



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

November 9, 2020

Jared V. Grubow
Wilmer Cutler Pickering Hale and Dorr LLP
O.B.O. The Brennan Center for Justice
jared.grubow@wilmerhale.com

**Re: FOIA Tracking No. FY20-113;
Brennan Ctr. vs. Dep't of Commerce, et al., D.D.C. No. 20-cv-02674**

Dear Mr. Grubow:

This letter responds to your July 1, 2020 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC") on behalf of the Brennan Center for Justice at NYU School of Law ("Brennan Center"), in which you sought four categories of "records created on or after June 27, 2019," "concerning the 2020 Census." As you know, the request is also the subject of the above-captioned litigation, was narrowed in certain ways by negotiations through counsel, and has the tracking number FY20-113. Pursuant to 28 C.F.R. § 16.5(b), your request was processed in the expedited processing track.

OLC has completed a search of its files and identified three responsive records. We have enclosed one record without redaction. That record may be privileged and therefore exempt from mandatory disclosure pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), but we are releasing it as a matter of discretion. We are withholding the remaining two records in full pursuant to FOIA Exemption Five. Portions of one of the withheld records are also withheld pursuant to FOIA Exemption Six, 5 U.S.C. § 552(b)(6), which exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. As agreed through counsel, we have enclosed a preliminary index of the withheld records with additional information about the records and the bases for their withholding. We have determined that none of the withheld material is appropriate for discretionary release.


For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Stephen Elliott of the Civil Division at 202-353-0889 or at stephen.m.elliott@usdoj.gov to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National

Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Although your request is the subject of ongoing litigation, and administrative appeals are not ordinarily acted upon in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following website: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,


for Paul P. Colborn
Special Counsel

Enclosures

cc: Stephen M. Elliott, Senior Counsel
Civil Division, Federal Programs Branch



U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

July 11, 2019

MEMORANDUM

*Re: Proposed Executive Order entitled, "Collecting
Information About Citizenship Status in Connection with
the Decennial Census"*

The attached proposed Executive Order was prepared by the Office of the Counsel to the President and submitted to this Office for review with respect to form and legality.

In *Department of Commerce v. New York*, No. 18-966, 2019 WL 2619473 (June 27, 2019), the Supreme Court held that the decision by the Department of Commerce (Department) to include a citizenship question on the 2020 decennial census was, in the circumstances of the case, insufficient to support the Department's decision. The Court therefore approved vacating the decision and remanding the issue to the Department. *See id.* at *16. Because the Court's decision, as a practical matter, means that a citizenship question cannot be added to the 2020 census, the attached proposed Order would set out an alternative process for collecting complete and accurate citizenship data.

The proposed Order would explain that taking action to acquire accurate and complete citizenship data is important for several reasons. Access to such data could potentially (1) help government officials make basic policy decisions about immigration; (2) assist decisionmakers as they evaluate potential changes in public benefits programs; (3) allow the government to generate a reliable count of the unauthorized alien population; and (4) assist state officials that may be interested in using citizenship data to draw legislative districts. The proposed order would find that it is the policy of the United States to develop complete and accurate data on the number of citizens, non-citizens, and illegal aliens in the country.

To that end, the proposed Order contains four operative provisions. First, the proposed Order would direct federal departments and agencies to provide to the Department of Commerce ("the Department") access to existing administrative records that may be relevant to compiling accurate citizenship data. The proposed Order would specify that access to such records would be provided to the Department only to the extent allowed by law. Second, the proposed Order would establish an interagency working group to improve access to administrative records, with the ultimate goal of compiling administrative records showing the citizenship status of the entire United States population. Third, the proposed Order would direct the Secretary of Commerce to consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census and to consider regulatory changes to collect citizenship data through

other surveys administrated by the Census Bureau. Finally, the proposed Order would direct the Department to undertake efforts to obtain relevant citizenship data from the States.

The proposed Executive Order is approved with respect to form and legality.

A handwritten signature in black ink, appearing to read 'S. Engel', with a stylized, flowing script.

