



TO: John Flateau
Census Bureau Race and Ethnicity Advisory Committee

FROM: Kirsten D. Levingston
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DATE: April 22, 2005

RE: Analysis of Census Bureau Response to REAC Prison Count
Recommendation

Thank you for this opportunity to comment on the latest exchange between the Race and Ethnicity Advisory Committee and the Census Bureau about REAC's recommendation concerning the enumeration of incarcerated people. This memorandum lays out REAC's recommendation, the Census Bureau's response thereto, and the Brennan Center's analysis of that response.

REAC Recommendation

The Race and Ethnicity Advisory Committee made the following recommendation to the Bureau:

Include Detainees, Inmates, and Prisoners at their Pre-Incarceration Address
Provide a count of inmates, detainees, and prisoners at their pre-incarceration addresses. We recommend that the Census Bureau include detainees, inmates, and prisoners including those housed outside of their home states, be counted as residents of their pre-incarceration addresses for purposes of Congressional apportionment, state and local redistricting, the distribution of government aid to their home communities, and to help those communities to have more resources for preventive and post-incarceration programs and services. We urge the Congress to consider changing the residency rules for these purposes.

Census Bureau Response

The Census Bureau responded to this recommendation as follows:

We have no plans to reevaluate the methodology that we use for counting prisoners where they are incarcerated. Census Bureau residence rules are a set of interdependent rules for making sure that every resident of the United States is counted only once and in the correct place.

Census Bureau residence rules state that individuals should be counted at their "usual residence." The concept of "usual residence" is the main principle for determining where people are to be counted and was established for the first census in 1790. This concept has been followed in all subsequent censuses. Usual residence is defined as the place where the person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence. According to the current formulation of the residence rules, all residents of institutional group quarters are counted where they sleep or live most of the time. Consequently, we do not collect data about the home community of the institutionalized population.

In 1992, the United States District Court for the District of Columbia confirmed the principle of usual residence (*District of Columbia v. U.S. Department of Commerce*). In that case, prisoners who were residents of the District of Columbia were incarcerated in a prison located in the state of Virginia and, consequently, counted as residents of Virginia in the 1980 census. The District of Columbia claimed that this action violated the Administrative Procedures Act, Article 1, Section 2, Clause 3 of the Constitution (the authority for taking the decennial census for the purpose of apportionment) and the 'due process clause' of the fifth amendment, and that it would cost the District \$60 million over the decade.

The court ruled that the application of the Census Bureau's 'usual residence rules' to prison inmates was a rational decision that was neither arbitrary nor capricious, and that it did not violate the constitutional command of the census clause. In other words, the court decided the Census Bureau could count the inmates at their usual place of residence as defined above.

Brennan Center Analysis of Census Bureau's Response to Recommendation

The Census Bureau begins its response to REAC's recommendation by reaffirming a principle at the heart of the current effort to change its method for counting incarcerated people: "Census Bureau residence rules," the agency states "are a set of interdependent rules for making sure that every resident of the United States is counted only once and *in the correct place*." (Emphasis added). Precisely because incarcerated people are currently counted in places with which they have temporary physical contact and no social, political, or economic contact – arguably the *incorrect* place – the Bureau's resistance to *re-evaluation* is puzzling and runs counter to the agency's method over the years. "Usual residence" is an evolving concept, one the Bureau has reviewed regularly throughout its history. In reconsidering the concept, the Bureau has promoted a flexible view of "usual residence," one informed by social trends affecting Census accuracy. Given this standard method of operation, the Bureau's response to REAC's recommendation is surprising in its apparent lack of deliberation.

1. "Usual residence" is an evolving concept that changes over time

According to its response the Bureau's resistance to rethinking its approach to counting incarcerated people hinges on its interpretation of "usual residence." "Usual residence," the agency explains, "is defined as the place where the person lives and sleeps most of the time," and "was established for the first census in 1790." Only a year ago, however, the Census Bureau described "usual residence" differently. In a letter dated April 9, 2004, from Census Bureau Director Charles Louis Kincannon to Rep. William Lacy Clay and Rep. Adam Putnam¹ (hereinafter "Kincannon Letter") the Director states:

[U]sual residence is the modern version of 'usual place of abode,' as stated in the Census Act of 1790. We found that the Census Act of 1790 has been interpreted with reasonable consistency over time, albeit with some fine-tuning along the way. One can trace the interpretation of 'usual place of abode' and 'usual residence' in census enumerator manuals and other documentation. In 1910, usual place of abode was described as 'commonly the place where one regularly sleeps.' In 1920, 1930, and 1940, usual place of abode was the 'permanent home,' or 'regular lodging place.' Not until 1950 did 'usual place of abode' become 'usual residence,' that is, the place where the person lives or sleeps most of the time. Thus, for the 1950 census, usual residence returned to a more readily defined and precise definition, 'permanent home' was not

¹ Director Kincannon's April 9, 2004 letter (hereinafter "Kincannon Letter") was in response to a March 24, 2004, letter from Rep. Clay and Rep. Adam H. Putnam, the ranking member and chair, respectively, of the Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census within the Government Reform Committee. Both letters are on file with the Brennan Center for Justice.

mentioned. We have not found any evidence of why this change was made for 1950.’²

This excerpt from the Kincannon Letter demonstrates two things: First, that the “usual residence” concept has evolved over time and, second, that throughout the Bureau’s history it has revisited the question of whether its rules promote the fair and accurate count it seeks. As the above excerpt indicates five decades have passed since the Bureau last altered the concept in 1950. During the intervening years the prison population has grown exponentially and become concentrated in rural areas. These dramatic social trends and the passage of time suggest review with respect to the prison population is in order.

