

## Authority of HOAs in Texas examined

The Texas Legislature has considered numerous bills in recent years to address the management and conduct of homeowners associations (HOAs). In April, the Senate Intergovernmental Relations Committee and the House Business and Industry Committee both held hearings to consider if current law governing HOAs is adequate to protect the interests of homeowners.

Recent cases of HOAs foreclosing on homeowners have received local and national attention. National and local media have run stories about HOAs foreclosing on homes in the Dallas area and in San Antonio for delinquent assessments owed to the association.

Critics of current HOA practices say abuses reported in the media and in public testimony before lawmakers show the need for state regulation of HOAs. A homeowner who has a dispute with an HOA has few meaningful protections, they say, and this can be corrected only by state law. Many HOAs have powers comparable to municipalities and should have to follow similar rules, critics say.

Supporters of current HOA practices say abuses that receive media attention are outlying cases that have been exaggerated and do not represent most interactions between HOAs and homeowners. Impairing the ability of HOAs to operate in order to

rein in the few that misbehave would be a disservice to the vast majority of Texans who have amicable relationships with their associations and enjoy the benefits such communities provide, HOA advocates say.

### Background

HOAs, which are set up to govern residential subdivisions made up of single-family houses, townhomes, or duplexes, are one type of property owners association

(POA). A POA typically is a nonprofit entity governed by a board that is elected by homeowners and sometimes developers. POAs include not only HOAs, but condominium associations and mixed-use associations, such as in Las Colinas or the Woodlands.

HOAs in particular have become more common in Texas in recent years, as developers increasingly rely on them to finance ongoing maintenance of common property

[\(See HOAs, page 2\)](#)

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## Where should inmates be counted for redistricting?

The Maryland, Delaware, and New York legislatures recently approved laws that, for redistricting purposes, will count inmates at their most recent permanent home addresses before they were incarcerated, rather than at the institution where they are housed. Maryland's law, the first to be enacted, will assign inmates to their previous addresses for both U.S. congressional and state legislative redistricting. The Delaware and New York laws will apply only to state legislative redistricting. Counting inmates at their addresses prior to incarceration differs from the U.S. Census Bureau's practice of counting inmates as residents of the communities where they are incarcerated.

While Texas and most other states use the Census Bureau's approach for redistricting, counting inmates where they are incarcerated, Connecticut, Florida, Illinois, Minnesota, Oregon, Rhode Island, and Wisconsin recently have considered or are considering measures similar to the ones adopted by Maryland, Delaware, and New York. During the 2009 regular session of the 81st Texas Legislature, the House Corrections Committee heard testimony

[\(See Inmates, page 8\)](#)

**HOAs, from page 1**

in residential subdivisions. Especially in areas of rapid growth, such as in suburban and exurban areas around cities and in unincorporated areas of counties, developers have used HOAs to ensure maintenance of privately built infrastructure, recreational features, and landscaping.

Texas has about 25,000 to 30,000 property owners associations, according to an estimate from national data prepared by the Community Association Institute (CAI), a national organization that represents POAs. According to the estimate, these associations represent about 750,000 condominium units and 1.9 million lots in single-family, residential subdivisions. Texas has the largest unincorporated community township in the country, the Woodlands, which is structured as a master planned community with a mandatory association. The Houston and the Dallas-Fort Worth areas also have significant concentrations of planned communities with established associations. POAs in Texas house 4.8 million people who contribute about \$3.2 billion in assessments each year, according to an estimate by the CAI.

Local governments in Texas have varying policies on the role they should assume in building and maintaining infrastructure and public rights of way in new residential subdivisions. Local governments cannot maintain private roads or other private amenities. As a result, unless a city or county agrees to maintain roads and other amenities as public infrastructure, developers must establish a private means to maintain them, such as by establishing an HOA. Some cities and many counties simply require new subdivisions to be set up with an association.

**Legal framework**

Condominiums and HOAs are treated differently under the law. Condominiums are governed primarily by the Uniform Condominium Act (Property Code, ch. 82). HOAs derive their authority primarily from common law, including deed restrictions and private covenants,

but increasingly are regulated by state and federal law and local ordinances.

Texas does not have a comprehensive statute on HOAs for residential subdivisions nor any law that mandates how HOAs are created or governed. Title 11 of the Property Code grants some powers to and imposes certain constraints on HOAs, such as prohibiting them from restricting reasonable political signs in yards (ch. 202). Many of the laws under Title 11 apply only to a certain county or region, and the statutes do not regulate procedures, boards, and bylaws as extensively as do laws that govern condominiums.

