



TESTIMONY OF

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BEFORE THE COMMITTEE ON OVERSIGHT AND REFORM

OF THE

U.S. HOUSE OF REPRESENTATIVES

Providing the Census Bureau with the Time to Produce a Complete and
Accurate Census

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Testimony of Hans A. von Spakovsky

Thank you for the invitation to testify before the Committee on the issue of the conduct of the 2020 Census and the vital importance of collecting citizen population data for the purposes of apportionment, redistricting, and enforcement of the Voting Rights Act of 1965 (“the VRA”).

I am Hans A. von Spakovsky, a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation (www.heritage.org). I was a Commissioner on the Federal Election Commission for two years and am a former career Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, where I coordinated enforcement of federal voting rights laws including the VRA.

I am also a former member of the Presidential Advisory Commission on Election Integrity; the Board of Advisors of the U.S. Election Assistance Commission; the Registration and Election Board of Fulton County, Georgia; the Electoral Board of Fairfax County, Virginia; and the Virginia Advisory Board to the U.S. Commission on Civil Rights. I have published extensively and have testified before both congressional and state legislative committees on voting and election issues.

All of the views and opinions I express in my testimony are my own and should not be construed as representing any official position of The Heritage Foundation or any other organization.

In summary, it is essential that the Census Bureau follow longstanding historical precedent and collect data on the number of citizens and noncitizens present in the United States using the available, extensive information on citizenship of the U.S. population contained in executive branch agency records. That data is important not only for potential use in apportionment and redistricting, but also for effective enforcement of the Voting Rights Act. It is within the constitutional and delegated authority of the chief executive to direct the collection of citizenship data, including for apportionment purposes.

Collection of citizenship data is also vital to establish a consensus on national immigration policy. Without citizenship data, it is not possible to have an informed debate and discussion over what U.S. policy should be and how to successfully implement it.

The collection of citizenship data by the Census Bureau from available executive branch agency records is required for effective enforcement of the Voting Rights Act.

On July 11, 2019, President Trump issued an executive order directing all federal agencies to provide the Census Bureau with administrative records “showing citizenship data.”² This citizen voting age population (“CVAP”) data is essential to effective enforcement of Section 2 of the VRA when implementing remedies in vote dilution cases.

The Census Bureau has been collecting citizen population data since the 1820 Census, which had the first citizenship question on a Census form. It currently collects that data through the American Community Survey (“the ACS”), which also has a citizenship question.

However, since the ACS is only sent out annually to about 2.5 percent of American households, the ACS does not collect complete data on the entire country. The executive order ensures that the Census Bureau has access to all available records on the citizenship status of the population.

This executive order followed a fragmented 2019 Supreme Court decision holding that the executive branch has both the constitutional and statutory authority to reinstate a citizenship question on the Census form, but that the Department of Commerce had not followed the proper procedure to do so under the Administrative Procedure Act.³ This was a flawed decision; the administration followed the correct procedures and, as Justice Clarence Thomas wrote in his dissent, the Court should have stopped its analysis when it determined that the citizenship question is both constitutional and within the legal authority of the Secretary of the Department of Commerce.

So the Census Bureau has the right to collect citizenship data. In fact, even the United Nations [recommends](#) that its member countries ask a citizenship question on their census surveys, and countries ranging from Australia to Germany to Indonesia all ask this question.⁴ Only in the U.S. is this considered at all controversial — and it shouldn’t be.

² Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census, E.O. 13880, July 11, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/>.

³ Department of Commerce v. New York, 588 U.S. ___ (2019).

⁴ Principles and Recommendations for Population and Housing Censuses, Department of Economic and Social Affairs, Statistics Division, United Nations, 2017, p. 191, https://unstats.un.org/unsd/publication/seriesM/Series_M67Rev3en.pdf.

When it is available, the limited citizenship data from the ACS is routinely used by the Civil Rights Division of the Department of Justice in enforcing Section 2 of the VRA, which prohibits laws, regulations, or voting practices and procedures that discriminate on the basis of race, color, or membership in a protected language minority group.⁵ Section 2 is most often used for challenges to at-large districts and to the redistricting process, ensuring that minority voters do not “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁶

Thus, when a court finds a violation of Section 2, the remedy is to draw a district – whether it is a town council, school board, county commission, state legislative, or congressional district – in which minority voters constitute a majority of the voters (known as a majority/minority district) such that they can elect their candidates of choice. Citizen population data is essential to drawing an effective voting district for minority voters.

