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U.S. Commission on Civil Rights
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Katherine K. Wallman, Chief Statistician
Office of Management and Budget
1800 G Street NW
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Dear Ms. Wallman:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I am submitting this comment on the proposed rule entitled “Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity.”¹ This comment is informed by the Commission’s report, “Racial Categorization in the 2010 Census.”

The proposed rule would create a new category for people who identify as “Middle Eastern or North African.” These people are currently classified as “white.” The notice document also suggests that OMB is considering revising the Hispanic or Latino category. Although the notice is vague on the precise shape of this revision, it appears likely that “Hispanic or Latino” would be changed from an ethnic categorization to a racial categorization. I believe that both these changes are unwise.

I believe it is unwise to create a separate “Hispanic” racial category, and indeed that it was unwise to create the “Hispanic” ethnicity out of whole cloth in the 1970s. If we are to maintain a designation for people presently classified as Hispanic, however, I suggest some changes. First, people with ancestral roots in Iberia, but not in Latin America (in other words, those who have ancestral roots in Spain and Portugal but not in the indigenous peoples or settlers² of Central and South America) should not be classified as “Hispanic.” The native peoples of Spain and Portugal are far more similar to the peoples of Italy and France than they are to the peoples of Mexico and Peru. It does not make sense to classify an American whose ancestors are from Lourdes, France as “white,” while classifying an American whose ancestors lived just across the border in Jasca, Spain as “Hispanic.” Second, the “Hispanic” designation should be replaced by “Latino.” It makes more sense to apply the designation of “Latino” to people whose ancestors include the indigenous peoples of Latin America. If we are going to classify Americans by race, let us at least be consistent.

As a basic matter, the game is given away by the “general principles” that were used in the 1977 and 1997 revisions of the racial and ethnic categories. The first principle is rather surprising to a layperson: “The racial and ethnic categories set forth in the standard shall not be interpreted as scientific or anthropological in nature.” Of course this principle must apply, or the entire category would immediately collapse. Consider the case of an Israeli Jew whose grandparents fled the Soviet Union, and who has now

¹ Office of Management and Budget, Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, Fed. Reg. No. 2016-23672, Sept. 30, 2016, <https://www.regulations.gov/document?D=OMB-2016-0002-0001>.

² It will simply be too difficult to try to classify a Peruvian-American descended from Welsh and Spanish settlers using every minute detail of his ancestry.

immigrated to the United States. He would be classified as “Middle Eastern or North African,” with all the attendant government solicitude OMB expects will accompany this status. His next door neighbor is an American Jew whose grandparents also fled the Soviet Union – in fact, they lived next door to his neighbor’s grandparents. He is classified as “white,” with all the government lack of interest that accompanies that status. So, obviously, if this category were to be based on scientific or anthropological principles, it would collapse immediately. The immediate question that springs to mind is, “Then on what are these categories based?”

The answer, I fear, is “Aggressive lobbying by ethnic organizations.” As the notice notes, demographic data collected by the Census is used for a number by a number of other federal agencies for federal civil rights enforcement, including:

- Enforcing the requirements of the Voting Rights Act;
- reviewing State congressional redistricting plans;
- collecting and presenting population and population characteristics data, labor force data, education data, and vital and health statistics;
- establishing and evaluating Federal affirmative action plans and evaluating affirmative action and discrimination in employment in the private sector;
- monitoring the access of minorities to home mortgage loans under the Home Mortgage Disclosure Act;
- enforcing the Equal Credit Opportunity Act;
- monitoring and enforcing desegregation plans in the public schools;
- assisting minority businesses under the minority business development programs; and
- monitoring and enforcing the Fair Housing Act.

It is important to remember why civil rights protections were established in the first place. African-Americans faced centuries of entrenched racism that denied them a place in American society. An African-American attorney could not purchase a home in many neighborhoods, even though he could pay the asking price. That same attorney would be barred from voting in many places through the abuse of literacy tests, although illiterate whites were allowed to vote through the use of “grandfather clauses.” Of course, that attorney’s children were required to attend often-inferior segregated schools. Drastic action was necessary to end these practices.

It is inarguable that no other racial or ethnic group has faced discrimination as severe or pervasive as did black Americans. Chinese-Americans, Japanese-Americans, and Mexican-Americans, to list a few³, have experienced various types of discrimination, but none that can compare with the historical experience of African-Americans. The discrimination they experienced might not have been considered sufficiently severe and pervasive to warrant the great restructuring of national life that was accomplished with the 1964 Civil Rights Act and the 1965 Voting Rights Act.

Whatever discrimination may be faced by persons of Middle Eastern and North African descent, it is not akin to that faced by African-Americans prior to the 1964 Civil Rights Act and the 1965 Voting Rights Act. Instances of disparate treatment discrimination against these groups are already covered by Title VI and Title VII – race, color, religion, and national origin. The only reason for requesting the creation of the “MENA” classification is to attempt to obtain preferential government treatment that other groups do not

³ Many are likely unaware that German-Americans, for example, faced public suspicion, particularly during and after WWI. *See Meyer v. Nebraska*, 43 S.Ct. 625 (1923)(prosecution of school teacher for teaching German language to student who had not attained and successfully passed the eighth grade). The government demonstrated no special solicitude for German-Americans, who proceeded to assimilate so successfully that almost everyone has forgotten they were ever German.

receive – “safe” congressional districts based on ethnicity, inclusion in federal affirmative action plans, and so on. Alas, my suspicions are strengthened by comments from Rep. Debbie Dingell. “Adding a MENA category, she said, would allow many of her Michigan constituents to ‘accurately identify themselves and access the employment, health, education and representation services that are based on census data.’”⁴