Disputes between HOAs and homeowners may be pursued in civil court or settled through

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alternative means. HOAs may sue homeowners for fines and assessments or to obtain an owner's compliance with the HOA's restrictions, and they may foreclose upon owners who do not pay monthly assessments. State law requires enforcement actions against homeowners to

be preceded by a certified letter providing notice of possible action and informing the owner that he or she is entitled a reasonable period to address a violation. Homeowners may sue an HOA for a perceived violation of the association's established procedures or for an arbitrary enforcement of a particular rule or regulation. Homeowners and HOAs also may agree to alternative dispute resolution, such as mediation. A court may order mediation before a trial is scheduled.

**Powers and responsibilities of HOAs**

HOAs usually are established by developers, who are required by state law to create and file a legal instrument, often called the association's covenants, conditions, and restrictions (CC&Rs) or the declaration. Most HOAs also have organizational bylaws and articles of incorporation. Many have rules and regulations, and some include architectural guidelines.

These governing documents establish the powers and responsibilities of HOA boards and homeowners. In general, the HOA bylaws address association

governance, such as qualifications for officers and directors, requirements for board and membership meetings, notice requirements for meetings, and voting procedures. Each governing document has its own procedure for how it may be amended by the HOA after the developer leaves.

HOAs generally maintain property and collect assessments. They might exercise architectural control and pursue delinquent accounts or violations of governing documents. In some cases, city ordinances or state laws may impose duties on HOAs, such as subjecting them to audits or requiring them to publish contact information. Associations also are restricted by some federal laws and may voluntarily comply with requirements of certain lenders, such as Fannie Mae and the Federal Housing Administration.

Maintenance responsibilities of HOAs vary based on their governing documents, applicable state law, and the size, type, and location of the development. Some HOAs may do little more than mow rights of way or maintain entrance features, such as gates, while others may be responsible for a greater range of duties. In Texas, depending on the community, responsibilities of HOAs may include:

- landscaping common areas and mowing front yards;
- operating recreational features, such as swimming pools and golf courses;
- maintaining private roads, alleys, and sidewalks, especially in gated communities;
- maintaining drainage and water retention structures;
- providing utilities, such as trash, electricity, water, wastewater, and cable;
- maintaining common water features, such as fountains and ponds;
- maintaining exterior paint and roofs, such as on townhomes; and
- maintaining controlled access gates and doors and security cameras.

HOAs charge yearly or monthly “assessments” for regular maintenance and duties set forth in their governing documents. They may impose “special assessments” for improvements and maintenance for

one-time events, such as to repair recent hurricane damage.

## Concerns about HOAs

Recurring concerns about the powers and practices of HOAs fall into several areas, including:

- power to foreclose on a homeowner;
- policies on applying payments received from homeowners to fines and assessments;
- excessive fines levied against homeowners;
- lack of regulation of elections and voting;
- applying state open meetings and open records laws to HOAs; and
- prohibiting HOAs from restricting certain improvements, such as solar panels.

While the Legislature has enacted laws in the past to revise individual aspects of HOA governance, no single bill significantly revising HOA practices in Texas has made its way to the governor’s desk in recent sessions. HB 1976 by Solomons, an omnibus bill seeking to make broad changes to HOA practices and procedures, was approved by the House but died in the Senate in 2009. The Legislature is likely once again to consider proposals concerning HOAs during the upcoming legislative session.

### *Power of foreclosure*

Proposals lawmakers may consider in 2011 include revoking HOAs’ power of foreclosure or mandating that they take extra steps before foreclosing on a home. Frequently discussed proposals include:

- revoking the power of an HOA to foreclose in favor of alternative means of debt collection;
- allowing foreclosures only when the assessments a homeowner owes exceed a predetermined amount;
- requiring a payment plan be issued to a homeowner before foreclosure;
- eliminating the option for non-judicial foreclosures, possibly replacing this with an “expedited judicial foreclosure” option; or

- requiring alternative means of settling disputes, such as providing a right to mediation before attorney's fees could be charged in a foreclosure suit.

The authority of HOAs to foreclose on homes to collect a subordinate lien for delinquent assessments the homeowner owes to the association is a long-standing issue facing the Legislature (see House Research Organization *Interim News*, "Foreclosure by Homeowner Associations: Striking a Balance", July 2002). The power derives primarily from a 1987 Texas Supreme Court ruling in *Inwood North Homeowners Association v. Harris* (736 S.W.2d 632) that a provision in the Texas Constitution restricting foreclosures does not protect homeowners from foreclosure for not paying monthly HOA assessments. In that case, the Supreme Court reversed a Houston Court of Appeals holding and ruled in favor of the Inwood North Association, which had foreclosed on a homeowner who was delinquent in assessments.

