

October 2, 2018

The Honorable Ron Johnson, Chairman
The Honorable Claire McCaskill, Ranking Member
U.S. Senate Committee on Homeland Security & Government Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson and Ranking Member McCaskill:

We write to you regarding the nomination hearing of Steven D. Dillingham to be Director of the Census¹ EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC takes no position for or against the nominee. However, the Census implicates numerous privacy issues.² EPIC specifically asks the Census Bureau to suspend the citizenship question from the 2020 census form until a thorough and updated Privacy Impact Assessment is conducted. The Bureau has failed to demonstrate the data gathered from that particular question will not undermine the privacy rights of those who respond to the census.

EPIC supports the work of the Census Bureau and the use of statistical analysis in policymaking and other government initiatives.³ The Census is an essential part of understanding the changing demographics in America. The census helps ensure evidence-based policy decisions and census data is the source of much political and economic planning in the United States. However, it is of the utmost importance the individual privacy is respected. Every effort must be taken to ensure that the personal information of individuals and that census data is not used improperly.

Through a Freedom of Information Act request EPIC has obtained documents regarding Secretary Ross's decision to add the citizenship question to the 2020 Census.⁴ The documents obtained by EPIC reflect the varying opinions from lawmakers, scientists, and immigration groups

¹ *Nomination of Steven D. Dillingham to be Director of the Census*, 115th Cong. (2018), S. Comm. on Homeland Security & Governmental Affairs, <https://www.hsgac.senate.gov/hearings/09/25/2018/nominations> (October 3, 2018).

² *The Census and Privacy*, EPIC, <https://epic.org/privacy/census/>.

³ EPIC testified before the Commission on Evidence-Based Policymaking and called for the Commission to adopt innovative privacy safeguards to protect personal data and make informed public policy decisions. Marc Rotenberg, Commission on Evidence-Based Policymaking: Privacy Perspectives, before the National Academies of Science, Sep. 9, 2016, <https://epic.org/privacy/wiretap/RotenbergCEBP-9-16.pdf>.

⁴ FOIA Production 1, <https://epic.org/foia/censusbureau/EPIC-18-03-22-Census-Bureau-FOIA-20180611-Production-1.pdf>; FOIA Production 2, <https://epic.org/foia/censusbureau/EPIC-18-03-22-Census-Bureau-FOIA-20180611-Production-2.pdf>; FOIA Production 3, <https://epic.org/foia/censusbureau/EPIC-18-03-22-Census-Bureau-FOIA-20180611-Production-3.pdf>; FOIA Production 4, <https://epic.org/foia/censusbureau/EPIC-18-03-22-Census-Bureau-FOIA-20180611-Production-4.pdf>.

about the proposal. The documents also reveal that Kris Kobach, former Vice Chair of the now-defunct Presidential Advisory Commission on Election Integrity, urged Secretary Ross "on the direction of Steve Bannon" to add the citizenship question. According to an analysis conducted by the Census Bureau, the impact of asking about citizenship would be "very costly, harms the quality of the census count, and would use substantially less accurate citizenship data than are available" from other government resources.

I. Past Misuses of Census Data

There is substantial concern about the confidentiality of census data as a result of Secretary Ross's decision to add a citizenship question to the 2020 census. Despite strong census privacy laws, the U.S. has a sordid history of misusing census data to target minority groups. The most egregious misuse of census data was the role it played in the internment of Japanese-Americans during World War II.⁵ In 1943 the Census Bureau complied with a request by the Treasury Secretary for the names and locations of all people of Japanese ancestry in the Washington, D.C., area.⁶ The Bureau should remember this human rights abuse every time another agency requests census data.

EPIC has a strong interest in the government's use of Census data. After 9-11, EPIC pursued a Freedom of Information Act request about the transfer of Census data to the Department of Homeland Security. Documents obtained by EPIC revealed that the Census Bureau had provided the Department of Homeland Security ("DHS") with census data on individuals of Arab ancestry.⁷ In 2004 EPIC obtained documents revealing that the Census Bureau provided the DHS statistical data on people who identified themselves on the 2000 census as being of Arab ancestry. The special tabulations were prepared specifically for the law enforcement agency. There is no indication that the Department of Homeland Security requested similar information about any other ethnic groups.

One document,⁸ obtained by EPIC, shows cities with populations of 10,000 or more and with 1,000 or more people who indicated they are of Arab ancestry. For each city, the tabulation provides total population, population of Arab ancestry, and percent of the total population which is of Arab ancestry. The tabulations were produced using data from the 2000 census long-form questionnaire, which goes to only a sample of the population. A second document⁹ shows the number of census responses indicating Arab ancestry in certain zip codes throughout the country. The responses

⁵ JR Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WW II*, Scientific American (March 30, 2007), <https://www.scientificamerican.com/article/confirmed-the-us-census-b/>.

⁶ W. Seltzer and M. Anderson, "Census Confidentiality under the Second War Powers Act (1942-1947)." Paper prepared for presentation at the annual meeting of the Population Association of America, New York, March 29-31, 2007, available at <http://studylib.net/doc/7742798/census-confidentiality-under-the-second-war-powers>.

⁷ *Department of Homeland Security Obtained Data on Arab Americans From Census Bureau*, EPIC, <https://epic.org/privacy/census/foia/>; Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, New York Times, Jul. 30, 2004, <http://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>.

⁸ EPIC FOIA, Tabulation 1: "Places with 10,000 or More Population and with 1,000 or More Persons of Arab Ancestry: 2000" https://epic.org/privacy/census/foia/tab_1.pdf.