In conducting past reviews of the “usual residence” concept, the Bureau’s thinking has been influenced by more than mere physical presence. As Director Kincannon says in his letter, “the use of the term ‘permanent home’ did [] lead us to explore a second concept[,] that of ‘enduring ties.’”³ More specifically, the letter explains:

[Enduring ties] can be, variously, your parental home, voting residence, permanent home, where you pay taxes, and where you feel you belong. We know respondents’ natural tendency is to answer in terms of social or enduring ties (e.g., commuter workers who want to be counted at their family homes rather than where they spend most of their time while working), but this often conflicts with our understanding of the constitutional/legal requirement that persons be counted at their usual residence. How can we get respondents to follow a ‘resides-most-of-the-time’ based definition of usual residence when they consider whom to include on their questionnaire and when they have strong opinions about who does and does not ‘belong in their household?’⁴

This question is far from rhetorical for the Bureau. The agency answers it by developing detailed residence rules that breathe life into the “usual residence” concept. According to the National Academy of Sciences, which has established a Panel on Residence Rules to suggest improvements, “there were 31 formal residence rules in 2000.”⁵ (The NAS Panel is discussed in greater detail below.) In those specific rules one sees the Bureau applying the “usual residence” concept in a manner echoing notions of “enduring ties” that Director Kincannon describes in the April 2004 letter. This is particularly apparent with respect to temporarily absent populations. Boarding school students, for example, are indeed counted as residents of “their parental homes,” while members of Congress are counted as residents of their “permanent homes... where [they]

² Kincannon Letter, at Enclosure 2, page 1.

³ Kincannon Letter, at Enclosure 2, page 1.

⁴ Kincannon Letter, at Enclosure 2, page 2.

⁵ http://www7.nationalacademies.org/cnstat/Residence_Rules.html

feel [they] belong”— in the states they represent, not in Washington, D.C. where they are physically present most of the time.

Given its history of revisiting the usual residence concept to ensure Census accuracy, particularly with respect to populations that are mobile, yet remain connected to their home communities, the Census Bureau’s unwillingness to reevaluate the prison count rule is disappointing.

2. The Bureau has embraced “enduring ties,” successfully convincing the U.S. Supreme Court to endorse the concept

The Bureau cites a 1992 trial court case, *District of Columbia v. U.S. Department of Commerce*,⁶ (hereinafter “Lorton case”) to support its interpretation of the “usual residence” concept. In that case the court upheld the Census Bureau’s decision to count District of Columbia residents incarcerated in Lorton, Virginia on Census day as residents of Lorton. Yet, in *Franklin v. Massachusetts*,⁷ a case decided that same year, the Bureau expressly promoted a more flexible construction of “usual residence,” instead of “a rigid rule of physical presence on the census date.”

In *Franklin* the state of Massachusetts challenged the Bureau’s decision to treat federal personnel deployed overseas as residents of their “home of record” during the 1990 census. This approach led to over 900,000 overseas federal employees being counted at their “home of record” and resulted in Massachusetts’ loss of a congressional seat. In challenging the Bureau’s approach, Massachusetts argued that using “home of record” information maintained in employee personnel files to apportion congressional seats was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. Section 701 et seq. The federal trial court agreed and ordered the President to change the congressional allocation. In appealing that decision to the U.S. Supreme Court the Bureau argued “[i]t is far too late in the Nation’s history to suggest that enumeration of the population of the States must be based on a rigid rule of physical presence on the census date—a rule that has never been applied and that is especially out of place in an age of ever-increasing mobility.”⁸ (Emphasis added).

The Bureau’s defense of a more nuanced enumeration ultimately succeeded in the Supreme Court. The *Franklin* Court stated that using “home of record” information was in keeping with the Census Bureau’s historic standard in that it “reflected the more enduring tie of usual residence.”⁹ The Court went on to explain usual residence

can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place. The first enumeration Act itself provided that ‘every person occasionally

⁶ 789 F.Supp. 1179 (D.C.D.C. 1992).