In Texas, HOAs may execute either judicial or non-judicial foreclosure, depending on the association's declaration. In a judicial foreclosure, the association files a lawsuit and tries to get a judgment against a property owner. In a non-judicial foreclosure, which must be specially authorized in an association's declaration, an HOA must provide notice to a homeowner through certified mail, and if the homeowner does not pay the assessments owed, the HOA may offer the house for sale at an auction for the amount of outstanding assessments, without an order from a judge. If there is a superior lien on a property, such as a mortgage lien from a bank, then whoever purchases the property at foreclosure does so subject to that lien.

In 2001, the 77th Legislature added Property Code, ch. 209, which restricted foreclosure powers of HOAs, including prohibiting HOAs from foreclosing on a homeowner solely to collect fines or attorney's fees associated with fines. The act also added a 180-day right of redemption period during which a homeowner could buy back a foreclosed home.

#### ***Debate on revoking HOA foreclosure power.***

Some say the power of foreclosure by HOAs should be

revoked altogether, while others say HOAs need this power to function effectively. Still others say the power of foreclosure should be restricted and non-judicial foreclosures prohibited, with homeowners having the right to pursue other options before foreclosure.

**Supporters of revoking or restricting the power of HOAs to foreclose** say HOAs are not subject to enough checks and balances and do not provide sufficient due process to exercise such a fundamental power over homeowners. They say this power should be reserved for instances clearly laid out in the Texas Constitution — for delinquent taxes, mortgages, and liens for property repair and renovation. Other service providers, such as doctors, lawyers, and mechanics, are not empowered by the Constitution to foreclose on homes to collect payments, even though they provide necessary and important services. Associations also have powers of non-judicial foreclosure that are not available even to government entities to collect delinquent property taxes.

Associations should have to use the same debt-collection methods as other common non-housing creditors, such as collection agencies and small claims courts, supporters of restricting HOA power say. As an alternative, HOAs could be allowed to place passive liens, without foreclosure power, on homes of those who owe delinquent payments. The association would collect its debt if the home were sold, but it could not foreclose on the home. Supporters of revoking foreclosure power note that many HOAs never file foreclosure lawsuits and that this shows they can collect assessments without exercising foreclosure authority.

Supporters of restricting HOA foreclosure authority say that some associations foreclose on homes for minor overdue amounts of \$1,000 or less, such as those recently featured in national news stories. The *Dallas Morning News* and National Public Radio recently ran stories about an army captain serving in Iraq whose Dallas-area house was foreclosed on and sold because he and his wife owed \$1,000 in assessments and late fees to their HOA. In July, CNBC aired a story on an HOA in the San Antonio area that foreclosed on a homeowner for less than \$800 in assessments owed. Supporters say such examples are not exceptional, but commonplace.



**Opponents of revoking or restricting the power of HOAs to foreclose** say without this power, HOAs would have no effective way to collect overdue assessments, enforce deed restrictions, provide essential services, and protect homeowners' investments. Services provided by HOAs — such as trash collection, pool maintenance, and safety patrols — reduce the demand for services from cities and counties and help preserve, protect, and maintain neighborhoods. The power to foreclose is appropriate for HOAs because their duties are tied to the safety, security, and value of homes and neighborhoods. Without foreclosure power, associations could become little more than “civic clubs” with a small number of members paying dues while a larger number refused. If 20 percent of the owners in an association stopped paying dues, opponents say, remaining owners would have to increase their assessments by 25 percent to make up the loss in revenue.

People voluntarily buy homes in areas governed by homeowners associations and contractually agree to abide by their rules, including the right of foreclosure, opponents of revoking this power say. While the vast majority of homeowners pay the money they owe, associations need flexibility to proceed with foreclosure if it is warranted. HOAs rarely file foreclosure suits, and then only as a last resort. HOAs want homeowners to pay their fees so the HOA can perform its duties. Few foreclosure suits result in the sale of a home because homeowners usually pay their delinquent obligations or settle the suits. Taxing authorities also foreclose on homes for debts large and small, and homeowners associations are comparable to these authorities in some of the services they provide.

The Texas Supreme Court and other courts have upheld HOAs' right to foreclose, and the Legislature should not infringe on that contractual right, opponents say. Abuses of foreclosure authority by a few associations are isolated incidents that should not be used as an excuse to deprive all associations of a vital tool.

### *Open meetings, open records*

A number of concerns about HOAs relate to records and board meetings. Some homeowners say they have not been able to acquire certain documents,

such as an association's financial records, in a timely manner. Others claim they have not been able to access information readily about the time and location of board meetings and agendas and that some boards abuse the power to hold executive sessions, preventing owners from viewing proceedings. Some have suggested that HOAs should be subject to the state's open government laws — the Public Information Act and the Open Meetings Act — in order to make their activities more transparent.