Steven A. Engel
Assistant Attorney General



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

July 11, 2019

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive Order entitled, "Collecting Information About Citizenship Status in Connection with the Decennial Census." This proposed Executive Order was prepared by the Office of the Counsel to the President and submitted to this Office for review with respect to form and legality.

The proposed Executive Order is approved with respect to form and legality.

Respectfully,

A handwritten signature in black ink, appearing to read "S. Engel", is written over the typed name.

Steven A. Engel
Assistant Attorney General

EXECUTIVE ORDER

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COLLECTING INFORMATION ABOUT CITIZENSHIP
STATUS IN CONNECTION WITH THE DECENNIAL CENSUS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. In *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), the Supreme Court held that the Department of Commerce (Department) may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census and, more specifically, declined to hold that the Secretary of Commerce's decision to include such a question on the 2020 decennial census was "substantively invalid." That ruling was not surprising, given that every decennial census from 1820 to 2000 (with the single exception of 1840) asked at least some respondents about their citizenship status or place of birth. In addition, the Census Bureau has inquired since 2005 about citizenship on the American Community Survey -- a separate questionnaire sent annually to about 2.5 percent of households.

The Court determined, however, that the explanation the Department had provided for including such a question on the census was, in the circumstances of that case, insufficient to support the Department's decision. I disagree with the Court's ruling, because I believe that the Department's decision was fully supported by the rationale presented on the record before the Supreme Court.

The Court's ruling, however, has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire. After examining every possible alternative, the Attorney General and the Secretary of

Commerce have informed me that the logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the question on the 2020 decennial census.

Nevertheless, we shall ensure that accurate citizenship data is compiled in connection with the census by other means. To achieve that goal, I have determined that it is imperative that all executive departments and agencies (agencies) provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective. When the Secretary of Commerce decided to include the citizenship question on the census, he determined that such a question, in combination with administrative records, would provide the most accurate and complete data. At that time, the Census Bureau had determined based on experience that administrative records to which it had access would enable it to determine citizenship status for approximately 90 percent of the population. At that point, the benefits of using administrative records were limited because the Department had not yet been able to access several additional important sets of records with critical information on citizenship. Under the Secretary of Commerce's decision memorandum directing the Census Bureau "to further enhance its administrative record data sets" and "to obtain as many additional Federal and state administrative records as possible," the Department has sought access to several such sets of records maintained by other agencies, but it remains in negotiations to secure access. The executive action I am taking today will ensure that the Department will have access to all

available records in time for use in conjunction with the census.

Therefore, to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department, I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.

Access to the additional data identified in section 3 of this order will ensure that administrative records provide more accurate and complete citizenship data than was previously available.

I am also ordering the establishment of an interagency working group to improve access to administrative records, with a goal of making available to the Department administrative records showing citizenship data for 100 percent of the population. And I am ordering the Secretary of Commerce to consider mechanisms for ensuring that the Department's existing data-gathering efforts expand the collection of citizenship data in the future.

Finally, I am directing the Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship.

Ensuring that the Department has available the best data on citizenship that administrative records can provide, consistent with law, is important for multiple reasons, including the following.

First, data on the number of citizens and aliens in the country is needed to help us understand the effects of immigration on our country and to inform policymakers considering basic decisions about immigration policy. The Census Bureau has long maintained that citizenship data is one

of the statistics that is "essential for agencies and policy makers setting and evaluating immigration policies and laws."

Today, an accurate understanding of the number of citizens and the number of aliens in the country is central to any effort to reevaluate immigration policy. The United States has not fundamentally restructured its immigration system since 1965. I have explained many times that our outdated immigration laws no longer meet contemporary needs. My Administration is committed to modernizing immigration laws and policies, but the effort to undertake any fundamental reevaluation of immigration policy is hampered when we do not have the most complete data about the number of citizens and non-citizens in the country. If we are to undertake a genuine overhaul of our immigration laws and evaluate policies for encouraging the assimilation of immigrants, one of the basic informational building blocks we should know is how many non-citizens there are in the country.

