
Factsheet: Citizenship and Legal Status Questions on the 2020 Census | Preventing a Decennial Disaster

Overview

In January 2017, a draft Executive Order (EO) from the Trump administration, related to “prioritiz[ing] the interests of American workers,” began to circulate publicly. The order, which has not been issued, included a provision that directed the U.S. Census Bureau (also, the Bureau) to ask about U.S. citizenship and immigration status on the “long-form questionnaire in the decennial census.” This alarming development raised concerns for census stakeholders that members of Congress or the administration might resurrect proposals to add questions on U.S. citizenship and legal status to the 2020 Census form.

Indeed, such proposals subsequently did emerge in 2017, both legislatively and by executive action. Interestingly, proponents of adding citizenship and legal status questions to the 2020 Census and related American Community Survey (ACS) have given different and shifting reasons to justify the new data collection. This memo offers relevant background on these threats to a fair, accurate, and cost-effective census and comprehensive ACS, as well as arguments to counter these ill-advised, costly and, in some cases, unconstitutional proposals.

Background

Terminology:

To demographers, the term “immigration status” means data on whether a person is an immigrant (i.e. foreign born), his/her country of origin and/or birth, and when that person immigrated to the United States. That information, in the aggregate, helps researchers and policymakers better understand the experiences of U.S. immigrants and address the challenges they face. The ongoing ACS (a legal part of the decennial census) includes these questions.

On the other hand, “legal status” refers to whether a person is a legal permanent resident or asylee; holds a student or business visa; or has Temporary Protected, Deferred Action for Childhood Arrival (DACA), or some other status, such as living in the United States without proper documentation.

Previous and current legislative attempts to add citizenship and “immigration status” questions to the decennial census form intend to collect information on whether a respondent is a legal or undocumented resident. Therefore, the proposals described below to add questions to the 2020 Census use the term “immigration status” interchangeably with “legal status.”

Pre-2020 Census Proposals:

The U.S. Constitution requires a census every 10 years for the purpose of apportioning seats in the U.S. House of Representatives (Article I, sec. 2, clause 3) among the 50 states. The *apportionment base* is composed of the population of each state counted in the census.¹ Both Republican and Democratic administrations, through the U.S. Department of Justice (DOJ), have

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confirmed unequivocally that the Constitution requires a count of all persons living in the United States on Census Day, *regardless of citizenship or legal status*. **In fact, in adopting the 14th Amendment, Congress rejected proposals to allocate seats in the House of Representatives based on voter-eligible population, rather than total population.**

Nevertheless, at various times over the past several decades, members of Congress have sought to exclude persons who are not legal residents of the United States, or even all non-citizens, from the apportionment base. Former Sen. David Vitter, R. La., was at the forefront of recent efforts to require U.S. citizenship and immigration or legal status questions on the census, for the stated purpose of excluding either undocumented residents or non-citizens (the senator used the terms interchangeably, making it difficult to determine exact intent) from the state population totals used for congressional apportionment. The so-called “Vitter amendment” to the Commerce, Justice, and Science (CJS) Appropriations bill was first filed before the start of the 2010 Censusⁱⁱ and again several times over the next several years with an eye towards the 2020 Census. The full Senate did not consider the amendment in the years since the 2010 Census because the chamber either did not start or did not complete consideration of a stand-alone CJS bill. Sen. Vitter retired in 2016.

Beyond the dubious constitutionality of such proposals, it would be nearly impossible to determine the legal status of all residents with any accuracy, in order to exclude some from the state population totals used for congressional apportionment and possibly for congressional redistricting. And while no proposals have suggested removing noncitizens or undocumented residents from the census numbers used to allocate more than \$600 billion annually in federal program funds to states, localities, and individuals or familiesⁱⁱⁱ — *any effort to determine legal status would jeopardize the accuracy of the entire census, leaving public, private, and nonprofit decision-makers with bad information for all purposes.*

Current Proposals for the 2020 Census

Justice Department Request for Citizenship Question:

On December 12, 2017, Arthur Gary, General Counsel, Justice Management Division at DOJ, sent a letter to Acting Census Director Ron Jarmin, to “formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship.” DOJ also asked the Bureau to release citizenship status data as part of the redistricting files released to the states by April 1 of the year following the census (e.g. 2021). DOJ did not inform census stakeholders or all (and possibly any) members of the Census Bureau’s authorizing committees about the request; it came to light in an article by [ProPublica](#).