**Supporters of bringing HOAs under the Public Information and Open Meetings acts** say these laws would provide a framework for holding associations accountable to homeowners because they provide real penalties not authorized in current law governing HOAs. These laws establish requirements for time frames within which records must be provided to a requestor, types of records that must be provided, notice that must be provided for meetings, and other requirements. Supporters say that because associations have many of the powers of governments, they should have similar obligations to be responsive, open, and transparent. Supporters say the costs of complying with these laws have been exaggerated.

**Opponents of bringing HOAs under the Public Information and the Open Meetings acts** say the requirements of these laws would be too onerous for HOAs, which do not have the capacity that cities do to operate under such rigid and technical guidelines. They say HOAs are private entities operating on a smaller scale than governments and would be unduly burdened by regulations crafted for larger bureaucracies. Many associations have difficulty even achieving a quorum at board meetings. Bringing HOAs under strict state laws, opponents say, could require an attorney to be involved in every HOA meeting because of criminal penalties provided under these laws, drastically increasing operating costs for many associations. This also would deter many potential board members from serving because of fear of penalties and the investment of time necessary to conform to the statutes. Opponents say it would be better to create a separate, more flexible law for HOAs with sanctions for not providing records in a timely manner or holding meetings without sufficient notice.

### *HOA authority to collect fines*

Some homeowners say they are saddled with disproportionate fines that may be enhanced by attorney's fees awarded to an HOA that prevails in a lawsuit. State law expressly allows an HOA to file suit against a homeowner for violation of an association's declaration, such as by making unapproved additions or not maintaining property to the association's standards. A court may assess civil damages of \$200 or less for each day a violation takes place. Under Property Code, sec. 5.006, a prevailing party who asserts a legal action may collect reasonable attorney's fees, but the law does not authorize payment of legal fees for a prevailing defendant.

**Supporters of restricting HOA authority to collect fines** say current processes for charging and collecting fines are heavily weighted in favor of HOAs because petitioning the HOA itself is the only recourse for a homeowner who disputes a fine, other than pursuing costly legal action.

Some say HOAs and management companies should not have the power to levy fines. Supporters of restricting the authority to fine say associations are private entities with a unique power to fine homeowners for violations on the homeowners' own property that other private entities do not possess. Others say fines should have strict caps in state law and that when an association loses a suit it initiates against a homeowner, the association should have to pay attorney's fees.

Supporters of restricting the authority of HOAs to fine say associations commonly charge unreasonable fines for violations and that these fines compound with attorney's fees. For example, an HOA in Houston recently filed suit against a homeowner for failing to make roof repairs with an approved material. The association is seeking \$2,000 in damages (\$200 a day for 10 days), \$290 for assessments and late charges, and at least \$2,500 for attorney's fees.

Supporters also say that in most cases the HOA sues the homeowner, and as such, the association is able to collect attorney's fees for prevailing. Homeowners, who less frequently sue their associations, are left to pay the HOAs attorney's fees if they lose but still must pay their

own attorney's fees if they win. Further, homeowners are essentially paying twice for attorneys fees — once for their own attorney and once for the association's attorney, paid for in part through association assessments.

**Opponents of restricting HOA authority to collect fines** say fines are a necessary means for HOAs to uphold the values and rules to which property owners agreed by purchasing a home in the community and to preserve the value of member homes. Planned communities are established with certain values an owner embraces by buying property in the community, contractually agreeing to certain minimum standards, and becoming a member of the association. Associations need the ability to impose reasonable fees to ensure that members adhere to the standards of the community that they agreed to by purchasing a home benefiting from the association. Others say the state could strike a balance by requiring HOAs to publish a schedule of fines and make it available to all members and that association members could revise it if they so chose.

### *Priority of payments*

Some have expressed concerns about the way many associations prioritize where a homeowner's payments will be applied — to assessments, attorney's fees, or fines. Some homeowners say their associations have applied their payments to fines that the homeowner disputes, instead of to their assessments, allowing the HOA to hold them in arrears on their assessment and threaten or pursue foreclosure. One recent proposal adopted by the House but not the Senate would have required associations to apply payments first to assessments, then to fines and other fees, unless the homeowner requested otherwise.

**Supporters of statewide requirements for priority of payments** say some HOAs get around state laws prohibiting foreclosing on homeowners for fines by applying assessment payments to fines first, against the wishes of the homeowner. Supporters say homeowners are commonly charged unreasonable fines for a host of violations, such as not maintaining their property to the association's standards or parking improperly, and that paying these fines may mean a homeowner cannot afford to pay an assessment. Homeowners

in associations that apply payments to fines may be threatened with foreclosure if they cannot afford to pay both fines and assessments. Supporters of restricting this practice say it is clearly at odds with the intent of state law that prohibits HOAs from foreclosing for fines. Statewide requirements are necessary to close this major loophole in state law that some associations are using to subvert the intent of the Legislature, they say.

