



Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

March 15, 2018

Dear Dr. Jarmin:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, to urge that the 2020 Census include a citizenship question.

I am aware that the Department of Justice has already requested the inclusion of a citizenship question in the 2020 Census so that it can properly enforce Section 2 of the Voting Rights Act.¹ I urge you to include a citizenship question for a similar, but not identical, reason. It is not only important that votes not be diluted on racial grounds. It is also important that all citizens in a state have their votes weighted equally, and that the votes of citizens of different states should also have roughly the same weight. When noncitizens, particularly illegal aliens, are counted as citizens for purposes of apportionment, this goal is undermined. It shifts votes away from states that have a lower percentage of non-citizens to states that have a higher percentage of non-citizens. Within states, it also shifts weight away from voters in districts with small number of non-citizens to districts with large numbers of non-citizens, and makes it easier for candidates to win in the latter districts.²

I realize that a citizenship question would not ask if an individual is in the country legally or illegally. However, it would be possible for Congress or a state to apply statistical analysis to determine what percentage of non-citizens within a state are in the country illegally and to use that information to draw legislative districts. Even if the information is imperfect, it is better than no information at all.

I realize that Congress is unlikely to act to exclude illegal aliens from apportionment, particularly because states that have large number of illegal aliens would fiercely fight such a change for fear

¹ Letter from Arthur E. Gary to Dr. Ron Jarmin, Dec. 12, 2017, <https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html>.

² John J. Miller, "One Citizen, One Vote," National Review Online, December 6, 2005, <https://www.nationalreview.com/blog/corner/re-one-citizen-one-vote-john-j-miller/>.

Counting illegal aliens in congressional apportionment creates a set of modern-day rotten boroughs – political districts with representatives who are elected by a pitifully small number of voters. Those who believe illegal aliens should count in apportionment say that they deserve representation, too. The 14th Amendment does call for apportionment to be based on “the whole number of persons” in each state. But we don’t count tourists or business travelers who are here legally; why should we count illegal aliens?



they might lose a congressional seat. However, states are free to draw their districts based on the number of citizens present, not the number of individuals, and we should give them the data to do so.³ As the Supreme Court has said:

Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e.g., *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.⁴

For example, the Nebraska Constitution provides that “The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census.”⁵ A Nebraska state senator has introduced a bill that would follow this provision of the Nebraska Constitution when redistricting occurs after the next Census. With reliable citizenship information available from the 2020 Census, other states may wish to follow suit. Other states will likely prefer to dilute the votes of their citizens in favor of non-citizens. But states that want to ensure that the votes of eligible voters have roughly the same weight throughout the state should be able to do so.⁶

Vast amounts of money and time have been expended in Section 2 “one person, one vote” litigation over the years in an effort to ensure that the votes weigh roughly the same, regardless of the voter’s race. It is at least as important to ensure that the votes of citizens are not diluted by the presence of non-citizens, particularly non-citizens who are in the country illegally.

³ See generally Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 *BYU J. Pub. L.* 35 (2011) (arguing that when the Fourteenth Amendment was adopted, the understanding was “The whole number of persons in each State cannot mean everybody on the soil at the particular time, nor exclude everybody who may happen not to be on it at the same time, and of course should be authoritatively construed by the law-making power.”).

⁴ *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

⁵ Chris Dunker, “Murante’s proposed redistricting plan would remove non-U.S. citizens from count,” *Lincoln Journal-Star*, Jan. 18, 2018, http://journalstar.com/legislature/murante-s-proposed-redistricting-plan-would-remove-non-u-s/article_98fc3de3-b11c-5c70-b571-bc01a813eb8a.html.

⁶ Charles, *supra* note 3, at 42.

[O]nly through the elective franchise, the right to petition, and the legislative process can state legislatures and municipal governments be made to apportion according to citizenship. However, such encouragement starts with the citizens themselves, for only in response to their voice and opinion will state and municipal governments take action. In exercising this voice, it should be emphasized that not only does apportionment according to citizen interests ensure that every citizen’s voting power is equal, but it serves as a vehicle for petitioning Congress to remedy the Census Bureau’s counting of unlawful aliens for apportionment purposes.



Furthermore, this data would be useful for the citizens of the United States, especially given the now nearly two-decades-long national argument over immigration. How many non-citizens are in the country? How many are in the country compared to when the question was asked on the 2000 Census? What percentage are likely in the country illegally? Does it appear that non-citizens naturalize relatively quickly? All of this information is important for the American people to have. Perhaps it would alleviate concerns that there is such a large illegal immigrant problem that any amnesty is almost unthinkable. Perhaps it would reveal that naturalization is not proceeding as quickly as we would like, and that there might be something that can be done to speed the process. There would likely be interesting surprises in the data for everyone. But without the data, we cannot address any of this.

Lastly, if the citizenship data is collected, and if more states use it in redistricting, it would send a salutary message to our elected representatives: You are elected to represent American citizens. It appears some of our elected representatives forget this from time to time. It is also in the interests of certain organizations to blur the distinction between citizens and non-citizens. But it is a very important distinction, and one we should maintain, in part to encourage those who live among us but have not yet become part of our polity through naturalization to do so.
Sincerely,

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow
Commissioner