It should be noted that while the office in which Mr. Gary serves **does not** have responsibility within the department for enforcing voting rights laws, the letter asserted that block-level citizenship data are “critical” to enforcement of Section 2 of the Voting Rights Act (VRA) and to

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protect “against racial discrimination in voting.” DOJ noted that the ACS collects data on citizenship status from a sample of U.S. households, which it then suggested are not sufficiently statistically reliable to use in enforcing Section 2 protections. However, DOJ ignores that the census has not collected citizenship data from every household during the decennial census since 1960 – every decade since enactment of the VRA – instead collecting the information on a census form sent to a sample of homes.^{iv} Further, prior to its December 2017 request, DOJ had never asserted a need for block-level citizenship data – which would require a question on the census form sent to every household – to properly enforce Section 2 of the VRA. In fact, states carried out the redistricting process, and DOJ and civil rights groups successfully enforced and monitored compliance with the VRA after the 2010 Census using ACS data.

In addition, DOJ submitted its request for a new question almost nine months *after* the Census Bureau submitted to Congress the “subjects” to be included in the 2020 Census and related ACS, as required by the Census Act (13 U.S.C. §141(f)(1)). The Bureau must submit the actual questions it will include in the census and ACS (starting in 2019) to its congressional authorizing committee by April 1, 2018 – two years before Census Day (13 U.S.C. §141(f)(2)). The law provides a way for the Bureau to alert Congress that it wants to add topics or modify question wording after those legal deadlines, *if* the Secretary of Commerce “finds new circumstances exist which necessitate” the proposed new subjects or modifications (13 U.S.C. §141(f)(3)).

The law (13 U.S.C. §141) is silent on whether Congress must accept or reject the topics and questions proposed for the census. Therefore, as a practical matter, if lawmakers disagree with the Census Bureau’s submissions, Congress would need to pass (and the president would need to sign) legislation to add or eliminate questions or modify question wording if the Bureau did not agree to do so on its own.

In addition, the Paperwork Reduction Act (PRA) governs the process for adding, modifying, or eliminating questions on federal surveys/censuses. The PRA requires public notice of any such proposed actions but does not guarantee that the Office of Management and Budget must consider public comments when approving or finalizing an agency action.

Legislation:

Two new legislative proposals emerged in 2017 (115th Congress) to add questions to the decennial census on citizenship, legal status, and (in one case) the basis – by federal program or provision of law – for a person’s legal status in the United States.

1. The “Census Accuracy Act of 2017,” sponsored by Rep. Steve King, R. Iowa, does not aim to affect the apportionment base, but rather to “document” the number of immigrants in the country and their legal status, especially the “number of aliens who are in the country illegally,” according to Rep. King’s press statement on the bill. H.R. 3600, introduced on July 28, 2017 with no original cosponsors, was referred to the Committee

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on Oversight and Government Reform. The bill has eight cosponsors as of January 1, 2018; there is no companion Senate bill to date. Nevertheless, Rep. King released a video on his website on December 22, 2017, urging President Trump to support the exclusion of undocumented residents from the census-derived state population totals used for congressional apportionment. This statement calls into question the true intent of the congressman’s legislation.