**Opponents of statewide requirements for priority of payments** say such an approach would be too inflexible to suit the diverse range of HOAs across the state. Opponents say HOAs have few ways to collect fines without going through court proceedings, which are not effective for small amounts. A better approach would be to require HOAs to adopt specific policies about how they will apply payments received. These policies would have to be approved by the communities by majority vote, giving residents a say in how their community processes payments.

#### *Other proposals*

Other issues that lawmakers may address in the 2011 regular session include HOA voting practices, how associations may amend their declarations, and requiring associations to follow some alternative dispute resolution processes before taking formal legal action. Proposals for statewide revisions that legislators may consider include:

- changing HOA voting procedures, such as requiring an independent third party like a CPA to verify board election results, limiting the number of proxy votes, and requiring HOAs to allow absentee or electronic voting;
- requiring alternative dispute resolution, such as mediation before legal action, for HOAs and homeowners, or establishing an ombudsman's office to provide a neutral forum to resolve disputes;
- prohibiting enforcement of certain restrictions, such as those prohibiting parking in the street, hanging symbols like crosses or mazuzahs on doorways, placing solar panels on rooftops, or xeriscaping; and
- revising HOA administration, such as eliminating or capping fees that associations

or management companies may charge for compiling resale certificates, establishing term limits for board members, or repealing or revising laws that provide special authority to associations in the Houston area.

**Supporters of statewide restrictions on HOA practices** say abuses are fairly common across the state, homeowners have little recourse or due process under current law, management companies hired by HOAs often exploit existing legal imbalances to maximize profits at the expense of the homeowner, and in many cases homeowners are unable to participate in and effect change in their HOAs. With the increasing numbers of HOAs in the state, homeowners do not have a genuine choice to move into non-HOA neighborhoods. Supporters of statewide restrictions say substantial change to existing law is necessary to correct imbalances. Supporters also say many HOAs do not truly reflect the majority will of property owners due to overuse of proxy voting — that is, one owner voting for others with their approval. In some associations, dozens of property owners may be represented at a meeting by a handful of members, each with many proxy votes.

**Opponents of statewide restrictions on HOA practices** say examples of abusive HOAs are rare and have been exaggerated in the media. HOAs are a critical means of preserving home values and providing indispensable services in the state, opponents say, and they need to retain powers to achieve these ends. People who move into communities organized under HOAs have ample opportunity to review governing documents, and they choose to abide by certain rules when buying a home in the neighborhood. Homeowners are empowered to participate in their neighborhood's affairs and remove an association's board if it contradicts owners' wishes. Opponents say statewide restrictions, if they are not carefully crafted and limited, could hinder all HOAs just to address a few problem cases.

— *by Andrei Lubomudrov*

***Inmates, from page 1***

on, but did not report, HB 2855 by Dutton and HB 672 by Hodge, both of which would have required Texas to count inmates at their addresses before incarceration. During the 2001 regular session, the House Elections Committee favorably reported a similar bill, HB 2639 by Dutton, which the House rejected by 48-91-3. In addition, U.S. Rep. Gene Green, D-Houston, has filed a bill in Congress (H.R. 2075) that would require the Census Bureau to count inmates at their previous addresses for the 2020 Census.

Supporters of the new law argue that counting inmates where they are incarcerated artificially inflates the populations of rural areas where most prisons are located at the expense of urban areas where most inmates come from and eventually return. Opponents say that counting inmates at their address before incarceration ignores the impact that prison populations have on the districts where they are incarcerated and that it would be administratively burdensome.

**Three ways to count inmates**

Three common approaches for counting inmates for redistricting purposes include counting inmates where they are incarcerated, not counting them at all when establishing district base populations for redistricting purposes, or counting inmates at their residence before they were incarcerated.

***Counting inmates where incarcerated***

Counting inmates where they are incarcerated is the method used by almost all states and local governments. It is the method used for the federal decennial census, and in Texas, for the redistricting of congressional, legislative, and state board of education districts and for most local redistricting, such as dividing Texas counties into commissioner and justice of the peace precincts.

The U.S. Census Bureau has counted inmates where they are incarcerated since 1850. This is consistent with the bureau's general practice of counting individuals where they reside, which the Census Bureau defines as "where they live and sleep most of the time." The Bureau's goal is to count all the people in the country and tie them to a specific geographic location. Other groups the Census Bureau counts where they reside, rather than at their previous addresses, include college students in dormitories, senior citizens in retirement homes, and stateside military personnel in barracks.

***Excluding inmates***

Another approach to counting inmates is to exclude them from population counts for the limited purpose of redistricting and representation. Sometimes certain population segments are excluded in the belief that they are too transitory or simply do not participate fully in the life of the community.

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A few states exclude military personnel housed on bases or college students in dormitories for redistricting. Hawaii excludes military personnel, and Kansas excludes both military personnel and college students. According to Prisoners of the Census, a redistricting reform advocacy group, more than 100 local governments across the country exclude inmate populations when drawing representative districts, such as county commissioner precincts or city council districts.

