passing either a bill or a resolution. The former, Wagner said, might be "overkill," although even passing a nonbinding resolution isn't necessarily easy. "It turns out it's very difficult in Massachusetts to get resolutions if it's not about someone's birthday," he said.

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"We've been advised that acting sooner rather than later is advisable," Rosenberg said. "But we've also been told that we have roughly until about 2015 to try to influence the shape of the next federal census," meaning that a resolution could hold until the next session. Even if a resolution isn't passed this session, Wagner said, the redistricting committee's interest in the issue represents important progress in the effort to change the policy.

Census officials, meanwhile, aren't ready to say what, if any, changes the Bureau might make. Catherine McCullly, director of the Census' redistricting data office, told the *Advocate* she couldn't comment on any specific requests that might be forthcoming from the Massachusetts Legislature until and unless the Bureau receives one.

Changing how the Census counts prisoners would be more complicated than it sounds, McCullly added. "It's more than just the prison population we'd be looking at," she explained; prisons fall under a larger category called "group-quarters remuneration" that also includes dorms, nursing homes and group homes, and any change could affect all the institutions in that category.

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But it helps to have legislative leadership in your corner. Rosenberg told the *Advocate* that he and state Rep. Mike Moran (D-Brighton), the House chairman of the Redistricting Committee, agree that the state should ask the Census Bureau to change the way it counts prisoners.

While the imbalances created by the existing practice aren't as dramatic in Massachusetts as in other states, he added, as a matter of principle, the commonwealth should do all it can to ensure equal representation. That request, Rosenberg said, could take the form of a letter to the Census Bureau, the White House and the Mass. Congressional delegation, signed by as many state legislators as cared to. Or it could take the form of a resolution, which could be seen as carrying more clout. But with the end of the legislative session fast approaching, and many other items still to be resolved, Rosenberg indicated that it could be hard to pass, this session, a resolution on an issue that isn't even on the radar of most legisla-

tors.

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