

PRISON INMATES AND REDISTRICTING

Please accept these written comments in opposition to deviating from how the U.S. Census counts prison inmates for purposes of redistricting. These comments are similar to the verbal testimony I gave to the Reapportionment Commission at the October 21, 2001 hearing.

In 2020, while I was chairman of the Cranston Charter Review Commission, various advocates argued that prison inmates should not be included in the city's population for Cranston ward redistricting. While strongly opposed to gerrymandering,¹ I concluded that the allegation of prison gerrymandering in Cranston was meritless.

Since its inception more than two centuries ago, the U.S. Census has counted prison inmates as residing at prisons because that is where they are physically at the time the census is taken. The U.S. Census policy of counting people where they are physically at the time of the census applies not only to prison inmates, but other people in group living quarters such as college students.

Those alleging prison gerrymandering believe prison inmates should be counted differently than how it is done by the U.S. Census because: (1) prison inmates do not vote; (2) prison inmates are only transient, temporary residents; and (3) elected officials do not interact with prison inmates like other constituents. Their argument is flawed.

First, there are other groups who are not voters. For example, children, and non-U.S. citizens including those who are illegally in this nation, do not vote but all are included in the population count for redistricting the same way as someone who votes.

Second, there are other groups that are transient. For example, college students are all included in the population count for redistricting just like full-time residents. In fact, out-of-state college students can be counted as residing in one state for purposes of the U.S. Census and redistricting although they vote in another state.

Third, there are other groups that do not interact with elected officials like a typical constituent. For example, small children and individuals who are mentally incapacitated generally do not directly interact with elected officials, but they are all included in the population count for redistricting just like typical constituents.

If the Reapportionment Commission deviates from the U.S. Census when it comes to prison inmates, then there will likely be future efforts to adjust U.S. Census data for redistricting.² If you think drawing district lines is difficult now, just see what happens when the population totals to be used for redistricting are a matter of debate as well.

¹ I drafted the recently adopted anti-gerrymandering amendment the Cranston City Charter.

² The U.S. Supreme Court has accepted redistricting plans that rely "on the registered-voter or voter-eligible populations" and has left open the possibility of excluding non-voting persons such as "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime [from] the apportionment base." Evenwel v. Abbot, 136 S. Ct., 1120, 1124 n.3, 1132–33 (2016); Burns v. Richardson, 384 U.S. 73, 92 (1966); Davidson v. City of Cranston, 837 F.3d 135, 143-144 (1st Cir. 2016).

Only about a dozen states have decided to deviate from the U.S. Census in regards to prison inmates for purposes of redistricting.³ Perhaps, these states determined that following the U.S. Census led to prison gerrymandering in their state. However, there is no evidence of prison gerrymandering in Rhode Island.

First, there is no evidence that following the U.S. Census's approach for prison inmates has led to political gerrymandering in Rhode Island. In 1906, the General Assembly followed the U.S. Census's approach regarding prison inmates and determined that Cranston's population was entitled to an additional representative in the R.I. House of Representatives. In 1910, state representative and local ward districts which encompassed the prison population were established in Cranston. Over the past century, numerous people from both political parties have been elected to the state legislature and the city council from districts which included the prison population. Therefore, following the U.S. Census approach for counting prison inmates was not done to favor a particular candidate or a political party.

Second, there is no evidence that following the U.S. Census's approach for prison inmates has led to some form of racial gerrymandering in Rhode Island. In 2016, in a unanimous decision, the U.S. First Circuit Court of Appeals ruled against the ACLU and determined that Cranston's inclusion of prison inmates in its ward redistricting plan "easily passes constitutional muster."⁴ Sandra Lynch, a Clinton appointee, stated "there is no showing, nor even a claim, that either racial or political groups have been fenced out of the process in Cranston."⁵ In fact, Justice Lynch noted that the "hypothetical claim ... that the inclusion of minority ACI inmates in the Redistricting Plan dilutes the political power of the communities of color where the prisoners resided pre-incarceration ... is simply not advanced by the plaintiffs in this case."⁶