Some Texas counties exclude inmates when establishing county commissioner precincts. Anderson, Bee, Brazos, Coryell, Childress, Concho, Dawson, Grimes, Karnes, Madison, Mitchell, Pecos, Walker, and Wood counties all have excluded inmate populations when establishing county commissioner, justice of the peace, and constable precincts, according to studies in March and June by Prisoners of the Census. In Anderson and Concho counties, excluding inmate populations prevented the creation of precincts that would have consisted entirely of inmates.



When drawing new boundaries, these counties exclude the populations of felony-level prisons, as well as institutions that house illegal immigrants awaiting deportation hearings. Counties that engage in this practice say it helps protect the one-person, one-vote principle because incarcerated felons and illegal immigrants cannot vote. These counties include population from juvenile detention facilities, which house people up to age 21, because some still may be eligible to vote. This practice affects the drawing of boundaries for the election of other county level offices, such as justices of the peace and constables, as well as designating election precincts. While JPs and constables do not hold representative offices, their boundaries often

are drawn to conform to plans for county commissioner courts so that election precincts across the county may be used for all county offices.

Texas counties have wide discretion when crafting county commissioner, justice of the peace, and constable precincts under Art. 5, sec. 18 of the Texas Constitution. These precincts are subject to requirements of the federal Voting Rights Act intended to prevent discrimination against minority voters or dilution of their votes. When these counties submit their plans to the U.S. Department of Justice for pre-clearance under sec. 5 of the Voting Rights Act, they detail which facilities were excluded, arguing that those populations

## Excluding certain populations in redistricting

States must adjust the boundaries of their legislative districts every decade in order to comply with the constitutional, one-person, one-vote requirement. In 1973, the U.S. Supreme Court ruled in *Mahan v. Howell*, 410 U.S. 315, 330-332, that states do not necessarily have to use census data for legislative redistricting or to show compliance with the one-person, one-vote requirement.

Under the U.S. Supreme Court's holding in *Burns v. Richardson*, 384 U.S. 73, 92 (1966), excluding certain populations in redistricting is permissible if it results in a distribution of legislators "not substantially different" from what would result if state citizen population were used. In *Burns*, the Court said it had not required states to include aliens, transients, short-term or temporary residents, or those convicted of a crime and therefore unable to vote, either in apportioning state legislative districts or to show compliance with the Equal Protection Clause.

Until it was amended in 2001, the Texas Constitution required that state Senate districts be drawn based on "qualified electors" — those eligible to vote — rather than on the total population. While the requirement had little practical effect after the "one-person, one-vote" Supreme Court decisions of the 1960s, which required that legislative districts be drawn based on equal population, then Gov. Bill Clements vetoed a legislative redistricting plan in 1981 because it did not apportion state Senate districts on the basis of "qualified electors."

In 1981, Attorney General Mark White said in an opinion that the constitutional provision requiring "qualified electors" rather than population as the basis of senatorial districts was unconstitutional on its face and inconsistent with the federal constitutional standard. The opinion cited *Kilgarlin v. Martin*, 252 F. Supp. 404,411 (S.D. Tex. 1966), which found the state constitutional provision violated the Equal Protection Clause because it did not require that senatorial districts be apportioned on a population basis to produce districts of as nearly equal population as practicable. In 2001, the provision of the Texas Constitution requiring the use of qualified electors for Senate districts was repealed by Texas voters as part of a "clean-up" amendment intended to remove obsolete provisions.

are not eligible to vote and including them would unduly skew the county's one-person, one-vote goals. Some counties point out that any additional minority population numbers a prison or detention facility might contribute toward creating a minority opportunity district — which is a district with a minority population large enough to select a representative of its choice — would not translate to voting power because inmates cannot vote.

### *Counting inmates at previous residence*

Another approach to counting inmates is to count them at the address where they lived before they were incarcerated. Maryland will use this method for redistricting in 2011, as will New York and Delaware under their recently passed laws.

In Maryland, the first state to implement the law, state officials are seeking to compile an accurate list of previous residences for inmates currently housed there. Their initial step was to gather previous addresses from arrest records and records from Maryland's Department of Corrections. After examining these addresses, Maryland officials cross checked inmate identification numbers with court records. Sometimes one record filled in gaps in another record. For example, an unusable, fictional address on an arrest record could be supplanted by a correct address from a court document. The resulting data contain usable previous addresses for all but a few thousand inmates, according to the Maryland Department of Legislative Services. The third step will be to contact inmates directly when a usable address cannot be determined from official records.

Once an accurate list is compiled, Maryland will use the data to identify inmates at the addresses at which they lived before being incarcerated. The state will use this adjusted census data during its 2011 redistricting process.