Second, the lack of complete data on numbers of citizens and aliens hinders the Federal Government's ability to implement specific programs and to evaluate policy proposals for changes in those programs. For example, the lack of such data limits our ability to evaluate policies concerning certain public benefits programs. It remains the immigration policy of the United States, as embodied in statutes passed by the Congress, that "aliens within the Nation's borders [should] not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations" and that "the availability of public benefits [should] not constitute an incentive for immigration to the United States" (8 U.S.C. 1601(2)). The Congress has identified compelling Government interests in restricting public benefits "in order to assure that aliens be

self-reliant in accordance with national immigration policy" and "to remove the incentive for illegal immigration provided by the availability of public benefits" (8 U.S.C. 1601(5), (6)).

Accordingly, aliens are restricted from eligibility for many public benefits. With limited exceptions, aliens are ineligible to receive supplemental security income or food stamps (8 U.S.C. 1612(a)). Aliens who are "qualified aliens" -- that is, lawful permanent residents, persons granted asylum, and certain other legal immigrants -- are, with limited exceptions, ineligible to receive benefits through Temporary Assistance for Needy Families, Medicaid, and State Children's Health Insurance Program for 5 years after entry into the United States (8 U.S.C. 1613(a)). Aliens who are not "qualified aliens," such as those unlawfully present, are generally ineligible for Federal benefits and for State and local benefits (8 U.S.C. 1611(a), 1621(a)).

The lack of accurate information about the total citizen population makes it difficult to plan for annual expenditures on certain benefits programs. And the lack of accurate and complete data concerning the alien population makes it extremely difficult to evaluate the potential effects of proposals to alter the eligibility rules for public benefits.

Third, data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country. Data tabulating both the overall population and the citizen population could be combined with records of aliens lawfully present in the country to generate an estimate of the aggregate number of aliens unlawfully present in each State. Currently, the Department of Homeland Security generates an annual estimate of the number of illegal aliens residing in the United States, but its usefulness

is limited by the deficiencies of the citizenship data collected through the American Community Survey alone, which includes substantial margins of error because it is distributed to such a small percentage of the population.

Academic researchers have also been unable to develop useful and reliable numbers of our illegal alien population using currently available data. A 2018 study by researchers at Yale University estimated that the illegal alien population totaled between 16.2 million and 29.5 million. Its modeling put the likely number at about double the conventional estimate. The fact is that we simply do not know how many citizens, non-citizens, and illegal aliens are living in the United States.

Accurate and complete data on the illegal alien population would be useful for the Federal Government in evaluating many policy proposals. When Members of Congress propose various forms of protected status for classes of unauthorized immigrants, for example, the full implications of such proposals can be properly evaluated only with accurate information about the overall number of unauthorized aliens potentially at issue. Similarly, such information is needed to inform debate about legislative proposals to enhance enforcement of immigration laws and effectuate duly issued removal orders.

The Federal Government's need for a more accurate count of illegal aliens in the country is only made more acute by the recent massive influx of illegal immigrants at our southern border. In Proclamation 9822 of November 9, 2018 (Addressing Mass Migration Through the Southern Border of the United States), I explained that our immigration and asylum system remains in crisis as a consequence of the mass migration of aliens across our southern border. As a result of our broken asylum laws, hundreds of thousands of aliens who entered the

country illegally have been released into the interior of the United States pending the outcome of their removal proceedings. But because of the massive backlog of cases, hearing dates are sometimes set years in the future and the adjudication process often takes years to complete. Aliens not in custody routinely fail to appear in court and, even if they do appear, fail to comply with removal orders. There are more than 1 million illegal aliens who have been issued final removal orders from immigration judges and yet remain at-large in the United States.

Efforts to find solutions that address the immense number of unauthorized aliens living in our country should start with accurate information that allows us to understand the true scope of the problem.

Fourth, it may be open to States to design State and local legislative districts based on the population of voter-eligible citizens. In *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), the Supreme Court left open the question whether "States may draw districts to equalize voter-eligible population rather than total population." Some States, such as Texas, have argued that "jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline -- including total population and voter-eligible population -- so long as the choice is rational and not invidiously discriminatory". Some courts, based on Supreme Court precedent, have agreed that State districting plans may exclude individuals who are ineligible to vote. Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population. But because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population.

