

United States Senate

September 10, 2020

The Honorable Dr. Steven Dillingham
Director
U.S. Census Bureau
4600 Silver Hill Road
Washington, DC 20233

Dear Director Dillingham:

We write to raise concerns about the data and methodologies that the Census Bureau will use to develop apportionment counts for each of the states. With the president's unconstitutional memorandum excluding undocumented people from apportionment, coupled with your agency's decision to end the 2020 Census count one month early, we also raise serious concerns about a fair and accurate distribution of congressional representation—a fundamental and crucial aspect of our constitutional democracy.ⁱ

From the time of our founding, the Constitution established a democracy premised on the idea that all persons—no matter where they are from, regardless of whether they can vote—deserve representation in our government. To ensure representation for all, the Constitution, through both Article I, Section 2 and the Fourteenth Amendment, explicitly requires the federal government to accurately conduct an “actual Enumeration” of the people.ⁱⁱ The Fourteenth Amendment places a clear duty on the federal government to count the “whole number of persons in each State.”ⁱⁱⁱ In other words, the federal government must count *all people* living in the United States, whether they are citizens or non-citizens, whether they were born in the United States or in a distant part of the world, whether they are living here in accordance with our laws or not.

Furthermore, the framers of the Fourteenth Amendment considered immigrants, undocumented or otherwise, as *people* entitled to equal representation, insisting that the “whole immigrant population should be numbered with the people and counted as part of them.”^{iv} The Supreme Court has affirmed this constitutional understanding, emphasizing that “the Framers chose to use population . . . as the basis for representation,”^v and that “representatives serve all residents, not just those eligible or registered to vote.”^{vi}

Following the Supreme Court's ruling to block this administration's attempt to add a citizenship question to the 2020 Census, the president issued an executive order directing Commerce Secretary Wilbur Ross to collect citizenship information from other governmental sources.^{vii} Per this directive, the Census Bureau has amassed a collection of administrative records from various sources—some from existing agreements with federal, state, and local agencies, and others from newly established partnerships.^{viii}

However, the collection of citizenship information is not uniform across the country. This raises the prospect that the Census Bureau will have incomplete information as to the citizenship status

of all persons residing in the country. For example, some federal agencies have agreed to share citizenship information with the Census Bureau.^{ix} However, a person's immigration status can change over time. The administrative data on a person is only as good as the moment when the agency interacts with that person.^x For example, a person who entered the country without documentation may have received Deferred Action for Childhood Arrivals protection, or may have started a path to citizenship by serving in the military, or may have been granted asylum protection. Depending on when a person interacts with an agency, their status may be very different from what it is currently.

At the same time, not every state is sharing citizenship data. States such as Iowa, Nebraska, South Carolina and South Dakota agreed to share driver's license and state identification card information.^{xi} But states like Pennsylvania, New Hampshire, and Illinois denied the Census Bureau's request to share information.^{xii} Furthermore, state administrative data on citizenship can be unreliable and inaccurate.^{xiii} As a result, your agency will have arbitrarily collected information based on state officials who decide to share or not information about their citizens, some of which will contain citizenship information, and some will not.

This arbitrary collection of citizenship information implicates the president's unconstitutional attempt to exclude undocumented people from fair representation in the Congress. Apportionment is a geographic division of congressional seats. If only certain states are sharing citizenship information—and the data shared is itself unreliable or inaccurate—and federal data sets do not capture all persons in the country, then the data available to the Census Bureau for apportionment tabulation will be incomplete and run afoul of the Constitution. The resulting reapportionment report submitted to the U.S. House of Representatives by the president will be an inaccurate, arbitrary, and unconstitutional distribution of congressional seats across the country, based on states that either had or did not have citizenship information for selected portions of their population.^{xiv} An arbitrary collection of data will produce a bad output based on that data—garbage in, garbage out.

In addition, the *Census Act* prohibits the Census Bureau from using sampling methods to determine apportionment. In 1999, the U.S. Supreme Court rejected the Census Bureau's proposed uses of statistical sampling to calculate the population for purposes of congressional apportionment following the 2000 decennial census.^{xv} A similar effort by the agency to use statistical sampling to determine the numbers of undocumented people in each state should be rejected by the courts.

These problems are further exacerbated by the agency's decision to end self-response and non-response follow up operations a month early—from October 31 to September 30.^{xvi} The shortened schedule risks the accuracy of the Census Bureau's data products, including the apportionment tabulation, and raises risks that errors will neither be found nor fixed. A federal judge recently issued a temporary restraining order to stop the Census Bureau from winding down or altering 2020 Census field operations until a September 17 hearing.^{xvii} Furthermore, the administration's refusal to include statutory deadline extensions in their negotiations with congressional leaders on coronavirus relief legislation, raise questions about their commitment to addressing these concerns.^{xviii}

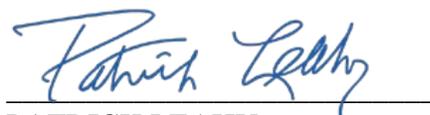
To address some of these concerns, we ask that you provide answers to the following questions:

