



Commerce Department Announces Citizenship Question on 2020 Census and Lawsuits Filed

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On March 26, 2018, the Commerce Department, which houses the [U.S. Census Bureau](#), [announced](#) that the [2020 decennial census](#) questionnaire will include a citizenship question. Thereafter, the [State of California](#) and a [coalition](#) of states and cities led by the State of New York filed lawsuits to stop Commerce from including the question, generally arguing that including a citizenship question would suppress the census response rate and result in undercounts that would violate the U.S. Constitution’s mandate to count every resident. Commerce [maintains](#), among other things, that inclusion of the citizenship question in the census questionnaire to the entire U.S. population will produce census block level data on “citizenship voting age population” (CVAP) that is more accurate and complete than current data, thereby outweighing concerns of a lower response rate, and that such data will assist the Department of Justice in enforcing the Voting Rights Act. This sidebar provides an overview of the Commerce Department’s announcement; relevant constitutional and statutory provisions; how census data is used in redistricting and ensuring compliance with the Voting Rights Act; and pending legal challenges.

Background and Commerce Announcement

In the [memorandum](#) announcing the decision to include a question on citizenship in the 2020 census, Commerce Secretary Wilbur Ross references a December 12, 2017 request from the Department of Justice (DOJ) that the Census Bureau “reinstate a citizenship question on the decennial census to provide census block level citizenship voting age population (‘CVAP’) data that are not currently available from government survey data” for use by the courts and DOJ “for determining violations of [Section 2](#) of the Voting Rights Act (‘VRA’).” Further, the memorandum states that “having these data at the census block level will permit more effective enforcement of the Act.”

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Most [decennial censuses through 1950](#) included a citizenship question. In addition, as the memorandum explains, the 2000 decennial census “long form” survey, which was [distributed to one in six people](#) in the U.S., included a question on citizenship. Subsequently, the “long form” survey was replaced by the [American Community Survey \(ACS\)](#), which has included a citizenship question since 2005. The ACS gathers social, economic, demographic, and housing data monthly from a sample of the population and aggregates the data over time to produce yearly estimates for areas with at least 65,000 people and five-year estimates for less populous areas.

According to Secretary Ross’ [memorandum](#), “DOJ seeks to obtain CVAP data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected, and DOJ states that the current data collected under the ACS are insufficient in scope, detail, and certainty to meet its purpose under the VRA.” Further, the memorandum states that “the census-block-level citizenship data requested by DOJ are not available using the annual ACS, which . . . does ask a citizenship question and is the present method used to provide DOJ and the courts with data used to enforce Section 2 of the VRA.”

Key Constitutional and Statutory Provisions

Every 10 years, the U.S. Constitution requires a population census or “actual Enumeration” for the apportionment of seats in the House of Representatives. Specifically, [Article I, Section 2, clause 3](#), as amended by Section 2 of the [Fourteenth Amendment](#), provides that the House of Representatives is to be apportioned—or divided—among the 50 states, based on each decennial census that is conducted “in such Manner” as Congress “shall by Law direct.”

Accordingly, federal law addresses how the questions to be included on the census questionnaire are determined. Specifically, [13 U.S.C. §5](#) provides that “[t]he Secretary [of Commerce] shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.”

Census Data, Redistricting, and the Voting Rights Act

When congressional and state legislative redistricting maps are drawn, census data is integral for ensuring population equality among districts and compliance with the Voting Rights Act. The Supreme Court has [interpreted Article I, Section 2, clause 1](#) of the Constitution to require that each electoral district within a state contain approximately the same population. This requirement is known as the “equality standard” or the principle of “one person, one vote.” [Ideal or precise equality](#) is the average population that each district would contain if a state population were evenly distributed across all districts. According to the Court, congressional districts are required to have less deviation from precise equality than is permissible for state legislative districts. While the Court has issued [several decisions](#) since 1964 on the extent to which precise mathematical equality among districts is constitutionally required, the Court has not specifically addressed the question of *who* should be counted (i.e., total population, voting age population (VAP), CVAP, or some other measure of eligible voters or population) within districts in order to achieve such equality. In a 2016 ruling, [Evenwel v. Abbott](#), against a [Fourteenth Amendment equal protection](#) claim, the Court held that states are permitted to use total population to draw electoral districts; however, the Court did not rule specifically on the constitutionality of a state drawing district lines based on some other measure of population, such as eligible, CVAP, or registered voters. Therefore, that question could come before the Court in a future case.

In addition, census data is relevant in ascertaining whether congressional and state legislative district boundaries comply with [Section 2](#) of the VRA. Section 2 authorizes the federal government and private citizens to challenge discriminatory voting practices or procedures, including minority vote dilution, (that is, the diminishing or weakening of minority voting power). Specifically, Section 2 prohibits any voting

qualification or practice applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. Section 2 further provides that a violation is established if, based on the totality of circumstances, electoral processes are not equally open to participation by members of a racial or language minority group in that the group's members have less opportunity than other members of the electorate to elect representatives of their choice. Accordingly, in certain circumstances, Section 2 requires the creation of one or more "majority-minority" districts in a redistricting plan. A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid racial vote dilution by preventing the submergence of minority voters into the majority, and the denial of an equal opportunity to elect candidates of choice. In ascertaining whether a violation of Section 2 has occurred, the Supreme Court has utilized both the CVAP and the VAP as the measure of population.

Legal Challenges

Both the [State of California](#) and a [coalition](#) of states and cities led by the State of New York have recently filed lawsuits in federal district courts seeking to stop the Commerce Department from including a question about citizenship on the 2020 census. In both lawsuits, the [parties argue](#), among other things, that including a citizenship question in the census questionnaire will suppress the census response rate and result in undercounts of their population in violation of the Constitution's mandate to conduct an "actual Enumeration." The parties [further argue](#) that the inclusion of the citizenship question in the census is agency action subject to the Administrative Procedure Act, and that it violates that Act's prohibition against arbitrary and capricious agency action and action that is not in accordance with the law, contrary to constitutional right, and beyond statutory authority. The parties in both lawsuits [allege harms](#) from inclusion of a citizenship question, including that an undercount will negatively impact their apportionment of congressional seats, Electoral College electors, and federal funding.