### **District size**

Counting inmates at their previous residences or excluding them from the population for redistricting purposes would affect equal population requirements when districts are redrawn using the new census data.

Districts of equal size are intended to ensure that each resident has equal influence with government and elected officials. Courts have strictly interpreted Art. 1, Sec. 2, of the U.S. Constitution, which states that representatives "shall be apportioned among the several states...according to their respective numbers," as requiring U.S. congressional House seats in the same state to have populations that are as equal as possible.

The courts have allowed some deviation from exact population equality for legislative and other districts when justified. The U.S. Supreme Court held in *Reynolds v. Sims*, 377 U.S. 533 (1964), that the Equal Protection Clause of the 14th Amendment requires only that state legislative districts be substantially equal in population. Later Supreme Court cases have established that for state legislative districts, the combined total deviation of the largest and smallest districts from the ideal district population cannot be greater than 10 percent. The ideal district population is determined by dividing the total state population by the number of districts.

### **Debate about where to count inmates**

In Texas, inmates are counted for redistricting purposes mostly in the districts where they currently are housed. Advocates for changing the current approach have argued for either counting inmates at their addresses before incarceration or excluding them altogether from population counts for redistricting purposes.

### *Counting inmates at their previous address*

**Supporters of counting inmates at their addresses before they were incarcerated** say it would create more equitable results under the "one person, one vote" equal population principle and would allow the districts from which inmates came to retain the resources they need to serve the inmate population when they return to their districts. They say any administrative challenges associated with identifying addresses can be overcome.

*One person, one vote.* Supporters say counting inmates at their previous addresses would create more equitable results under the "one-person, one-vote" equal

district population requirement established by the U.S. Supreme Court in a series of decisions beginning in the 1960s. When districts have equal numbers of people, each person's vote counts the same as that of a person in a neighboring district. For example, a district with 100 people, 10 of whom are non-voting inmates, has only 90 people who can vote, and thus influence their representative. These 90 people have the same voting power as 100 people in a district with no inmates. Every urban inmate counted as a rural resident decreases the number of voting rural residents required for a rural district. As the number of voting residents declines, the weight of a vote by a rural resident increases. These "phantom" rural residents have significant effects on district composition in Texas. In two current Texas House districts, inmates make up 12 percent of the population. If the inmate population were removed from these districts' population counts, they would have to expand geographically to be within the allowable equal population requirements.

*Effects on district.* Inmates' home communities cannot afford the loss in population and subsequent political clout that follow inmates to where they are incarcerated. Because inmates do not participate in the communities in which they are incarcerated, their population numbers and political power should stay in the community from which the inmates came and are likely to return. Supporters say urban areas lose significant population when community members who commit crimes are sent to rural prisons for incarceration. Large urban areas like Harris and Dallas counties can lose thousands of inmates to rural counties. According to New York University's Brennan Center for Justice, of the more than 650,000 people who leave prison each year, almost all of them will return to their home neighborhoods. When these inmates return, they will need services and resources their home districts might not have been able to secure due to the temporary loss of population and political power.

*Inmate representation.* While many legislators may do exemplary work representing inmates temporarily located in their districts, the fact that inmates cannot vote means too many are ignored. Constituent service should be considered a duty of lawmakers, and inflated population counts should not be a reward for having a large inmate population.

*Administrative challenges.* The challenges of identifying previous addresses for inmates can be overcome once states develop and implement reliable systems for gathering addresses. For instance, local police departments and the courts can be instructed to not accept P.O. boxes as residences, but to require a physical location, as the Census Bureau does. Modern data-base software enables states to adjust census data by counting inmates at their previous residences.

*Comparison to other groups.* Inmates can be distinguished from other temporary resident groups who are counted where they reside. Those counted in group homes away from their home residences, such as military personnel and college students, are more likely to participate in their communities than are inmates. These other temporary resident groups also are less likely to resettle in their previous communities than are released inmates. Inmates are more appropriately compared to military and U.S. State Department employees serving overseas. For apportionment of U.S. House seats, overseas federal employees are counted in the states where they have "enduring ties and allegiance," a standard approved by the U.S. Supreme Court in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Because both groups usually return to the communities from which came, both should be counted in their home communities.

**Opponents of counting inmates at their addresses before they were incarcerated** say that inmates should be counted in the districts in which they currently are using resources and that identifying reliable previous addresses for all those who are incarcerated would be administratively burdensome. In addition, opponents say, it would not achieve the one person, one vote ideal because a significant number of constituents other than inmates who either cannot vote or are present in a district only temporarily also are counted in the district in which they reside.