2. Rep. Clay Higgins, R. La., filed an amendment with the House Committee on Rules, to offer during floor debate on the FY 2018 CJS appropriations bill. (The CJS bill was considered as part of a larger package of eight appropriations bills in early September 2017.) The amendment would have prohibited the expenditure of any money on the 2020 Census unless it asks questions on U.S. citizenship and “immigration status.” After census stakeholders expressed significant opposition to the proposal, the Rules Committee did not make the amendment “in order” for consideration by the full House.

Draft Executive Order (EO):

As previously mentioned, in January 2017, a draft EO authored by Andrew Bremberg surfaced publicly. Titled “Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Program,” the EO included the following provision: “[T]he Director of the U.S. Census Bureau shall include questions to determine U.S. citizenship and immigration status on the long-form questionnaire in the decennial census.”

The draft provision was puzzling and uninformed for several reasons (especially in hindsight and in light of the December 2017 DOJ letter):

- There is no longer a “long form questionnaire in the decennial census.” The 2000 Census included the last “long form,” sent to roughly one-in-six homes to collect comprehensive socio-economic data beyond the basic data on the “short form” sent to every home. The census long form was replaced in 2005 with the ongoing ACS. The ACS – which, by law, is part of the decennial census – is sent to a rolling sample of 3.5 million addresses a year (295K/month) to produce updated, comprehensive demographic, social, and economic data between censuses, down to the block-group level for the “5-year estimates,” which are averaged from data collected over a five year period to ensure adequate sample size that is roughly equivalent to the old “long form” sample size.
- The ACS, similar to the “long form” before it, **already asks** about citizenship status: (1) “yes,” and if so, whether born in the U.S., a U.S. territory, abroad to U.S. citizen parents, or naturalized; or (2) “no.”

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- The ACS **already asks** about place of birth: (1) in the United States (write in state); or (2) outside the United States (write in foreign country or U.S. territory). As explained earlier, demographers use this information to understand immigration status.
- The ACS **already asks** immigrants (anyone not born in the United States) what year they came to the United States. Again, this information could be considered part of “immigration status,” since it sheds light on transition and assimilation issues.
- If the intent of the draft EO provision was to have the Census Bureau collect data on *legal status in the ACS*, there is very limited precedent for doing so in a government survey (and none for doing so in a mandatory survey). Advocates rightfully should be concerned about a *chilling effect among immigrant households*, which would depress participation in the ACS and, therefore, skew results and reduce data quality, usefulness, and availability for small and less populous areas and small population groups.
 - *The same concern is heightened if applied to the 2020 Census because the decennial enumeration affects every person and every household in the country and is conducted amid a very public and universal advertising and promotion campaign (unlike the ACS).*
 - The Census Act requires the Census Bureau to submit the actual questions to be included in the 2020 Census (which includes the ACS) by April 1, 2018 – a milestone the Bureau approaches only after years of careful design, testing, and evaluation of questions. The Census Bureau already submitted the *topics* to be included in the 2020 Census and ACS; the law required such a submission by April 1, 2017.

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Key Points

Undermining Accuracy

Adding citizenship and/or legal status questions to the 2020 Census, or a legal status question to the ACS, would jeopardize the accuracy of the 2020 Census and quality of the ACS in every state and every community.