The Department has said that if the officers or public bodies having initial responsibility for the legislative districting in each State indicate a need for tabulations of citizenship data, the Census Bureau will make a design change to make such information available. I understand that some State officials are interested in such data for districting purposes. This order will assist the Department in securing the most accurate and complete citizenship data so that it can respond to such requests from the States.

To be clear, generating accurate data concerning the total number of citizens, non-citizens, and illegal aliens in the country has nothing to do with enforcing immigration laws against particular individuals. It is important, instead, for making broad policy determinations. Information obtained by the Department in connection with the census through requests for administrative records under 13 U.S.C. 6 shall be used solely to produce statistics and is subject to confidentiality protections under Title 13 of the United States Code. Information subject to confidentiality protections under Title 13 may not, and shall not, be used to bring immigration enforcement actions against particular individuals. Under my Administration, the data confidentiality protections in Title 13 shall be fully respected.

Sec. 2. Policy. It is the policy of the United States to develop complete and accurate data on the number of citizens, non-citizens, and illegal aliens in the country. Such data is necessary to understand the effects of immigration on the country, and to inform policymakers in setting and evaluating immigration policies and laws, including evaluating proposals to address the current crisis in illegal immigration.

Sec. 3. Assistance to the Department of Commerce and Maximizing Citizenship Data. (a) All agencies shall promptly provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens, non-citizens, and illegal aliens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective. In particular, the following agencies shall examine relevant legal authorities and, to the maximum extent consistent with law, provide access to the following records:

- (i) Department of Homeland Security, United States Citizenship and Immigration Services - National-level file of Lawful Permanent Residents, Naturalizations;
- (ii) Department of Homeland Security, Immigration and Customs Enforcement - F1 & M1 Nonimmigrant Visas;
- (iii) Department of Homeland Security - National-level file of Customs and Border Arrival/Departure transaction data;
- (iv) Department of Homeland Security and Department of State, Worldwide Refugee and Asylum Processing System - Refugee and Asylum visas;
- (v) Department of State - National-level passport application data;
- (vi) Social Security Administration - Master Beneficiary Records; and
- (vii) Department of Health and Human Services - CMS Medicaid and CHIP Information System.

(b) The Secretary of Commerce shall instruct the Director of the Census Bureau to establish an interagency working group to coordinate efforts, consistent with law, to maximize the availability of administrative records in connection with the

census, with the goal of obtaining administrative records that can help establish citizenship status for 100 percent of the population. The Director of the Census Bureau shall chair the working group, and the head of each agency shall designate a representative to the working group upon request from the working group chair.

(c) To ensure that the Federal Government continues to collect the most accurate information available concerning citizenship going forward, the Secretary of Commerce shall consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census and to consider any regulatory changes necessary to ensure that citizenship data is collected in any other surveys and data-gathering efforts conducted by the Census Bureau, including the American Community Survey. The Secretary of Commerce shall also consider expanding the distribution of the American Community Survey, which currently reaches approximately 2.5 percent of households, to secure better citizenship data.

(d) The Department shall strengthen its efforts, consistent with law, to gain access to relevant State administrative records.

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,

**Brennan Center for Justice at NYU School of Law v. U.S. Dep't of Commerce, et al.,
No. 20-cv-02674 (D.D.C.)**

Preliminary Index of Withheld Records

Office of Legal Counsel

Doc	Date	Author	Description	Exemptions
1	4/17/2020	Benjamin Wallace, Attorney Adviser	Email chain, including emails from the Office of Management and Budget and the DOJ Office of Legislative Affairs seeking legal advice and an email from the Office of Legal Counsel providing legal advice, regarding constitutionality of draft legislation, with attachments.	(b)(5): deliberative process privilege, attorney-client privilege (b)(6)
2	7/21/2020	Steven A. Engel, Assistant Attorney General	Memorandum to file memorializing legal advice provided to the Office of the Counsel to the President regarding the form and legality of a presidential memorandum.	(b)(5): deliberative process privilege, attorney-client privilege, presidential communications privilege