⁷ *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

⁸ Brief for the Appellants at 17, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

⁹ *Franklin*, 505 U.S. at 795.

absent at the time of the enumeration [shall be counted] as belonging to that place in which he usually resides in the United States' [citation omitted] The Act placed no limit on the duration of the absence, which, considering the modes of transportation available at the time, may have been quite lengthy. For example, during the 36-week enumeration period of the 1790 census, President George Washington spent 16 weeks traveling through the States, 15 weeks at the seat of Government, and only 10 weeks at his home in Mount Vernon. He was, however, counted as a resident of Virginia.¹⁰

Today the Bureau continues to treat temporarily absent populations – including military and federal employees stationed abroad, members of Congress, and boarding school students – as it treated the first President in the first Census. The Bureau enumerates them as residents of the places to which they maintain an “enduring tie” even though they are temporarily removed from that place. Even though people in prison have less physical, social, economic or political connection to the towns in which they are incarcerated than the temporarily absent populations mentioned above, people in prison are not counted back in their home communities. This, of course, will not change unless the Bureau reconsiders its approach, something it is currently positioned to do.

3. The stage is set for the Bureau to rethink its prison count approach

Between now and 2006, when Census conducts its next test, the Bureau is in a contemplative mode. REAC and the other advisory committees exist in order to help make this period of Census reflection as grounded, productive, and useful as possible. Refusals to evaluate issues of clear significance like the prison count impede that task. While it is true that over a decade ago, in the Lorton case, a trial court ruled that the Census Bureau *could* count people where they are incarcerated, that decision should not be the end point for an agency concerned with conducting an enumeration in the context of an ever-changing society. The question remains whether the agency *should* continue to count people in prison this way without paying close attention to the fairness and accuracy of the approach. The Census Bureau response to the REAC recommendation on the prison count fails to answer that deeper, more fundamental question.

The subsequent history of the Lorton case actually calls into question the accuracy of this counting approach. At the time the Census Bureau litigated the case people convicted of crimes in D.C. were incarcerated in Lorton, Virginia. By December 31, 2001, however, all of the D.C. residents locked up in Lorton had been transferred to federal facilities across the country,¹¹ and Lorton closed its doors. A similar scenario plays out every decade for people locked up on Census day. Most people in prison are virtually certain to be released or transferred before the next Census takes place, perhaps

¹⁰ *Franklin*, 505 U.S. at 804.

¹¹ Paige Harrison and Allen J. Beck, *Prisoners in 2002*, Bureau of Justice Statistics Bulletin at 3, Table 3 “note” (July 2003).

even shortly after the enumeration occurs.¹² Given this trend, it is surprising that the Census Bureau is disinterested in contemplating ways to calibrate its enumeration tool so as to deal effectively with this social reality.

The Bureau has, in fact, already engaged the National Academy of Sciences (NAS) to review its existing residence rules with an eye toward identifying the impact of social trends on Census accuracy. The Census asked the NAS Panel on Residence Rules to

examine census residence rule issues and make recommendations for research and testing to develop the most important residence rules for the 2010 census. Recommendations will address potential ways to modify census residence rules to facilitate more accurate counting of the population or identify the reasons why the rules should stay the same.

The panel would consider residence rules in terms of how they contribute to or inhibit an accurate count of the population. *Its deliberations may include the appropriate geographic location for enumerating each person* but would not include the issue of who should be enumerated in the census: for example, whether civilian citizens who live abroad or undocumented immigrants should be included. (Emphasis added).

The NAS Panel, notwithstanding the Census Bureau's hesitancy to evaluate the prison count, has asked Patricia Allard from the Brennan Center and Peter Wagner from the Prison Policy Initiative to present on the topic at its next meeting on June 2, 2005. Others would also like to see the Bureau delve into the issue. Former Census Bureau Director Kenneth Prewitt has urged a new approach, writing: "Counting people in prison as residents of their home communities offers a more accurate picture of the size, demographics, and needs of our nation's communities, and will lead to more informed policies and a more just distribution of public funds."¹³ Groups concerned about issues ranging from community development to prison families have weighed in as well, signing a letter urging Congress to set aside funds to test a new approach to the prison count.¹⁴

¹² The median prison sentence for state felony offenses is 36 months. Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics (2002).

¹³ Patricia Allard and Kirsten Levingston, *Accuracy Counts: Incarcerated People and the Census* at p. 1.

¹⁴ The following groups signed on to a letter dated April 8, 2005, urging Congress to fund the Census Bureau to test a new approach to counting incarcerated people: Call To Do Justice, Criminal Justice Washington Letter, D.C. Prisoners' Legal Services Project, Ethnic Studies Graduate Group at the University of California, Berkeley, Family and Corrections Network, Family Justice Center, Federal Prison Policy Project, Goodwill Industries International, Inc., Justice Fellowship, Justice Policy Institute, Learning Disabilities Association of America, Legal Action Center, National Association of Blacks in Criminal Justice, National Council of La Raza, National TASC, NuLeadership Policy Group, United Church of Christ - Justice and Witness Ministries.

Time is on the Bureau's side. Vehicles and processes are in place to help the agency sort through the complexities of developing a fair and accurate prison count. Folks who care about an accurate count, including REAC members, are craving review of the issue. Based on the Bureau's response to REAC's recommendation, the only missing piece of the puzzle is agency will to do so.