- The U.S. Constitution provides that the state population totals used as the basis for congressional apportionment, as derived from a census conducted every 10 years, shall include the “whole number of persons in each State” (14th Amendment, Section 2). Every census since the first enumeration in 1790 has included citizens and non-citizens alike.
- Asking about citizenship or legal status in the 2020 Census, or adding a legal status question to the ACS, will have a *chilling effect* and keep many residents from responding, jeopardizing the accuracy of the census in every state and community.
- In fact, new qualitative Census Bureau research *confirms* that survey respondents and focus group participants are expressing an “unprecedented” level of concern about the confidentiality of data they provide to the Bureau and whether those data will be shared with other federal agencies, and especially immigration enforcement agencies. Some respondents are falsifying data or leaving household members off survey rosters. These findings clearly suggest that adding questions on citizenship and/or legal status to the 2020 Census could have a *chilling effect* on participation, depress response rates for immigrant and mixed status households, and lead to false answers, jeopardizing the quality and usefulness of all data.
 - The proposed new questions (through legislation and executive request) are unnecessarily intrusive and will raise concerns among all respondents – native- and foreign-born, citizens and non-citizens – about the confidentiality of information provided to the government and how government authorities might use that information.
 - Immigrant and “mixed status” households – those with members who are both citizen and non-citizens with various legal status – who will be especially fearful of providing information to the federal government in 2020, given the heightened *climate of fear* that anti-immigrant rhetoric and policies have created.
- Four former Census Directors, who served in both Republican and Democratic administrations, wrote in an [amicus curiae brief](#) in *Evenwel v. Abbott* (578 U.S. ___, 136 S.Ct. 1120 (2016)) that asking about citizenship status in the decennial census, which goes to every household, “would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status.” The former directors went on to say that, “The sum effect would be bad Census data. ...[B]ecause a one-by-one citizenship inquiry would invariably lead to a lower response rate to the Census in

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general, such an inquiry would seriously frustrate the Census Bureau’s ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states.”

- Civil rights groups that litigate the majority of Section 2 claims, and also are involved in the redistricting process from a legislative advocacy standpoint, disagree strongly with DOJ’s assertion that they need block-level citizenship data, collected in conjunction with the basic census demographic data rather than the existing ACS, in order to ensure compliance with Section 2 of the Voting Rights Act. Without a valid legal or programmatic reason for the Census Bureau to collect this information from every household, *many residents who already are skeptical of government surveys might view a new census question on citizenship as unwarranted government intrusion.*
- Congress allocates at least [\\$600 billion annually](#) in federal grants or direct payments to states, localities, and individuals/families for a range of vital programs and services, based on census-derived data. An inaccurate census will skew the prudent and fair distribution of program funds for the next decade.
- There are no do-overs with the census. The nation must live with the consequences of a failed, inaccurate \$15+ billion population count for the next 10 years.

Derailing Census Readiness, and Increasing Costs

Adding citizenship and/or legal status questions to the 2020 Census would disrupt preparations at a pivotal point in the decade, undermining years of costly, painstaking research and testing, and increasing census costs significantly at a time when Congress has directed a less expensive enumeration.

- The Census Bureau has *finished* a multi-year, multi-million dollar research and testing phase for the 2020 Census. It is now finalizing all major design elements and working to operationalize IT systems and methods in preparation for a dry run in early 2018 (the End-to-End Census Test).
- Adding new questions on citizenship and legal/immigration status would require the Bureau to go back to the drawing board on questionnaire design and testing – a process that literally began *more than seven years ago* during the 2010 Census. Requiring these new topics this late in the decade would ***threaten the success of the 2020 Census*** because robust testing in a census-like environment is essential, given the probable chilling effect of adding these questions to the form. The final opportunity for field-testing is the 2018 End-to-End Census Test in Providence County, RI, which kicks off in early 2018.
 - There is no time for additional research and testing of new questions. And the decennial census must take place in 2020 – the Constitution requires it.

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- Adding new questions on citizenship and immigration/legal status to the 2020 Census undoubtedly would affect response rates, outreach and advertising strategies, and other important elements of the nation's largest, most complex peacetime activity, calling into question the results of many years of costly, painstaking research and testing.
- Key 2020 Census design elements and cost assumptions are based on years of research and testing that did not include questions on citizenship and/or legal status. Those assumptions and decisions include questionnaire design, projected self-response rates, staffing needs for telephone assistance and door-to-door follow-up, location and number of local census offices, and the use of administrative records to "count" occupied homes that do not self-respond. It is well documented that even small changes in question order and wording can affect response rates and quality (i.e. truthfulness or accuracy).
- Therefore, Congress will have wasted hundreds of millions of taxpayer dollars already spent to design and plan the 2020 Census. The cost of the census will rise significantly as the Bureau tries to incorporate untested question(s) with little time to spare and then count millions of people who will be more reluctant to participate because of the new topic(s).
- Census costs are likely to rise by hundreds of millions, or even billions, of dollars, as the Bureau tries to incorporate untested question(s), develop new outreach and communications strategies, and plan for the expanded field operation that is likely to emerge as a result of adding controversial topic(s).
- Had Congress adopted the *Higgins amendment*, it essentially would be holding the Census Bureau hostage at a time when the Bureau already does not have sufficient funding to finish rigorous, comprehensive testing and preparations for the 2020 Census. It is irresponsible for Congress to require new questions at the 11th hour for a constitutionally required activity that *must* take place on time.
- Adding new questions to the census at this late date essentially would require the Bureau to conduct the census using untested questions, *a sure recipe for disaster and an inaccurate result.*