Third, following the U.S. Census's approach for prison inmates does not result in a malapportionment type gerrymandering in Rhode Island. Malapportionment occurs when voters are not given equal weight such as when a small group of voters is given a greater amount of representation as a large group of voters.⁷ In some other states, where prison inmates make up the majority of a district's population, a type of malapportionment is likely to occur. However, this is not the case in Rhode Island. Because the prison population is so small, it ends up being a low percentage of a district's population.⁸ For example, based on the current census, the prison population is only 6.5 percent of the population in House District 15, and 7 percent of the population in Senate District 27.⁹ More importantly, according to recent information from the R.I. Secretary of State, the districts which include the prison population have more active registered voters than other districts. For example, House District 15 has more active registered voters than two-thirds of other representative districts and Senate District 27 has more active registered voters

³ Most New England states, including Massachusetts, follow the U.S. Census approach regarding prison inmates.

⁴ Davidson v. City of Cranston, 837 F.3d, at 144.

⁵ Id., at 143.

⁶ Id., at 139, n. 2.

⁷ See Reynolds v. Sims, 377 U.S. 533, 557-559, 562-563 (1964).

⁸ There are only about 2,442 prison inmates in Cranston. The ideal state Senate district has a population of 28,878. The ideal state legislative House district is 14,632. The ideal Cranston ward population is 13,822.

⁹ The prison population is 11.4 percent of the population in House District 20, 1.4 percent of the population in Senate District 31, and 18.2 percent of the population in Cranston Ward 6 under the draft city redistricting plan.

than a majority of other senate districts.¹⁰ Also, the districts that include the prison population cast more votes than some other districts. For example, House District 15 cast 8,285 votes for president in 2020 while House District 1, which includes thousands of out-of-state Brown University students of which many vote from their home states, only cast 4,553 votes for president in 2020.¹¹ If people think prison gerrymandering is occurring in Cranston gerrymandering, then I guess there is college gerrymandering occurring in Providence as well.¹²

Assuming it is legally permissible,¹³ reallocating prison inmates to their pre-incarceration address would likely be administratively difficult, time consuming, and not justifiable. First, it could prove difficult to determine the exact pre-incarceration address of the approximately 2,442 inmates living at the ACI prison complex at the time the census was taken. This task would likely be even more difficult for the approximately 640 inmates at the Wyatt Detention Center.¹⁴ Guesswork cannot be used to calculate the population totals for districts. Second, this task will likely require some time and therefore either reduce the amount of time the public and the Reapportionment Commission will have to review proposed maps or delay final approval of new maps by the General Assembly, which could negatively impact local boards of canvassers in preparing for the next election. Third, even if the pre-incarceration address of some inmates can be determined, some inmates may have no ties or connection to that former address. They may not have lived at this pre-incarceration address for years or even know the people living at that address today. While it is uncertain what connection some prison inmates may have to a former address, what is certain is at their current address these prison inmates are provided Cranston city services, such as fire and sewer, comparable to other Cranston residents, and those services are paid for by Cranston taxpayers.

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¹⁰ House District 20 has more active registered voters than one-third of other representative districts. Senate District 31 has more active registered voters than nearly two-thirds of other senate districts. Ward 6 in Cranston has more active registered voters than Ward 3 (Cranston has six wards).

¹¹ In Cranston, Ward 6 casts more votes than Ward 3 and sometimes more votes than Ward 2 as well.

¹² It is ironic that some of those alleging prison gerrymandering in Cranston, reside in districts that have fewer active registered voters and cast fewer votes than the districts which include the prison population.

¹³ It has not been adjudicated to what extent the Reapportionment Commission can deviate from the U.S. Census under the state constitution. Under the Cranston City Charter, Cranston's redistricting plan must include prison inmates because it must be "based on total population from the Census." Davidson v. City of Cranston, 837 F.3d, at 144. The First Circuit noted that Cranston's City Charter "mirrors the total-population apportionment required by Rhode Island's constitution." Id.

¹⁴ Interestingly, advocates for changing how prison inmates are counted rarely mention the Wyatt Detention Center located in Central Falls. Assuming that prison inmate population is included in the Central Falls ward redistricting plan, the Wyatt prison population is more than 10 percent of the ward population in one of Central Falls five wards.