This would be unwise for three reasons. First, as Roger Clegg of the Center for Equal Opportunity testified before the Commission, collecting racial and ethnic data encourages the maintenance of a separate ethnic identity, which ultimately does not benefit even those who maintain that identity.⁵ There is no credible evidence that Americans with roots in the Middle East or North Africa face discrimination comparable to that faced by African-Americans before the 1964 Civil Rights Act. Any public suspicion they encounter is similar to that faced by previous waves of immigrants – the Irish, the Germans, the Italians – and, given the prevalence of nondiscrimination norms, is probably much less. Absent disparate treatment, such public pressure has the salutary effect of encouraging immigrants to emphasize their identity as Americans and minimize their ethnic background. German-Americans were regarded with suspicion during and after WWI, but produced General (later President) Eisenhower, who was instrumental in Allied victory during WWII. President Eisenhower is an American hero, his Germanic heritage a mere historical curiosity. Likewise, Irish immigrants were reviled upon their arrival in America. Yet two presidents of Irish descent, Kennedy and Reagan, are two of the most revered presidents of the twentieth century. Both are American heroes, not merely Irish-American heroes. This is what members of all racial and ethnic groups should aspire to.

Second, it is irrational and unfair. African-Americans had been largely shut out of mainstream American life for generations, which is why intrusive measures were necessary to ensure that they could participate in public life. That is not the case with Americans of Middle Eastern and North African descent, many of whom are recent immigrants or the children of immigrants.⁶ They arrived in a country with nondiscrimination laws. If they experience disparate treatment, they can invoke the nondiscrimination laws. But it would be wrong to give Syrian-Americans a “safe” congressional district and federal affirmative action preferences when Americans of Sicilian descent must simply lump it. We are rapidly approaching a situation in which all groups except whites of European descent (and in regard to education, Asian-Americans) are positively favored by the government. If every group save one is positively favored by the government, the government is necessarily discriminating against that group.

Finally, these reasons combined yield the most powerful reason for rejecting this proposal: it increases the balkanization of American society. America is a fragile experiment. A nation founded by British settlers and largely based on English law and custom, yet open to immigrants from all nations who pledge allegiance to her government and ideals and leave their old attachments behind. If we are to have a nation that is not based on tribe or blood – which is the basis for most non-settler nations in the world, including such giants as Russia and China – then those who come to America must largely leave their tribe behind. Yet efforts such as this are, on the part of the ethnic lobbying organizations, efforts to maintain the tribe in America and to obtain benefits at the expense of other Americans. This inevitably breeds resentment,

⁴ Gregory Korte, “White House wants to add new racial category for Middle Eastern people,” USA Today, Oct. 2, 2016, <http://www.usatoday.com/story/news/politics/2016/09/30/white-house-wants-add-new-racial-category-middle-eastern-people/91322064/>.

⁵ Roger Clegg, Vice President and General Counsel of the Center for Equal Opportunity, U.S. Commission on Civil Rights, Briefing on Racial and Ethnic Data Collection by Government Agencies, May 17, 2002.

⁶ Jie Zong and Jeanne Batalova, “Middle Eastern and North African Immigrants in the United States,” Migration Policy Institute, June 3, 2015 (“Between 1980 and 2010, the size of the MENA population increased four-fold, from 223,000 to 861,000; and between 2010 and 2013 increased a further 18 percent, to 1,017,000.”), <http://www.migrationpolicy.org/article/middle-eastern-and-north-african-immigrants-united-states>.

leads to heightened racial and ethnic identification among other groups, and leads to inter-ethnic jockeying for government benefits. As Mr. Clegg stated in his testimony before the Commission, “Discrimination is more likely to occur in a society in which people have strong racial identities and an us-them mentality.”⁷

Given that this may be my only opportunity to comment on the revision of the Census form, I would like to address an issue that is not raised in this notice but was mentioned in media reports about the notice. USA Today reported:

“[T]he Census Bureau, which has been quietly studying the issue for two years, also has gotten caught up in debates about some groups – such as Turkish, Sudanese, and Somali Americans – who aren’t included in that [MENA] category. Those are issues the White House is trying to resolve before adding the box on 2020 census forms.”⁸

Incorporating separate categories on the census for these groups or others would be as nonsensical as creating the MENA category. Separating Turkish-Americans out from any new MENA category would simply be bizarre, and confirm that there is no rhyme or reason to these categories other than the strength of an ethnic lobbying group. Similarly, why would Sudanese-Americans and Somali-Americans be broken out separately from the “black” category? Should we next add separate categories for Ugandan-Americans, Ethiopian-Americans, and Nigerian-Americans? And is that even good enough? Every high school graduate, if he knows nothing else about Africa, can dutifully recite, “Colonialism imposed arbitrary borders on Africa that simply lumped disparate tribes together.” Should we ask Sudanese-Americans to further identify whether they are Sudanese Arab, Fur, Beja, Nuba, or Fallata?⁹ Should a Sudanese-American receive more government solicitude than an African-American whose family has lived in the United States for 300 years because the former is a more recent arrival, or should the latter receive more solicitude because his family suffered through slavery and Jim Crow? Where does it end?

Perhaps the better approach would be to categorize census groupings to the point where each of 320 million Americans is his own category. That would be closer to the American ethos of treating everyone as an individual in one nation, under God, indivisible, with liberty and justice for all.

Sincerely,



Peter Kirsanow
Commissioner

⁷ Clegg, *supra* note 5, at 2.

⁸ Korte, *supra* note 4.

⁹ Central Intelligence Agency, The World Factbook, “Sudan,” <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>.