For example, if a group of minority voters constitutes 51 percent of a district, then they will be able to elect their candidates of choice as the majority of the electorate in that district. But if a district is drawn using total population data, which includes both citizens and noncitizens, to draw a district in which Hispanics, for example, constitute 51 percent of the district, eligible Hispanic voters – citizens – may not constitute 51 percent of the voting electorate in that district. Thus, the Hispanics who can vote may only be a minority of the electorate and therefore are not able to elect their candidate of choice. Using total population rather than citizen population will not cure a Section 2 violation.

The Justice Department, as the designated chief enforcer of the VRA, concentrates on the number of eligible *citizen* voters when evaluating possible violations of the law and the appropriate remedies – when that data is available from the ACS. But because of its limited scope, that data is not available for every jurisdiction in the country, which handicaps the Justice Department and the courts in effectively enforcing the VRA.

The Justice Department’s use of citizenship data can be seen in the complaints filed by the Civil Rights Division of the Justice Department to enforce Section 2. This included, for example, the Justice Department’s complaint filed in *U.S. v. Town of Lake Park, Florida*, when DOJ challenged the town’s at-large method of electing commissioners “on the grounds that it dilutes the voting strength of black citizens in violation of Section 2.”⁷

⁵ 52 U.S.C. §10301 (a).

⁶ 52 U.S.C. §10301 (b).

⁷ Civil Action. No. 09-80507 (S.D. Fla.) (emphasis added), <https://www.justice.gov/crt/united-states-district-court-southern-district-florida-west-palm-beach-division>.

The complaint relied on citizen voting age population, rather than total voting age population, to ensure that the new districts would include at least one that would have a majority of eligible black voters which would be sufficient to elect their candidate of choice.

Numerous other enforcement cases filed by the Justice Department emphasize the need to use citizen voting age population when drawing districts. These include *U.S. v. Euclid City School District Board of Education*; *U.S. v. The School Board of Osceola County, Florida*; *U.S. v. Georgetown County School District, South Carolina*; *U.S. v. City of Euclid, Ohio*; *U.S. v. City of Boston*; and *U.S. v. Alamosa, County, Colorado*.⁸

While the Supreme Court concluded in 2016 in *Evenwell v. Abbott* that the use of total population, which includes noncitizens, in drawing districts does not violate the “one-person, one-vote requirement” of the Equal Protection Clause of the Fourteenth Amendment, the use of citizen population data is necessary to prevent the creation of discriminatory districts that dilute the votes of citizens. This is especially true for racial and ethnic minority citizens who may constitute a minority of the voting electorate in their particular districts.⁹

Basing apportionment on total population that includes large numbers of illegal aliens is fundamentally unfair to American citizens and dilutes and diminishes the value of their votes.

The right to vote is a sacred one and American leaders should make every effort within the law to ensure that right is protected. Including illegal aliens – who have no electoral or representational rights in the U.S. – in the population used to apportion congressional seats is fundamentally unfair to American citizens. It dilutes the votes of citizens and denies states with fewer illegal aliens seats in Congress to which they would otherwise be entitled. The inclusion of illegal aliens perversely incentivizes states to encourage more illegal immigration in violation of U.S. law and the well-being of American citizens in order to gain more congressional representation. This contributes to the breakdown in the rule of law, one of the most basic and fundamental principles on which this democratic republic is based.

On July 21, 2020, President Trump issued a memorandum to the Commerce Department directing that illegal aliens be excluded from the population used for apportionment

⁸ These complaints are all available at the website of the Civil Rights Division, <https://www.justice.gov/crt/voting-section-litigation>.

⁹ 136 S.Ct. 1120 (2016).

purposes.¹⁰ This is within his constitutional and statutory authority, as well as the correct policy.

Art. I, Sec. 2, Cl. 3 of the Constitution grants Congress the power to direct the conduct of the Census. By statute, Congress has delegated authority to the Secretary of the Department of Commerce to conduct the Census “in such form and content as he may determine.”¹¹ The Secretary transmits the report of the total population to the President.¹² The President then makes a determination of the “whole number of persons in each state” for the purpose of apportioning congressional representation and sends that information to Congress.¹³

As the U.S. Supreme Court said in *Franklin v. Massachusetts*, it is the “personal transmittal of the report to Congress” that “settles the apportionment” of congressional representatives; the president’s discretion in carrying out that duty is more than “ceremonial or ministerial.”¹⁴ In other words, part of the president’s duty (and of the Commerce Department and the Census Bureau) is to make “policy judgments,” including determining who are the inhabitants of each state that must be included in the apportionment population.