- In implementing Executive Order 13880, can the Census Bureau collect administrative record data uniformly and universally across the country? If so, how?
- What are the models and methodologies that the Census Bureau is currently developing and studying to tabulate apportionment? Does the agency have enough time to study, test, and implement these apportionment models and methodologies prior to the December 31, 2020 deadline? How will these models and methodologies comply with the *Census Act*'s prohibition on the use of statistical sampling for apportionment purposes?
- An agency document on 2020 Census operations and data processing notes that “A compressed review period creates risk for serious errors not being discovered in the data – thereby significantly decreasing data quality.”^{xix} The document also notes that “serious errors discovered in the data may not be fixed — due to lack of time to research and understand the root cause or to re-run and re-review one or multiple state files.” How will the Census Bureau ensure that its apportionment tabulation does not contain significant errors?
- As the Census Bureau implements the president’s July 21, 2020, memorandum, how will you ensure that the apportionment tabulation is developed in a way that is not arbitrary when the agency uses administrative data collected through agreements with other federal, state, and local agencies that is not uniformly shared and may contain errors and inaccuracies?
- To what degree of confidence can the Census Bureau assure the public that its apportionment tabulation is not arbitrary, does not contain significant errors, and is a fair and representative distribution of congressional seats? What is the basis for the agency’s confidence, considering many of the quality assurance processes that will be side-stepped or completed hastily under the condensed timeframe?

These questions raise serious concerns about one of the most fundamental constitutional activities: the apportionment of congressional representation. With the end of the 2020 Census and the apportionment deadline fast approaching, we request your written response by September 24, 2020. Thank you for your attention to our request.

Sincerely,


BRIAN SCHATZ
United States Senator


PATRICK LEAHY
United States Senator


RON WYDEN
United States Senator


KIRSTEN GILLIBRAND
United States Senator



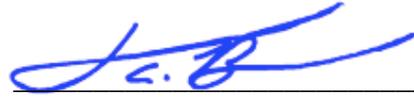
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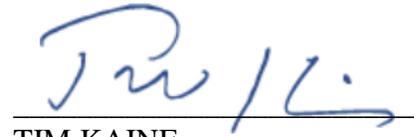
JEFFREY A. MERKLEY
United States Senator

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MARTIN HEINRICH
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MAZIE K. HIRONO
United States Senator



TIM KAINE
United States Senator



BERNARD SANDERS
United States Senator



JACKY ROSEN
United States Senator

cc: The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce

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- ⁱ “Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census,” Memorandum, 85 FR 44679, 21 July 2020, <https://www.federalregister.gov/documents/2020/07/23/2020-16216/excluding-illegal-aliens-from-the-apportionment-base-following-the-2020-census>.
- ⁱⁱ U.S. Const. art. I, § 2, cl. 3.
- ⁱⁱⁱ *Id.* Amend. XIV, § 2.
- ^{iv} Cong. Globe, 39th Cong. 1st 432 (1866).
- ^v *Utah v. Evans*, 536 U.S. 452, 478 (2002).
- ^{vi} *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).
- ^{vii} “Collecting Information About Citizenship Status in Connection With the Decennial Census,” EO 13880, 11 July 2019, 84 FR 33821, <https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connection-with-the-decennial-census>.
- ^{viii} Hansi Lo Wang, “To Figure Out Who’s A Citizen, Trump Administration Is Using These Records,” *NPR*, 20 May 2020, <https://www.npr.org/2020/05/20/855062093/to-figure-out-whos-a-citizen-trump-administration-is-using-these-records>.
- ^{ix} Hansi Lo Wang, “To Produce Citizenship Data, Homeland Security To Share Records With Census,” *NPR*, 4 Jan. 2020, <https://www.npr.org/2020/01/04/793325772/to-produce-citizenship-data-homeland-security-to-share-records-with-census>.
- ^x Tye Rush, Suzanne Almeida, Keshia Morris, “Whitewashing Representation: How using citizenship data to gerrymander will undermine our democracy,” Common Cause Education Fund, 2019, https://www.commoncause.org/wp-content/uploads/2019/10/WhitewashingRepresentation_WEBFINAL.pdf.
- ^{xi} Hansi Lo Wang, “Four States Are Sharing Driver’s License Info To Help Find Out Who’s A Citizen,” *NPR*, 14 July 2020, <https://www.npr.org/2020/07/14/890798378/south-dakota-is-sharing-drivers-license-info-to-help-find-out-who-s-a-citizen>.
- ^{xii} *Ibid.*
- ^{xiii} ACLU, “ACLU 2020 Census State Administrative Records Comment,” 15 Nov. 2019, <https://www.aclu.org/letter/aclu-2020-census-state-administrative-records-comment>.
- ^{xiv} 13 U.S.C. § 141 (b): The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.
- ^{xv} *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, (1999).
- ^{xvi} “U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19,” U.S. Census Bureau, 13 April, 2020, <https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020>.
- ^{xvii} Mike Schneider, “Census Bureau stops layoffs for door knockers after order,” *AP News*, 8 Sept. 2020, <https://apnews.com/3605213c469e941ccd630b7b618d11e7>.
- ^{xviii} “In New Letter, Schumer And Pelosi Say Trump Administration’s Efforts To Rush Census Count Despite Expert Warnings Are Politically Motivated And Threaten Census Accuracy, Call For Full Disclosure Of Decision-Making Process,” Senate Democrats, 4 Sept. 2020, <https://www.democrats.senate.gov/newsroom/press-releases/in-new-letter-schumer-and-pelosi-say-trump-administrations-efforts-to-rush-census-count-despite-expert-warnings-are-politically-motivated-and-threaten-census-accuracy-call-for-full-disclosure-of-decision-making-process>.
- ^{xix} “Operational and Processing Options to Meet Statutory Date of December 31, 2020 for Apportionment,” U.S. Census Bureau, 3 Aug. 2020, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Census%20Slide%20Deck%20Aug%203%2020.pdf>.