⁹ EPIC FOIA, Tabulation 2: "People of Arab Ancestry by ZIP Code Tabulation Area: 2000" https://epic.org/privacy/census/foia/tab_2.pdf.

indicating Arab ancestry are subdivided into Egyptian, Iraqi, Jordanian, Lebanese, Moroccan, Palestinian, Syrian, Arab/Arabic, and Other Arab. Although this data was not personally identifiable, its disclosure to a law enforcement agency was unethical.

The reason DHS gave for requesting these tabulations was to determine which languages signs should be in at international airports.¹⁰ Heavily redacted emails¹¹ between a Census Bureau analyst and a DHS official show that the Bureau gave the documents before the intended purpose for the data was known and that this explanation was given after the tabulations had already been disclosed. The ex-post-facto reason given by DHS seems pretextual.

As a result of these revelations, resulting from EPIC's FOIA litigation, the Census Bureau revised its policy on sharing statistical information about "sensitive populations" with law enforcement or intelligence agencies. Customs and Border Protection also changed its policy on requesting "information of a sensitive nature from the Census Bureau."¹²

II. Census Data Should Never Be Used for Enforcement Purposes

Using census data to help enforce laws is a corruption of the decennial census's constitutional purpose. The Department of Justice ("DOJ") requested the citizenship question on the census would allow the agency to better enforce Section 2 of the Voting Rights Act, which bars the dilution of voting power of a minority group through redistricting. DOJ wants census-block-level data for locations where they suspect Section 2 violations have occurred.

The decennial census's statistical purpose is frustrated when other agencies ask it to collect data for other purposes. The DOJ's responsibility to enforce the Voting Rights Act is vital to ensuring fair elections. In its request to the Bureau, the DOJ called the decennial census the "most appropriate vehicle" for collecting data on the citizen voting-age population.¹³ EPIC disagrees with this assertion. The decennial census was never intended to be a catch-all data collection to assist other federal agencies. In fact, the statutes concerning the privacy of census data are meant to expressly prohibit this.

If the Census Bureau gets into the business of collecting data because it will assist other federal agencies enforce laws, it will be difficult to stay true to its constitutional purpose of conducting impartial statistical analysis. And it will undermine the integrity, accuracy, and reliability of the census. As a former director of the Bureau succinctly put it thirteen years ago: "The Census Bureau cannot become a quasi-investigatory agency and still perform its basic responsibilities as a statistical agency."¹⁴ The Bureau does not serve an investigatory function and the DOJ (or any other agency) should not expect it to.

¹⁰ EPIC FOIA, https://epic.org/privacy/census/foia/census_emails.pdf.

¹¹ *Id.*

¹² U.S. Customs and Border Protection, *Policy for Requesting Information of a Sensitive Nature from the Census Bureau*, Memorandum (Aug. 9, 2004), <https://epic.org/privacy/census/foia/policy.pdf>.

¹³ *Re: Request to Reinstate Citizenship Question on 2020 Census Questionnaire* (Dec. 12, 2017), <https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html>.

¹⁴ *Counting the Vote: Should Only U.S. Citizens be Included in Apportioning Our Elected Representatives?*, Hearing Before Subcomm. on Federalism and the Census of the H. Comm. on Gov't Reform, 109th Cong. 77 (2005) (statement of former director of U.S. Census Bureau Kenneth Prewitt).

IV. Insufficiency of Privacy Impact Assessment

The Privacy Impact Assessment (“PIA”) for the 2020 decennial census¹⁵ indicates that the Census Bureau has not undertaken an appropriate analysis of the privacy risks of the citizenship question. “Citizenship” is listed as “other general personal data” that will be collected by the census.¹⁶ But, where the Bureau is required to indicate the status of the information system, it selects: “This is an existing information system without changes that create new privacy risks.”¹⁷ There is no analysis of the new question.

The PIA does not satisfy the Department of Commerce’s own standards.¹⁸ A PIA must be updated “where a system change creates new privacy risks.” The Department of Commerce lists nine examples of new privacy risks, and the addition of the citizenship question and the stated purposes for doing so would create at least four of those risks.

The new question would alter the character of the data: “when new information in identifiable form added to a collection raises the risks to personal privacy (for example, the addition of health or financial information).”¹⁹ Citizenship data is new information and it is identifiable because it is collected alongside the other information of the person filling out the census form. Immigration status added to the collection of the other demographic data collected by the census undeniably raises the risk to personal privacy. If that privacy were to be violated, that information could be used against the respondent for deportation or other purposes. The PIA does not acknowledge the privacy risks raised by the new question and the Bureau should conduct a new PIA dealing specifically with the issues raised by the citizenship question.

EPIC looks forward to working with the Committee to ensure that the census data provides the maximum benefit to the American public while minimizing the privacy risks. We ask that this letter from EPIC be entered in the hearing record.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ Christine Bannan
Christine Bannan
EPIC Consumer Protection Counsel

¹⁵ U.S. Department of Commerce, U.S. Census Bureau, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division* (July 28, 2018)

http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN08_PIA_SAOP_Approved.pdf.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 2.

¹⁸ U.S. Department of Commerce, Office of Privacy and Open Government, *Privacy Compliance* <http://www.osec.doc.gov/opog/privacy/compliance.html>.

¹⁹ *Id.* “Alteration in Character of Data” is the ninth example in the list of privacy risks.