Ignoring the Constitution

Should legislation move forward to add citizenship and legal status questions to the census in order to change the apportionment base, the Census Bureau would be adding rushed, untested, unnecessary, and politically motivated questions to the 2020 Census for a purpose that most experts agree is unconstitutional.

- Although the U.S. Supreme Court has never ruled directly on the constitutionality of excluding non-citizens or undocumented residents from the state population totals used for congressional apportionment, *the plain meaning of the 14th Amendment could not be clearer.*

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- In *Evenwel v. Abbott* (578 U.S. ___, 136 S.Ct. 1120 (2016)), a case about state legislative redistricting, a unanimous Supreme Court in 2016 noted that the 14th Amendment contemplates that “representatives serve all residents, not just those eligible to vote,” and that seminal cases setting forth the one-person, one-vote principle (e.g., *Wesberry v. Sanders* (376 U.S. 1); *Reynolds v. Sims* (377 U.S. 533)) confirmed a total-population basis for representational equality in the U.S. House of Representatives.

Please direct questions about the information in this memo to Terri Ann Lowenthal, Census Consultant to The Leadership Conference Education Fund, at TerriAnn2K@aol.com.

ⁱ In accordance with decennial census Residence Criteria, the apportionment base includes members of the armed forces and federal civilian employees stationed outside of the United States, as well as any family members living with them, at the time of the census. These individuals generally are counted in the state listed on their “home of record,” an administrative term that refers to the place a person lived at the time of enlistment or start of federal service. The U.S. Supreme Court has upheld this policy, which was adopted after Congress indicated a clear preference before the 1990 Census to include overseas service members and federal employees in the apportionment population totals (although the policy is not codified).

ⁱⁱ Former Sen. Robert Bennett, R. Utah, also was a primary sponsor of the amendment debated in October 2009.

ⁱⁱⁱ See Reamer, Dr. Andrew, *Counting for Dollars: The Role of the Decennial Census in the Geographic Distribution of Federal Funds (16 Largest Census-guided Programs)*, George Washington Institute of Public Policy, Washington, DC, June 2017. See also <http://civilrightsdocs.info/pdf/census/CountingForDollars-Intro.pdf>

^{iv} In 1940, and again in 1970 through 2000, the Census Bureau used two questionnaires to collect population and housing data during the decennial census. It used the “short” or “100%” form to ask some questions of all households, and a “long” or “sample” form to ask additional questions from a sample of households. The census has not asked about citizenship status on the “short” form sent to all households since 1960. Roughly one-in-six households, on average, received the long form. At the urging of Congress, the Bureau replaced the “long form” in 2005 with the ACS, which gathers a similarly broader range of socio-economic characteristics data that the “long form” did, from a sample of 3.5 million housing units annually. Over a period of five years, the ACS collects data from a comparable sample of homes that the old “long form” did once every 10 years, thereby producing information that is more current throughout the decade. The Census Bureau releases annually updated “5-year ACS estimates” for geographic areas as small as census block groups. Like the data from the census “long form” produced through the 2000 Census, those estimates are now the source of data on citizen voting-age population used in the redistricting process.