Since the first Census, we have not counted every single individual physically present in each state. As is the normal procedure, for example, “Citizens of foreign countries visiting the United States, such as on a vacation or business trip” are “[n]ot counted in the census.”¹⁵

In the *Franklin* case, the Supreme Court pointed out that the key phrase in the Constitution concerning the number of persons “in each State” 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.”¹⁶ Illegal aliens clearly have no element of political allegiance to any state or the federal government – they cannot be drafted for jury duty or

¹⁰ Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44674, July 21, 2020, <https://www.federalregister.gov/documents/2020/07/23/2020-16216/excluding-illegal-aliens-from-the-apportionment-base-following-the-2020-census>.

¹¹ 13 U.S.C. § 141(a).

¹² 13 U.S.C. § 141(b).

¹³ 2 U.S.C. § 2a(a). Section 2 of the Fourteenth Amendment provides that representatives shall be apportioned based on the “whole number of persons in each State.”

¹⁴ 505 U.S. 788, 799-800 (1992).

¹⁵ Residence Criteria and Residence Situations for the 2020 Census of the United States, U.S. Census Bureau, <https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html>. See also *Federation for American Immigration Reform v. Klutznick*, 486 F.Supp. 564 (D.D.C. 1980) (noting that foreign diplomats and foreign tourists have not been counted by the Census).

¹⁶ 505 U.S. at 804.

for military service (if the U.S. still had a mandatory draft) because they owe their political allegiance to the native country of which they are a citizen.

Furthermore, illegal aliens have no “enduring tie” to any state since they are illegally present in the country. They can be picked up, detained at any time by federal authorities, and removed from the U.S. Thus, excluding individuals who have no allegiance or enduring tie to a state is well within the precedent set by the Court in *Franklin*. As the Court said in *Reynolds v. Sims*, its seminal case on representational government and the Equal Protection Clause, “achieving of fair and effective representation of all *citizens* is concededly the basic aim of legislative apportionment.”¹⁷

The Court in *Franklin* cited the disputed congressional residence qualifications in 1824 of “would-be Representative John Forsyth...who had been living in Spain during his election.” The House of Representatives determined he was qualified. In the debate, “Representative Bailey, supporting the qualification of Mr. Forsyth, pointed out that if ‘the mere living in a place constituted inhabitancy,’ it would “exclude sitting members of this House.”¹⁸

Illegal aliens are not citizens and the fact that they may be temporarily (or “merely” as the Supreme Court said) living in a particular state does not make one an “inhabitant” who must be counted for apportionment purposes.

Finally, including aliens in apportionment not only dilutes the votes of individual citizens, but also damages the distribution of representation of state governments in our federal republic. In 2015, the Congressional Research Service analyzed how seats in the House would have been apportioned using the estimated citizen population instead of the 2010 total population Census count. Louisiana, Missouri, Montana, North Carolina, Ohio, Oklahoma, and Virginia would have all gained one congressional representative. California, Florida, New York, and Texas would have lost seats. These latter states have gained congressional seats based on noncitizen populations, particularly large numbers of illegal aliens in states like California, at the expense of the representation to which Louisiana, Missouri, Montana, North Carolina, Ohio, Oklahoma, and Virginia are entitled.¹⁹

Conclusion

¹⁷ 377 U.S. 533, 565-566 (1964) (emphasis added).

¹⁸ 505 U.S. 788, 805 (citations omitted).

¹⁹ Royce Crocker, Apportioning Seats in the U.S. House of Representatives Using the 2013 Estimated Citizen Population, Congressional Research Service, Oct. 30, 2015,

Including noncitizens in apportionment and redistricting unfairly dilutes the votes of citizens and distorts the political representation of states, giving some states more congressional representatives than they are entitled (and depriving others) based on a population that has no right to political representation or to even be present in the country. This violates fundamental principles of fairness and equity to which citizens are entitled as members of the body politic.

The senior leadership of the Census Bureau has already testified before this Committee that it has the ability, the time, and the resources – despite the COVID-19 pandemic – to provide an accurate count of the population of the U.S., as it has in numerous prior Census counts. That includes its duty and obligation to provide a complete count of the number of citizens and noncitizens present in the country.