*One person, one vote.* Counting inmates at their previous addresses would not achieve the "one person, one vote" ideal. Elected officials represent a significant number of constituents besides inmates who cannot vote, such as children and non-citizens, and people who are present in a district only temporarily, such as college students. While these residents also have

significant effects on district composition in Texas, they nonetheless are counted as part of the district population where they currently reside. The same principle should apply to those residing in a district during the time they are incarcerated.

*Effects on district.* Those who are incarcerated should be counted where they are housed because that is where they currently are consuming resources and where their presence is currently felt. While urban counties may lose population when those who commit crimes are sent to rural prisons, rural counties also lose population to urban counties when students go away to college. In addition, there are no guarantees that an inmate will return to a previous address, which is one reason that census officials offer for why inmates are not counted at the address they maintained before being incarcerated. In many cases, it may be years, sometimes decades, before inmates return to their previous communities, if at all.

*Inmate representation.* Inmates should be counted where they are demanding services from their legislative representatives, which is in the community where they are incarcerated. Legislators from districts that house large inmate populations say they treat their non-voting incarcerated inmates as they would any other constituent. Inmates know their local legislators are responsible for constituent service and they demand and receive such service. In addition, while the former communities of inmates might gain increased political clout by having inmates counted there, this would not improve the representation of the inmates themselves, who do not live there.

*Administrative challenges.* Counting inmates at their previous addresses would pose administrative challenges, especially compiling an accurate list of previous residences. Compiling an accurate list of addresses is especially important for crafting U.S. House districts, which must have absolutely equal populations, requiring that a reliable address be found for each and every inmate. In implementing its new law, Maryland has found addresses that no longer exist and P.O. boxes listed as addresses, according to Maryland's Department of Legislative Services.

The Census Bureau has resisted calls to count inmates where they lived before they were incarcerated, saying it is impossible to know if the inmate will live there again. The bureau also says it would have to obtain information from inmates, then tie that information back to a specific address in the inmates' previous communities. The bureau has neither the resources nor expertise to carry this out across the country because the records kept by state and local officials vary and may not be reliable.

*Comparison to other groups.* Opponents of counting inmates at their previous addresses say that while federal employees stationed abroad are counted at the address where they lived before being stationed overseas, Census officials say this is because of the reliability of State and Defense Department records and because these groups return to certain specific locations required by their employer. It is sufficiently certain these federal employees, unlike inmates, will return to the communities in which they previously resided. Opponents say that for redistricting purposes, inmates are more appropriately compared to college students and military personnel in barracks in the United States. The census counts these individuals, housed in large group settings, as residents of where they are housed. Most states do the same for redistricting purposes because these groups heavily impact the communities in which they live.

### *Excluding inmates*

**Supporters of excluding inmates from population counts** say it would avoid shifts of legislative clout from one district to another and would be simple to administer.

*One-person, one-vote.* Excluding inmates from population counts for redistricting would substantially further goals of one-person, one-vote by preventing inmates from being used as "phantom" residents that artificially inflate the size of any district.

*Effects on district.* Excluding inmates also would prevent an unnecessary transfer of political influence to any particular legislative district. Inmates would not be counted in the districts where they are housed but did



not willingly locate and cannot participate, nor would they be counted in the districts from which they came but no longer live and might not return.

*Inmate representation.* While lawmakers still would have to represent and perform constituent services for inmates even if their numbers were excluded for redistricting, constituent representation and service should be treated as a responsibility even without the reward of inflated population numbers.

*Administrative challenges.* Excluding inmates would be an easy policy to implement because it would not require the onerous compilation of sometimes questionable previous addresses. State officials can readily identify and strip out inmate populations from data the Census Bureau already collects, and many Texas counties have done so in the past for redistricting purposes.

**Opponents of excluding inmates from population counts** say doing so would cause the population basis of districts to be unfairly skewed.

*One-person, one vote.* Excluding inmates from population counts still would not achieve the “one person, one vote” ideal because other constituents who cannot vote or who are present in a district only temporarily would continue to inflate the voting power of permanent residents who can vote. Elected officials represent everyone in their districts, not just those who vote.

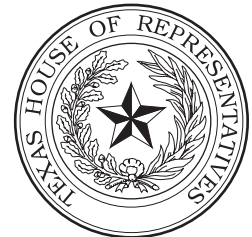
*Effects on districts.* Excluding inmates still would require the boundaries of legislative districts with large inmate populations to be redrawn in order to make congressional seats equal and to ensure that the populations of state legislative seats were within the allowable 10 percent deviation. Some districts would have to grow, causing a ripple effect with population taken from other districts to compensate for the removal of inmates from the population base.

*Inmate representation.* Like everyone else, inmates need to be represented in the Legislature. The most effective voice to hear their concerns is the legislator in whose district they reside. Legislators represent inmates just as they would any other constituent and should be allowed to count these inmates as part of the population of their districts.

— by Tom Howe

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